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AN OVERVIEW OF THE CONSUMER SAFETY AND PRODUCT LIABILITY REGIME IN SOUTH AFRICA

—Jacolien Barnard*

Abstract: *In recent years the focus on global sustainability, product safety and taking suppliers to task who do not comply with safety standards has increased. It became particularly prevalent in South Africa, even before the COVID-19 pandemic (that certainly changed the way in which suppliers do business moving forward). An efficient regulatory framework for consumer safety and product liability is specifically important when it comes to vulnerable consumers. The purpose of this contribution is to provide an overview of the regulatory framework for consumer safety and product liability in South Africa with particular focus on the provisions of the Consumer Protection Act 68 of 2008 (CPA).*

The overview follows the supply chain and life cycle of consumer goods to determine whether or not all the stages are regulated in terms of consumer protection law (specifically the CPA). The contribution will include a discussion on the purpose and application of the CPA regarding consumer safety and the interplay between the CPA and other relevant laws. The multi-agency framework and importance of co-operation of regulatory bodies will also be covered.

The contribution will further touch on the following provisions in terms of The CPA: The introduction of a consumer class action for collective redress as a vehicle to enforce consumer safety; product labelling, trade descriptions and the warning of risks; goods that comply with a standard of good quality (defective goods); recovery and safe disposal of harmful products and components; product recall; and product liability. Ultimately the contribution will also aim to identify whether the South African regulatory framework is

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efficient and which areas may need more attention in view of comprehensive consumer protection.

Keywords: Consumer Protection, Consumer Safety, Product Liability, Consumer Protection Act, Product Recall, Harmful Products, Defective Goods, Class Actions, Trade Descriptions.

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I. INTRODUCTION

As the world advanced in the production and manufacturing of consumer products (goods), the need for the regulation of safe manufacturing, marketing and supply of such goods became paramount. This would mean regulation not only within the supply chain but also throughout the lifecycle of goods. Let us take the example of a can of beans. A product that is inexpensive and yet a staple food throughout the world in both developed and developing countries. The beans as well as the container in which it is stored should follow a safe and responsible manufacturing process.

The label should indicate the content, allergens and expiry date as well as any other warnings of risks on how to safely use the can of beans. We should be able to ascertain where (country) the can of beans was produced and by whom. It should be packaged, stored and transported (many times also imported) responsibly and safely throughout the supply chain. The marketing of the can of beans should be accurate and honest and not misleading or deceptive; it should be in plain and intelligible language. The price of the can should be displayed clearly and should also be fair.

But what happens if there is a defect in the manufacturing process; or the can of beans was not stored properly somewhere through the supply chain; or

it is sold past its expiry date? What if the can of beans makes a person very ill or even causes death? Often the most vulnerable consumers utilise goods such as canned beans (the elderly, desolate etc.) What if hundreds, even thousands of consumers suffer harm due to this unsafe product? What can one consumer do taking into account the low cost of a can of beans? What can five hundred consumers do who suffered the same type of harm from the same producer or supplier?

Consumer safety and product liability suggest that all of the above issues should be included in a country's regulatory framework but also beyond a particular jurisdiction to ensure consumer safety on a broader, more regional and global level. The UN Sustainable Development Goals 2030 aim to have sustainable development by developing efficient systems regarding the economy, environment and social responsibility. When we consider the UN Sustainable Development Goals, we acknowledge the flow of goods from one country to another during various stages of the supply chain and life cycle of the goods and therefore there is also a regional and international responsibility towards consumer safety.

In recent years, the focus on global sustainability, consumer safety and also taking suppliers to task who do not comply with safety standards have increased. It became particularly prevalent in South Africa. This was even before the COVID-19 pandemic (that certainly changed the way in which suppliers do business moving forward). An efficient regulatory framework for consumer safety and product liability is particularly important when it comes to vulnerable consumers.

The purpose of this contribution is to provide an overview of the regulatory framework for consumer safety and product liability in South Africa with particular focus on the provisions of the Consumer Protection Act 68 of 2008 ("CPA"). The overview will follow the supply chain and life cycle of consumer goods as explained in the example of the can of beans above to determine whether or not all the stages are regulated in terms of consumer protection law (specifically the CPA but also other areas of law where relevant). Ultimately the contribution will also aim to identify whether the South African regulatory framework is efficient and which areas may need more attention in view of comprehensive consumer protection.

As we move closer together as a global community, the contribution may be relevant not only to the neighbouring countries of South Africa forming part of SADC,¹ but also in terms of South Africa as part of the BRICS countries.²

II. THE CONSUMER PROTECTION ACT 68 OF 2008 (2008)

A. Background and Implementation

Like many other jurisdictions, consumer protection regulation in South Africa was present prior to the implementation of the Consumer Protection Act 68 of 2008 but in many instances it was scattered, self-regulatory, inconsistent and unbalanced in favour of suppliers or businesses.³ There is an integrated approach to consumer protection law in South Africa and it will be clear from the discussion below that the CPA often applies together with other pre-existing laws and other legislations.

It should also be noted that South Africa has a mixed legal system with more than one source of law including the common law (originally Roman-Dutch law); judicial precedent; legislation; and customs very much influenced by Indigenous law.⁴ All these sources of law must of course be aligned with the values entrenched in the South African Constitution.⁵ This is also due to the very broad application of the CPA. The Act can be regarded as overarching legislation due to its broad scope. The CPA was fully implemented on 30 March 2011 and the subsequent regulations to the Act were implemented on 1 April 2011.

B. Broad Overview

At the outset, it is clear that social legislative intervention is a part of the core purpose of the CPA. The Preamble states that the Act aims to correct the social and economic inequalities of historically disadvantaged persons and promote their full participation as consumers. The CPA aims to promote 'a fair,

¹ SADC is the Southern African Development Community (SADC) which is a Regional Economic Community comprising 16 Member States including Angola, Botswana, Lesotho, Mauritius, Mozambique, Namibia, Seychelles and South Africa.

² BRICS is the acronym used for five major emerging economies being Brazil, Russia, India, China and South Africa and their influence on regional affairs.

³ T. Woker, 'Why the Need for Consumer Protection Legislation? Some of the Reasons Behind the Promulgation of the National Credit Act and the Consumer Protection Act' (2010) *Obiter* 217-231; J. Barnard, '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* 455-484; L. Hawthorne, 'Public governance: Unpacking the Consumer Protection Act' 2012 *THRHR* 345-370.

⁴ C. Nagel and B. Kuschke (eds), *Commercial Law* (6th edn, LexisNexis 2019) 12.

⁵ C. Nagel and B. Kuschke (eds), *Commercial Law* (6th edn, LexisNexis 2019) 13.

accessible and sustainable marketplace for consumer products and services and for that purpose to establish norms and standards relating to consumer protection⁶ improved standards of consumer information and education; prohibiting unfair commercial practices; establishing an effective and efficient system of redress and enforcing consumer regulatory authorities such as the National Consumer Commission (“NCC”).⁷

The Preamble to the CPA confirms that the Act aims to ‘protect consumers from hazards to their well-being and safety’. S. 3 not only explains the purpose of the Act but also includes within itself a category of vulnerable consumers who need particular protection taking into account the social justice approach. The categories of vulnerable consumers include low-income consumers from low-income communities; the young and the elderly or other similarly placed vulnerable consumers; including consumers who live in remote or isolated areas; and illiterate- and low-literacy consumers.⁸

The CPA provides certain fundamental consumer rights in terms of Chapter 2.⁹ Each of these fundamental rights (Part A-H) includes further rights under each part or S. that either regulate or prohibit certain commercial practices. It is clear that the reach of the CPA is very broad from the various rights under Chapter 2, which is regrettably also a double-edged sword, as it has caused legal uncertainty and unenforceability of certain S.s till date.¹⁰ For the purposes of this contribution the focus will be on the rights and provisions of the CPA that govern consumer safety and product liability in South Africa. The most significant of these fundamental consumer rights is the right to fair value, good quality and safety (Part H).

Chapter 1 of the CPA deals with the interpretation, purpose and application of the Act and it is clear that national and foreign law should be considered to

⁶ Preamble, CPA 2008.

⁷ Preamble read together with s 3 CPA.

⁸ CPA 2008, s 3(1)(b).

⁹ Ch 2 “Fundamental Consumer Rights” CPA: Right to equality in the consumer market (Part A); Right to privacy (Part B); Right of consumer choice (Part C); Right to disclosure and information (Part D); Right to fair and responsible marketing (Part E); Right to fair and honest dealing (Part F); Right to fair, just and reasonable terms and conditions (Part G); and right to fair value, good quality and safety (Part H). The supplier’s accountability to consumers is under Part I of ch 2.

¹⁰ E. Van Eeden and J. Barnard, *Consumer Protection Law in South Africa* (2nd edn, LexisNexis 2017); T. Naudé and S. Eiselen (eds), *Commentary on the Consumer Protection Act* (Juta 2019); J. Barnard and E. Miscenic, ‘The Role of the Courts in the Application of Consumer Protection Law: A Comparative Perspective’ (2019) JJS 111-138; J. Barnard, ‘For whom the bell tolls: The application of s 14 of the Consumer Protection Act 68 of 2008 on residential lease agreements - Transcend Residential Property Fund Limited v Mati (2018) 4 SA 515 (WCC)’ (2019) THRHR 164-175.

give effect to the purpose of the Act (S. 2). A very basic approach from which to determine the applicability of the CPA would be to determine whether or not goods or services are supplied to consumers for consideration by suppliers in their ordinary course of business. Most of the concepts have comprehensive definitions in terms of their usage in S. 1 of the Act except ‘in the ordinary course of business’ that has been interpreted by the courts.

For the purposes of this discussion only the parts of the definitions and concepts that are relevant to consumer safety and product liability will be highlighted. A “consumer” would be a natural person to which the goods or services are supplied or marketed, the user or beneficiary of the goods and also a franchisee to a franchise agreement.¹¹ Certain juristic or legal persons such as companies, partnerships and body corporate are also considered to be consumers for purposes of the CPA provided that their asset value or annual turnover is not above the legislative threshold.¹² The inclusion of juristic persons as consumers is most likely due to the imbalance between smaller and local business as compared to large multi-national corporations.

“Suppliers” refer to all the possible suppliers or businesses who “supply” (eg, sell, exchange, rent, perform, provide access to, activity, facility)¹³ “goods” (eg, water, gas, electricity, tangible objects, immovable property)¹⁴ or “services” (eg, work, education, advice, consolation, transportation, access)¹⁵ in their ordinary course of business¹⁶ for “consideration” (anything of value in exchange for goods and services including money, property, labour, coupons, loyalty credit).¹⁷

When we consider “supply chain” in the supply of safe and quality goods, it is the ‘collectivity of all suppliers who directly or indirectly contribute in turn to the ultimate supply of those goods to a consumer, whether as a producer, importer, distributor or retailer of goods’.¹⁸ It should be noted that a producer includes a person (including juristic person) who grows, mines, harvests, creates, manufactures goods not only within South Africa but also causes those

¹¹ CPA 2008, s 1 defines “consumer”.

¹² CPA 2008, s 1 definition “juristic person” read together with s 6.

¹³ CPA 2008, s 1 definition “supply”.

¹⁴ CPA 2008, s 1 definition “goods”.

¹⁵ CPA 2008, s 1 definition “service”.

¹⁶ “Ordinary course of business” is not defined in the Act, but has been the subject of interpretation in the field of insolvency, where it was found that the test is an objective one and regard must be had to all the circumstances, including the actions of both parties to the transaction. This approach was confirmed in *Eskom Holdings Ltd v Halstead-Cleak* (2017) 1 SA 333 (SCA) and in the NCT decision of *Doyle v Killeen* (NCT/12984/2014/75(1)(b)CPA) [2014] ZANCT 43.

¹⁷ CPA 2008, s 1 definition “consideration”.

¹⁸ CPA 2008, s 1 definition “supply chain”.

things to be done or make them available for supply or by applying a personal trade mark or business name in relation to those goods.¹⁹

The CPA provides (S. 53) for definitions that will specifically apply to Part H (fair value, good quality and safety) and should be considered where these terms are used as part of the discussion below. S. 53(1)(a) defines “defect” by referring to two situations. Firstly, “defect” refers to a material imperfection in the *manufacture* of the goods or components that renders such goods less acceptable than persons generally would be reasonably entitled to expect in the circumstances.²⁰

Secondly, “defect” refers to any *characteristic* of the goods or components that renders it less useful, practicable, or *safe* than persons would be reasonably entitled to expect.²¹ “Failure” means the inability of goods to perform the way they are intended to perform whilst “unsafe” means that goods present an extreme risk of personal injury or property damage due to a characteristic, failure, defect, or hazard in such goods.²² A “hazard” is a characteristic in the goods declared as such by law or presents a significant risk of personal injury or property damage when the goods are used.²³

On the one hand, the definition of a defect in terms of the CPA confirms for example the common-law concept of “latent defect” in terms of positive law.²⁴ On the other hand, the definition – including that of “defect” – has been a topic of much debate regarding the effective interpretation and enforcement of the rights encapsulated under Part H. This includes the consumer’s right to safe and quality goods; the warranty of quality; product recall and product liability for harm caused by goods.²⁵

It seems that, for example, the consumer expectations test is introduced by the definition of “defect” in terms of S. 53. This test has proven to be contentious in other jurisdictions and would be a problematic “baseline” test in South

¹⁹ CPA 2008, s 1 definition “producer”.

²⁰ CPA 2008, s 53(1)(a)(i).

²¹ CPA 2008, s 53(1)(a)(ii).

²² CPA 2008, s 53(1)(b) definition “failure” and s 53(1)(d) CPA.

²³ CPA 2008, s 53(1)(c).

²⁴ *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 3 SA 670 (A). See also J. Barnard, ‘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* 455-484, 455.

²⁵ M. Loubser and E. Reid, ‘S 53’ in T. Naudé and S. Eiselen (eds), *Commentary on the Consumer Protection Act* (Juta 2019); M.M. Botha and E.J. Joubert, ‘Does the Consumer Protection Act 68 of 2008 provide for Strict Product Liability? – A Comparative Analysis’ (2011) THRHR 305-318; C.M. Van Heerden and J. Barnard, ‘Narrowing the Reach of the Strict Product Liability Provisions in s 61 of the Consumer Protection Act 68 of 2008: *Eskom Holdings Ltd v Halstead-Cleak* (2017) 1 SA 333 (SCA)’ (2019) THRHR 444-465.

Africa because what ‘*persons* are reasonably entitled to expect in the circumstances’ would differ depending on the particular market segment and the immense diversity (socially and economically) of the South African populace.²⁶ Another example would be the discussion around the introduction of warning and design defects in the definition of “defect” which in the application of the warranty of quality in terms of S. 56 and the effective enforcement of S. 61 prove to be problematic.²⁷

The approach to redressal and enforcement in terms of CPA is very much in line with international practices since it focuses on consensual dispute resolution.²⁸ In this regard, the CPA establishes a layered approach in the enforcement of consumer rights. The gist of this layered approach is contained in S. 69 of the Act and the various enforcement bodies to approach include the statutory ombudsman, accredited industry ombudsman, provincial consumer protection authorities, the National Consumer Commission or “NCC” (also central to redress and enforcement) and the National Consumer Tribunal (“NCT”).

Consumers can only approach an “ordinary court” after all other avenues of redress in terms of national law have been exhausted.²⁹ The redress and enforcement of consumer rights in terms of the CPA is nuanced and unfortunately one of the biggest stumble blocks for effective enforcement of consumer rights in South Africa. Scholars and consumer lawyers have provided context to this problem at length³⁰ and the author will not endeavour to include a comprehensive legal analysis of this issue as part of the current contribution.

C. Interplay Between CPA and other Laws and Regulatory Bodies

Prior to any constructive analysis of consumer safety and product liability in South Africa, it is necessary to explain that the CPA should be applied

²⁶ M. Loubser and E. Reid, ‘Liability for Products in the Consumer Protection Bill 2006: A Comparative Critique’ (2006) *Stell LR* 413-425.

²⁷ C.M. Van Heerden and J. Barnard ‘Narrowing the Reach of the Strict Product Liability Provisions in S. 61 of the Consumer Protection Act 68 of 2008: *Eskom Holdings Ltd v Halstead-Cleak* (2017) 1 SA 333 (SCA)’ (2019) *THRHR* 444-465, 462.

²⁸ CPA 2008, s 3(1)(g).

²⁹ CPA 2008, s 69(d).

³⁰ J. Barnard and E. Miscenic, ‘The Role of the Courts in the Application of Consumer Protection Law: A Comparative Perspective’ (2019) *JJS* 111-138; C.M. Van Heerden, ‘S. 69’ in T. Naudé and S. Eiselen (eds), *Commentary on the Consumer Protection Act* (Juta 2019); C.M. Van Heerden and J. Barnard, ‘Caveat Emptor: Second-Hand Motor Vehicles and the Consumer Protection Act 68 of 2008’ in *De Serie Legenda: Developments in Commercial Law Volume I: Law of Specific Contracts and Banking Law* (LexisNexis 2019) 199-221; M.M. Koekemoer, ‘Consumer Complaints and Complaint Forums Employed in the South African Motor Car Service Industry: A Survey of the Literature’ (2014) *Journal of Applied Business Research* 659-670.

and interpreted to give effect to the realisation of the fundamental consumer rights within the Act (with particular protection of vulnerable consumers). In general, if the CPA applies together with other legislations and there seems to be an inconsistency with provisions (which occurs frequently) of the applicable legislation, it should be applied concurrently to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second and only where this is not possible should the interpretation that extends the greater protection to a consumer prevail.³¹ (The same approach is applied if provisions within the Act itself, read in its context, can reasonably be construed to have more than one meaning).³² However, in the case of hazardous chemical products only the provisions of the CPA will apply.³³

Finally, due to mixed legal system of South Africa, the provisions of the CPA should not be interpreted in a way that precludes the common law rights of the consumers (not the supplier). The courts and other enforcement institutions have a duty to develop the common law in order to give effect to the spirit and purpose of the Act and of course the values entrenched in the South African Constitution.³⁴

Along the same vein, it is important to note how crucial co-operation between government departments and regulatory bodies is for effective consumer redress and the enforcement of consumers rights. Though formal co-operation is established by the conclusion of an MOU (Memorandum of Understanding) between different departments or bodies, it is ineffective if there is not also the political will for co-operation. S. 83 of the CPA specifically encourages the co-operative exercise of concurrent jurisdiction on both a national and provincial level. The NCC has to ensure the promotion of consumer protection within the organs of state (S. 95) as well as the development of relations between other regulatory authorities (S. 97) on both a national and even international level.

III. PROVISIONS OF THE CPA AIMED TOWARDS DEVELOPMENT OF CONSUMER PRODUCT SAFETY AND PRODUCT LIABILITY

In this part, the most relevant provisions pertaining to consumer safety and product liability in terms of CPA will be discussed.

³¹ CPA 2008, s 2(9).

³² CPA 2008, s 4(3). The meaning that best promotes the spirit and purpose of the Act as well as the realisation of the rights of vulnerable consumers should be preferred.

³³ CPA 2008, s 2(9).

³⁴ CPA 2008, s 2(10).

A. The Introduction of the Class Action for Collective Redress: A Vehicle to Enforce Consumer Safety

“The introduction of the class action for collective redress (commonly referred to as ‘class actions’) in South African law provides a vehicle whereby larger number of victimised ‘Davids’ may collectively obtain justice from misbehaving ‘Goliath’, in circumstances where the institution of individualised lawsuits would not be economically practical.”³⁵

The institution of class actions for the infringement of basic human rights entrenched in the Bill of Rights (South African Constitution) is the basis of class action jurisprudence in South Africa. However, in terms of S. 4(1)(c) of the CPA, a person, as a member of, or in the interest of, a group or class of affected persons can approach the court or another enforcement institution if a right of the Act is infringed or threatened. This vehicle of enforcement is of particular importance when it comes to product liability claims. S. 76 makes specific provisions for the courts to award damages in case of class actions.

It was only recently with two major product safety incidents and the subsequent institution of product liability claims that consumer class actions came to the fore. The first was the recall of defective Ford Kuga-model cars after the engine components overheated and caught fire. There was extensive damage to property, injury and even the death of one of the motorists (consumer).³⁶ The causal link between the defect and the actual death of the consumer is but one of the points of contention in the ongoing dispute.³⁷ Despite an attempt to institute a class action in terms of S. 4 of the CPA against Ford South Africa, the producer has offered a settlement that was apparently “brokered” by the NCC. However, this was criticised in the media.³⁸

³⁵ M. Du Plessis and J. Oxenham (eds), *Class Action Litigation in South Africa* (Juta 2017) 1.

³⁶ S. Kamhunga, ‘Time for Ford SA to Stop Hiding and Face the Burning Kuga Debacle Head-On’ (*Huffpost*, 12 January 2017) <https://www.huffingtonpost.co.uk/sure-kamhunga/time-for-ford-sa-to-stop-hiding-and-face-the-burning-kuga-debacle_a_21652634/> accessed 30 April 2021; G. Hosken, ‘Ford SA will Recall Controversial Kuga Vehicle’ (*BusinessLive*, 16 January 2017) <<https://www.businesslive.co.za/bd/companies/transport-and-tourism/2017-01-16-breaking-news-ford-sa-to-recall-ford-kuga/>> accessed 25 April 2021; M.M. Botha and J. Barnard, ‘The Role and Responsibility of Suppliers in the Recall of Defective, Unsafe and Hazardous Consumer Products Causing Harm’ in *De Serie Legenda: Developments in Commercial Law Volume II: Law of Specific Contracts and Consumer Protection Law* (LexisNexis 2019) 39-64.

³⁷ K. Brandt, ‘Vehicle Systems Failure not Cause of Reshall Jimmy’s Death – Expert’ (*Eyewitness News*) <<https://ewn.co.za/2019/05/27/vehicle-systems-failure-not-cause-of-reshall-jimmy-s-death-expert>> accessed 22 April 2021.

³⁸ T. Broekman, ‘This is what is Wrong with the Ford Settlement’ (*BusinessLive*, 5 December 2019) <<https://www.businesslive.co.za/money/2019-12-05-this-is-what-is-wrong-with-the-ford-settlement/>> accessed 30 April 2021.

The other, equally tragic, product safety incident was the illness and death of many consumers (in particular vulnerable consumers) due to a listeriosis outbreak in processed meat products (such as polony) in South Africa.³⁹ The primary producer was Tiger Brands South Africa. A class action as a vehicle for redress is also being pursued due to the death of the most vulnerable consumers including infants and young children.⁴⁰ These product safety events were a steep learning curve with severe loss of life as well as financial loss which affected the South African economy.⁴¹ The incidents (the listeriosis outbreak in particular) prompted much better inter-governmental and agency co-operation in the areas of traceability, laboratory testing, recall of products and better communication with suppliers.

However, it has become blatantly clear that the absence of procedural legislative guidance for consumer class actions is preventing the successful implementation thereof. At this stage it seems that issues such as certification, whether an “opt-in” or “opt-out” approach should be followed, the representative of the class or group, costs and fees to name but a few is being interpreted on a case-by-case basis by the courts.⁴² Though many legal authors have attempted to provide suggestions and guidance, legal certainty is paramount for the successful institution of consumer class actions for product liability claims in South Africa.⁴³

³⁹ L. Korsten, ‘What Led to the World’s Worst Listeriosis Outbreak in South Africa’ (*The Conversation*, 13 March 2018) <<https://theconversation.com/what-led-to-worlds-worst-listeriosis-outbreak-in-south-africa-92947>> accessed 25 April 2021; WHO Disease outbreak news, ‘Listeriosis – South Africa’ (28 March 2018) <<https://www.who.int/home/cms-decommissioning>> accessed 26 April 2021.

⁴⁰ M. Njobeni, ‘Court Gives Listeriosis Victims Green Light to Sue Tiger Brands’ (*Business Day*, 3 December 2018) <<https://www.businesslive.co.za/bd/companies/retail-and-consumer/class-action-suit-against-tiger-brands-to-proceed/>> accessed 23 April 2021; R. Mahlaka, ‘High noon for Tiger Brands as summons issued in listeriosis class action lawsuit’ (*Business Maverick*, 17 June 2019) <<https://www.dailymaverick.co.za/article/2019-04-17-high-noon-for-tiger-brands-as-summons-issued-in-listeriosis-class-action-lawsuit/>> accessed 24 April 2021.

⁴¹ M. Maqhina, ‘2000 Jobs Lost in Listeriosis Outbreak, MP’s Told’ (*IOL News*, 29 June 2018) <<https://www.iol.co.za/news/south-africa/2-000-jobs-lost-in-listeriosis-outbreak-mps-told-15745138>> accessed on 26 April 2021.

⁴² *Tiger Brand Ltd v Pillay (Famous Brands and Another Intervening)* (2019/25309; 2018/12835; 2019/36431) [2020] ZAGPJHC 160 (23 June 2020).

⁴³ See M.M. Botha and J. Barnard, ‘The Role and Responsibility of Suppliers in the Recall of Defective, Unsafe and Hazardous Consumer Products Causing Harm’ in *De Serie Legenda: Developments in Commercial Law Volume II: Law of Specific Contracts and Consumer Protection Law* (LexisNexis 2019) 39-64, 42-43; E. Van Eeden and J. Barnard, ‘Chapter 16 Consumer Class Actions’ in *Consumer Protection Law in South Africa* (2nd edn, LexisNexis 2017) 531-550; T. Broodryk, ‘The South African Class Action Mechanism: Comparing the Opt-In Regime to the Opt-Out Regime’ (2019) (22) PER/PELJ DOI <<http://dx.doi.org/10.17159/1727-3781/2019/v22i0a4506>> accessed 30 April 2021.

B. Product Labelling, Trade Descriptions and the Warning of Risks

The correct information to consumers regarding the safe use of products are an important part of product safety and product liability. The warning of particular hazards or risks is equally important. Product labelling and trade descriptions form part of the consumer's right to disclosure and information (S. 24). The correct labelling and trade description of consumer products or goods involves important basic information for consumers to make an informed choice. Depending on the type of goods this could include the number, quantity, measure, producer information, place or country of origin, ingredients, allergens, contact information and trademarks.⁴⁴

Suppliers and businesses also have a responsibility to ensure that the labelling of goods is not tampered with or obscured in a manner calculated to mislead consumers (S. 24(2)). An example of this could be the type of allergens that could cause serious health issues or even the removal or changing of expiry dates of perishable goods. The Minister prescribed categories of goods that are required to have particular minimum information as part of their labelling and trade description, for example regulation 6 and the product labelling of textiles, clothing, shoes and leather goods; and regulation 7 dealing with genetically modified organisms ("GMO's"). Certain processed and dried meat products also have to be labelled in a prescribed manner in plain and understandable language as described in S. 22 of the CPA.⁴⁵

S. 58(2) provides for prescribed warnings concerning the packaging of any hazardous and unsafe goods for supply to consumers and these warnings must be displayed on or within that packaging. It must comply with the provisions of S. 22 (plain and understandable) language unless a substantially similar warning has been applied in terms of other public regulation. The consumer must be provided with adequate instructions for the safe handling and use of those goods. S. 58 applies even where the goods formed part of the supply of a service. This once again is very relevant regarding product safety and the Personal Protection Equipment ("PPE"), disinfectants, sanitation products and vaccination products such as needles that was supplied (and still being supplied) during the COVID-19 pandemic.

The importance of product labelling, trade descriptions and the warning of risks in relation to consumer safety was confirmed with the recent global COVID-19 pandemic and the influx of counterfeit and illicit goods beyond their expiry dates where the labels were tampered with, including basic canned

⁴⁴ CPA 2008, s 24; CPA 2008, s 1.

⁴⁵ CPA 2008, reg 6.

goods.⁴⁶ In particular also the unsafe PPE that flooded South African borders for our frontline workers who are in direct contact with COVID-19 patients in hospitals.⁴⁷

In this regard, the CPA applies with other legislation like the Merchandise Marks Act 17 of 1941; the Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972 and its regulations; the Medicines and Related Substances Control Act 101 of 1965; and the Genetically Modified Organisms Act 15 of 1997. The South African National Standards (“SANS”) for certain products as determined by the National Regulator for Compulsory Specifications (“NRCS”) should also be considered and is included in the labelling or instructions of consumer goods. The successful co-operation between government departments (such as the Department of Health (“DoH”) and the Department of Trade, Industry and Competition (“DTIC”) and regulatory bodies (such as the NCC and the NRCS) is significant in this regard.

C. Goods that Comply with Good Quality Standards (Defective Goods)

As explained in the definitions above, the provisions regarding defective goods in terms of the CPA are definitely a development not only of the common law rights of the consumer to align with the scope and content of the CPA but also with international practices.⁴⁸ It is clear that the content of S.S. 55-57 of the CPA is also important regarding product liability where the supply of defective goods caused harm. This unfortunately also causes a bit of legal uncertainty where the claim is purely based on monetary loss due to the defect and not in terms of subsequent product liability.

Initially scholars were very optimistic about the restoration of unequal bargaining powers between suppliers and consumers.⁴⁹ However, the practical

⁴⁶ P. Ash and others, ‘Swoop on fake masks as new Covid-19 variant hits SA - Concern over new variant of Covid-19 as professional masks fail efficacy tests’ (*Times Live*, 20 December 2020) <<https://www.timeslive.co.za/sunday-times/news/2020-12-20-swoop-on-fake-masks-as-new-covid-19-variant-hits-sa/>> accessed 30 April 2021; A. Partick, ‘Interpol Warns of Fake Vaccines Targeting the Desperate in SA’ (*TimesLive*, 29 September 2020) <<https://www.timeslive.co.za/news/south-africa/2020-12-29-interpol-warns-of-fake-vaccines-targeting-the-desperate-in-sa/>> accessed 30 April 2021.

⁴⁷ M. Mtshali, ‘How to Make Sure you are not Buying Counterfeit Covid-19 Products’ (*IOL News*, 24 August 2020) <<https://www.iol.co.za/news/opinion/how-to-make-sure-you-are-not-buying-counterfeit-covid-19-products-la49c750-2dac-4eee-8593-eab88824daad>> accessed 30 April 2021.

⁴⁸ *ibid.*

⁴⁹ J. Barnard, ‘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* 455-484; J.D. Lötze and C.J. Nagel, ‘Expanding the Scope of Latent Defects and the Protection

application of the provisions as well as the court's reluctance to adapt to a new more consumer-orientated approach is hindering effective and consistent consumer protection. This is disappointing when one takes into account that almost two-thirds of all consumer complaints in South Africa are about defective goods and in particular defective motor cars.⁵⁰

Barnard and Van Heerden highlight some of these issues which include the challenges of effective enforcement and redressal in terms of S. 69 as mentioned earlier as well as the complete disregard not only of the provisions of the CPA but also the recommendations and decisions of regulatory bodies such as the Motor Industry Ombud of South Africa ("MIOSA") and the National Consumer Tribunal ("NCT").⁵¹ The recent conservative approach of the Supreme Court of Appeal in favour of the supplier (motor dealership) in the case of *Motus Corporation (Pty) Ltd v Wentzel*⁵² is regretful.

It is important however to provide a brief overview of the standard of good quality in terms of the CPA because if the goods do not comply with the provisions of S.S. 55 to 57 and causes certain types of harm, it may open the door to a product liability claim as regulated by S. 61.

S. 55 and the consumer's right to safe, good quality goods will not apply where goods are bought at an auction.⁵³ S. 55(2) provides that, 'every consumer has a right to receive goods that:

- (a) are reasonably suitable for the purposes for which they are generally intended;
- (b) are of good quality, in good working order and free of any defects;
- (c) will be useable and durable for a reasonable period of time, having regard to the use to which they would normally be put and to all the surrounding circumstances of their supply; and

Afforded by "Voetstoots Clauses?" Developments in Case Law' (2014) THRHR 642-650; T. Naudé, 'The Consumer's Right of Safe, good Quality Goods and the Implied Warranty of Quality under ss 55 and 56 of the Consumer Protection Act 68 of 2008' (2011) SA Merc LJ 336-351.

⁵⁰ C.M. Van Heerden and J. Barnard, 'Caveat Emptor: Second-Hand Motor Vehicles and the Consumer Protection Act 68 of 2008' in *De Serie Legenda: Developments in Commercial Law Volume I: Law of Specific Contracts and Banking Law* (LexisNexis 2019) 199-221. See J. Barnard, 'Suppliers, Consumers and Redress for Defective Vehicles - The Reach of the National Consumer Tribunal: Tshehla v Aucamp Eiendoms Beleggings' 2020(2) SALJ 229-245.

⁵¹ C.M. Van Heerden and J. Barnard, 'Caveat emptor: Second-hand Motor Vehicles and the Consumer Protection Act 68 of 2008' in *De Serie Legenda: Developments in Commercial Law Volume I: Law of Specific Contracts and Banking Law* (LexisNexis 2019) 199-221.

⁵² (1272/2019) [2021] ZASCA 40.

⁵³ CPA 2008, s 55(1).

- (d) comply with any applicable standards set under the Standards Act, 1993 (Act No. 29 of 1993), or any other public regulation.’

S.S. 55(3) provides for situations where a consumer has specifically informed the supplier of the purpose for which the goods are bought or going to be used and is in addition to S.S. 55(2)(a) of the CPA. If the supplier either ordinarily offers to supply such specific goods or ‘acts in a manner consistent with being knowledgeable about those goods’, the consumer has a right to expect goods that are fit for that particular purpose as indicated.⁵⁴ S.S. 55(4) and (5) aim to provide further guidance and certainty to ascertain whether goods comply with S.S. 55(2) and dictates that all surrounding circumstances of their supply must be taken into account as well. For example, the manner in which such goods are marketed and the time of their supply. S.S. 55(6) provides that S.S. 55(2)(a) and (b) will not apply to goods and the condition in which they are supplied if the consumer has been expressly informed of the condition thereof *and* expressly agrees to accept goods in such a condition or acted in a manner consistent with accepting goods in such a condition.

S.S. 55(6) should not be regarded as an introduction of an exemption clause and should be strictly applied against suppliers who sell goods in a particular condition.⁵⁵ It does, however, provide an opportunity to suppliers of goods to disclose particular defects and make sure that consumers understand the condition of the goods (for example, a car or fridge or laptop) at time of conclusion of the contract.

S. 56 provides an implied warranty of quality pertaining to S. 55. The importance of the common-law rights of the consumer is confirmed in that this implied warranty is in addition to ‘any other implied warranty or condition imposed by common law’ (S. 56(4)(a)) and thus by implication also the remedies available upon breach.⁵⁶ If the consumer discovers, within six months after delivery of those goods by the supplier, that the goods do not comply with S. 55, the consumer may choose to either repair or replace the goods or request a refund from the supplier.⁵⁷ The choice is at the instance of the consumer and may be done without penalty and at the supplier’s risk

⁵⁴ CPA 2008, s 55(3).

⁵⁵ E. Van Eeden and J. Barnard, *Consumer Protection Law in South Africa* (2nd edn, LexisNexis 2017) 356-357; E. De Stadler, ‘S 55’ in T. Naudé and S. Eiselen (eds), *Commentary on the Consumer Protection Act* (Juta 2019).

⁵⁶ These common law remedies include an action for restitution; pro-rata reduction in the price of the goods and in certain instances also damages. See J. Barnard, ‘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* 455-484.

⁵⁷ CPA 2008, s 56(2).

and expense.⁵⁸ S. 57 provides further protection in the form of a legislative warranty on repaired goods for a further three months after the date of installation or repair.

D. Recovery and Safe Disposal of Harmful Products and Components

The safe disposal of harmful products and components is not only an important stage in the life cycle of goods but also at the recall stage. If the disposal of any type of goods is prohibited by any national legislation, the supplier of those goods must accept the return of it, without charge to the consumer.⁵⁹ The supplier can then return such goods to the importer or manufacturer.⁶⁰

The safe disposal of unsafe goods that have been recalled, often involves the co-operation of more than one consumer agency. Botha and Barnard explain that there are practical issues with the actual recall which could include setting up extraction points and the safe disposal of recalled products.⁶¹ Disposing of products in the correct manner will further ensure compliance with the UN Sustainable Development Goals 2030 and the environmental impact of unsafe goods. The CPA Recall Guidelines recognise that ‘low value products pose particular challenges for suppliers when it comes to recall. Low value does not mean low risk and suppliers should still seek to achieve effective recalls of such products.’⁶² The listeriosis outbreak of processed meat products is a very good example of this. The individual value of the meat products was very low but due to the type of safety hazard, the correct disposal of the products was paramount. The costs of mass disposal are also significant and not necessarily only incurred by the suppliers in the supply chain.

With the listeriosis outbreak, many livestock who had the potential to carry the listeriosis virus had to be euthanized. The correct disposal (including the financial implications thereof) should form part of any recall strategy. Disposal of unsafe products during the COVID-19 pandemic is another example where

⁵⁸ CPA 2008, s 56(3) provides that if the consumer elects to repair the goods and the goods are still defective within three months after repair, or new defects arise, the supplier must either replace the goods or provide the consumer with a refund.

⁵⁹ CPA 2008, s 59(1)(a).

⁶⁰ CPA 2008, s 59(1)(b).

⁶¹ M.M. Botha and J. Barnard, ‘The Role and Responsibility of Suppliers in the Recall of Defective, Unsafe and Hazardous Consumer Products Causing Harm’ in *De Serie Legenda: Developments in Commercial Law Volume II: Law of Specific Contracts and Consumer Protection Law* (LexisNexis 2019) 39-64, 55.

⁶² CPA Recall Guidelines, C 6.

correct disposal of medical and human waste became crucial to prevent the further spread of the virus and the co-operation between all parties involved.⁶³

Taking the UN Sustainable Development Goals 2030 into account and the effect that the incorrect disposal of harmful products could have on the environment, Feris explains that the provisions of S. 59 introduce the principle of Extended Producer Responsibility (“EPR”).⁶⁴ It is not however comprehensively regulated and pre-existing legislation in the form of the Management Waste Act 59 of 2008 and the Environment Conservation Act 73 of 1989 are referred to for sufficient regulation.⁶⁵

E. Product Recall

Product recall is governed by S. 60 of the CPA read together with the CPA Product Recall Guidelines. The NCC is central to recalls conducted in terms of the Act however it should be noted that the CPA Recall Guidelines are in many instances voluntary rather than compulsory towards suppliers.⁶⁶ Product recalls have been conducted for years by various regulatory bodies depending on the type of goods and whether or not specific legislation and international regulation is prescribed for the recall.

In South Africa for example, the key regulatory bodies involved in product recalls include the National Regulator for Compulsory Standards (“NRCS”), the Department of Health (“DoH”), the Department of Agriculture Land Reform and Rural Development (“DALRRD”), the South African Health Product Regulatory Authority (“SAHPRA”) and the NCC. Product recall

⁶³ See for example the mass graves for COVID 19 casualties and the spreading of the virus due to the incorrect disposal of medical and human waste as discussed in the South Africa media at a public hospital in the Eastern Cape province [T. Mahlakoana, ‘EC Lost 161 Health Workers to Covid-19 Since March Last Year – Zungu’ (*Eyewitness News*) <<https://ewn.co.za/2021/01/13/161-ec-health-workers-died-after-contracting-covid-19-since-march-last-year>> accessed 30 April 2021]. It should be noted however that the hospital was depleted of sufficient resources and equipment, under-staffed and the blame for the tragic conditions seemed to fall squarely on the mismanagement of the hospital by local government (L. Mketane, ‘Eastern Cape “Wasted” Lockdown by Failing to Prepare for Covid-19 Peak, Expert Says’ (*BusinessLive*, 21 July 2020) <<https://www.businesslive.co.za/bd/national/2020-07-21-eastern-cape-wasted-lockdown-by-failing-to-prepare-for-covid-19-peak-expert-says/>> accessed 30 April 2021).

⁶⁴ L. Feris, ‘S 59’ in T. Naudé and S. Eiselen (eds), *Commentary on the Consumer Protection Act* (Juta 2019) 59-1. See also E. Van Eeden and J. Barnard, *Consumer Protection Law in South Africa* (2nd edn, LexisNexis 2017) 396.

⁶⁵ L. Feris, ‘S 59’ in T. Naudé and S. Eiselen (eds), *Commentary on the Consumer Protection Act* (Juta 2019) 59-1.

⁶⁶ M.M. Botha and J. Barnard, ‘The Role and Responsibility of Suppliers in the Recall of Defective, Unsafe and Hazardous Consumer Products Causing Harm’ in *De Serie Legenda: Developments in Commercial Law Volume II: Law of Specific Contracts and Consumer Protection Law* (LexisNexis 2019) 39-64 and 40-48.

processes are often run concurrently between the NCC and other regulators, creating a complex environment for all parties involved. Product recalls by the NRCS are done in terms of specific published regulations or SANS (applicable to particular types of consumer goods eg: cars; foodstuffs and cosmetics; electronic apparatus etc.)⁶⁷ after inspection by the technically trained NRCS inspectors to determine compliance or non-compliance and importantly whether the consumer goods should be recalled, returned to the country of origin or safely destroyed.

Recalls of medicinal products are regulated and conducted by the SAHPRA in terms of the Medicines and Related Substances Control Act 101 of 1965 (“MRSA”) and Guidelines. The recall of medicine can be initiated as a result of reports referred to the holder of a certificate of registration/parallel importer or regulatory compliance from various sources. SAHPRA advises that recalls (in terms of the MRSA), regardless of the level, should not be undertaken without consultation with the SAHPRA and without agreement on the recall strategy. It is clear that the NCC may not always play a central role but can most certainly assist other institutional regulators, in particular with regards to the communication and information to consumers.

There are different types of recalls and not all have the same level of risk. Most consumers are unaware of the recall of products that take place on an almost daily basis because these products are recalled earlier in the supply chain before it reaches its end-supplier or simply because of the communication regarding the recall. A distinction should be made between Voluntary recalls; Compulsory recalls; and Market Withdrawals. A voluntary recall is usually done from a supplier’s own initiative (it could be at the request of the regulatory body regulating that particular type of recall).⁶⁸

A compulsory recall is where the recall is initiated by the regulatory body (for example the NCC) that also regulates the recall process throughout. These types of recalls should be distinguished from a “market withdrawal” where the removal of an unsafe product is not subject to legal action. Market withdrawals are the most common type of recalls and usually done without consumers’ or the public’s knowledge as it poses a low safety risk.⁶⁹

⁶⁷ NHTSA Vehicle Safety Recalls.

⁶⁸ ‘Unsafe by Definition: Voluntary Recall’ (*Consumer Reports*, 15 February 2010) <<https://www.consumerreports.org/cro/news/2010/02/unsafe-by-definition-voluntary-recall/index.htm>> accessed 24 April 2021.

⁶⁹ P. Fatemi and M.J. Neumann, ‘Market Withdrawal vs. Recall: What’s the Difference?’ (*Food Safety Tech*, 18 June 2015) <<https://foodsafetytech.com/column/beltway-beat-market-withdrawal-vs-recall-whats-the-difference/#:~:text=Market%20withdrawal:%20When%20a%20>

Two types of “market withdrawals” as mentioned earlier⁷⁰ are mentioned in the Product Recall Guidelines: “trade level recalls” and “safety alerts”.⁷¹ A “trade level” recall involves the recovery of goods from distribution points and wholesalers before they reach consumers. The urgency and stage of supply will therefore determine the level of recall. A “safety alert” suggests a certain level of hazard and should be done with the relevant information in a clear and concise manner.

Barnard and Botha explain that the NCC is tasked with providing an effective and efficient recall system and particular duties are mentioned in S. 60(1).⁷² Firstly, the NCC (and the system subsequently created) must be able to receive notice of certain information. This includes: consumer complaints; reports of product failures; defects or hazards; return of any goods because of a product failure; details with regard to any kind of damage caused by a product failure, defect, or hazard;⁷³ and any other indication of a failure, defect, or hazard.

Secondly, the NCC has a duty to monitor and analyse the sources of information referred to above with the particular purpose to determine, detect, or identify any previous undetected or unrecognised potential risk to the public from the use of, or exposure to, the particular goods.⁷⁴ The NCC must furthermore conduct investigations into the nature, causes, extent, and degree of the risk to the public.⁷⁵ S. 60(2) provides that if the NCC has reasonable grounds to believe that the use or continued exposure to goods are unsafe or pose a threat to the public and the producer or importer of those goods has not taken any steps as required by the CPA Recall Guidelines or industry code, the NCC may require the producer by written notice to either conduct its own investigation in terms of S. 60(1) or recall the unsafe goods.

It should be noted that there are minimum requirements for the product recall process in terms of the CPA Product Recall Guidelines. These are:

product,subject%20to%20FDA%20legal%20action.&text=Recalls:%20Actions%20taken%20by%20a,FDA%20order%20under%20statutory%20authority.> accessed 24 April 2021.

⁷⁰ *ibid.*

⁷¹ CPA Recall Guidelines, S B 1.2.2.

⁷² M.M. Botha and J. Barnard, ‘The Role and Responsibility of Suppliers in the Recall of Defective, Unsafe and Hazardous Consumer Products Causing Harm’ in *De Serie Legenda: Developments in Commercial Law Volume II: Law of Specific Contracts and Consumer Protection Law* (LexisNexis 2019) 39-64, 46.

⁷³ S 60(1)(a)(iii) CPA: ‘personal injury, illness or damage to property caused wholly or partially as a result of a product failure, defect or hazard’.

⁷⁴ CPA 2008, s 60(1)(b).

⁷⁵ CPA 2008, s 60(1)(c). There is an interchange between the words “consumers” and “public” which indicates a broader approach.

Notification and Communication Plan; Recall strategy; Retrieval and safe disposal of the product; and Reporting. The efficient notification to the relevant regulatory body as well as the communication to all role players are absolutely central to a successful recall. This would include all suppliers in the supply chain, all relevant consumers involved including the relevant regulatory agencies. In South Africa, in terms of S. 60 the CPA, this responsibility falls within the ambit of the NCC.

The CPA Recall Guidelines include a template for a standard notification form and the supplier will comply if such a form is completed and a copy of a notification is sent to the NCC within 10 days after providing the notice. Considering the large consumer segment that falls within vulnerable consumer groups, the method of communication is also important.⁷⁶ Not all consumers can be reached by social media or electronic means and other methods should be considered.

The media can play an important role and clearly inter-agency co-operation as well. There are minimum requirements for the communication plan prescribed in the guidelines and these include: product description, picture of the product, description of the defect, a statement of the hazard, a S. titled “What to do”, and contact details of the supplier.⁷⁷ Botha and Barnard remark that the communication should not designate the recall as “voluntary recall” because consumers may misconstrue it as an “optional” recall from their side.⁷⁸

A supplier’s recall strategy is a recall plan that should be comprehensive and in place even before a possible recall. It should be reviewed often and communicated to the relevant regulatory bodies (including the NCC). The recall strategy of the supplier must include a comprehensive risk analysis. An unsafe product according to the CPA Recall Guidelines, includes manufacturing as well as designing defects.⁷⁹ The NCC must attempt to identify the supplier highest up in the supply chain to ensure all suppliers comply to and are assisted with a product recall and this may include international recipients.⁸⁰

⁷⁶ M.M. Botha and J. Barnard, ‘The Role and Responsibility of Suppliers in the Recall of Defective, Unsafe and Hazardous Consumer Products Causing Harm’ in *De Serie Legenda: Developments in Commercial Law Volume II: Law of Specific Contracts and Consumer Protection Law* (LexisNexis 2019) 39-64.

⁷⁷ CPA Recall Guidelines, S C 5.

⁷⁸ M.M. Botha and J. Barnard, ‘The Role and Responsibility of Suppliers in the Recall of Defective, Unsafe and Hazardous Consumer Products Causing Harm’ in *De Serie Legenda: Developments in Commercial Law Volume II: Law of Specific Contracts and Consumer Protection Law* (LexisNexis 2019) 39-64, 47.

⁷⁹ CPA Recall Guidelines, B 1.2.1.

⁸⁰ CPA Recall Guidelines, B 1.2.1.

The requirement of safe disposal was discussed earlier in the contribution.⁸¹ However, the requirement of reporting is important not only throughout the recall process but also as an important final step of regulation. The supplier must keep record of the recall and risk analyses and draft a progress report during the recall and thereafter. The reporting process can be described in two stages.⁸² The CPA Recall Guidelines determine certain information should be provided and make it clear that: (a) a recall will not be closed unless a comprehensive final report has been submitted, and (b) 'closure of a recall does not affect the rights of consumers in relation to the product and the public can continue to access information about the recall'.⁸³

Non-compliance with product recall procedures can often strengthen a product liability claim if harm was caused to consumers in terms of section 61 and this could have been prevented with a timely recall.⁸⁴ It furthermore speaks to the corporate social responsibility of suppliers and can also severely affect their reputation and bottom line.⁸⁵

F. Product Liability

Prior to the implementation of the CPA, the product liability regime in South Africa was primarily based on the delictual claim or *Aquilian* action (Tort law) where all five elements of a delict had to be proven (a wrongful, culpable act by the producer that caused damage to the consumer).⁸⁶ Regarding the element of culpability (fault) the consumer or injured party had to, at the very least, prove negligence which has always been notoriously difficult to do. The imbalance of power is clear since producers are often large corporations with expert legal teams and more than enough funding as against a single consumer with limited legal knowledge and resources.⁸⁷ That is why the institution of product liability claims by way of a class action as explained above

⁸¹ See II.D above.

⁸² CPA Recall Guidelines, B.1.2.2.

⁸³ CPA Recall Guidelines, C 7.2.

⁸⁴ M.M. Botha and J. Barnard, 'The Role and Responsibility of Suppliers in the Recall of Defective, Unsafe and Hazardous Consumer Products Causing Harm' in *De Serie Legenda: Developments in Commercial Law Volume II: Law of Specific Contracts and Consumer Protection Law* (LexisNexis 2019) 39-64, 47.

⁸⁵ M.M. Botha and J. Barnard, 'The Role and Responsibility of Suppliers in the Recall of Defective, Unsafe and Hazardous Consumer Products Causing Harm' in *De Serie Legenda: Developments in Commercial Law Volume II: Law of Specific Contracts and Consumer Protection Law* (LexisNexis 2019) 39-64, 63-64.

⁸⁶ M. Loubser and E. Reid, 'S 53' in T. Naudé and S. Eiselen (eds), *Commentary on the Consumer Protection Act* (Juta 2019).

⁸⁷ E. Van Eeden and J. Barnard, *Consumer Protection Law in South Africa* (2nd edn, LexisNexis 2017) 381.

has been an effective vehicle for enforcement in general.⁸⁸ It was the court in the decision of *Wagener* that emphasised the need for urgent legislative intervention towards a more efficient and balanced product liability regime in South Africa.⁸⁹

Prior to an overview of S. 61 it should be noted that product liability law is complicated, technical and specialised. To simply discern that a jurisdiction either has a fault-based product liability regime or strict liability regime without recognising all the possible variances or hybrid models that are also possible would be restrictive and incorrect. With the implementation of the CPA in 2011, and the introduction of S. 61, the initial impression was primarily one of relief and that a strict liability regime will now (finally) be introduced for South African consumers.⁹⁰ Through an in-depth and significant amount of legal discourse on the topic since the implementation of the CPA, it seems however that this is not the case.⁹¹ The purpose of this contribution is to provide an overview of S. 61 as an important part of product safety in South Africa and only a few of the issues around the application of S. 61 will be highlighted.

The discussion of the definitions in terms of S. 53 above,⁹² is applicable to S. 61 (“defect”, “failure”, “hazard” and “unsafe”). Unless the supplier can prove one of the defences in S. 61(4), a supplier (which includes the producer or importer, distributor or retailer) of any goods will be jointly and severally liable, wholly or in part, for the harm as described in S. 61(5). In terms of S. 61(1), the supplier (or suppliers in the supply chain) will only be liable for harm caused as a consequence of supplying unsafe, defective or hazardous goods, or due to a product failure in the goods, or due to inadequate instructions or warnings provided to the consumer.⁹³

The wording of S. 61(1) clearly makes the link between inadequate warnings and subsequent product liability. The supplier will be liable irrespective of whether the harm resulted in any negligence by such a supplier.⁹⁴ It is not only

⁸⁸ See III.A above.

⁸⁹ *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd* (2003) 2 ALL SA 167 (SCA) 177-187.

⁹⁰ C.M. Van Heerden and J. Barnard, ‘Narrowing the Reach of the Strict Product Liability Provisions in Section 61 of the Consumer Protection Act 68 of 2008 in view of: Eskom Holdings Ltd v Halstead-Cleak 2017 1 SA 333 (SCA)’ (2019) THRHR 444-465; M. Loubser and E. Reid, ‘Liability for Products in the Consumer Protection Bill 2006: A Comparative Critique’ (2006) Stell LR 413-425.

⁹¹ C.M. Van Heerden and J. Barnard, ‘Narrowing the Reach of the Strict Product Liability Provisions in Section 61 of the Consumer Protection Act 68 of 2008 in view of: Eskom Holdings Ltd v Halstead-Cleak 2017 1 SA 333 (SCA)’ (2019) THRHR 444-465, 445.

⁹² See II.B above.

⁹³ S 61(1) read together with s 61(3) CPA.

⁹⁴ S 61(1) CPA.

a supplier of goods but also a supplier of services who can be held liable as long as the supplier, in conjunction with those services, also ‘applies, supplies, installs or provides access to any goods’.⁹⁵ The type of harm that is included in S. 61(5) is the death, injury or illness of a natural person; the loss or physical damage to any property (movable or immovable); and economic loss caused due to such harm.

S. 61(4) provides certain defences for suppliers. These defences clearly indicate that South Africa follows a hybrid product liability regime rather than a pure strict liability regime.⁹⁶ A supplier will not be liable if the unsafe product, defect, failure etc. that resulted in harm was wholly attributable to compliance by the particular supplier with any public regulation.⁹⁷ With regard to the actual product, the supplier will not be liable if the unsafe, defective, failure, or hazard did not exist in the goods at the time it was supplied by that particular supplier in the supply chain or that particular supplier simply complied with the instructions of the previous supplier in the supply chain.⁹⁸

The distributor or retailer will not be liable if it is unreasonable to expect them to have discovered the defect, failure or hazard taking into account that distributor or retailer’s role in the marketing of the goods to consumers.⁹⁹ If the product liability claim has prescribed (claim for damages brought more than three years after the situations described in S. 61(5)(d)(i) to (iv)) the supplier will not be liable.¹⁰⁰ Finally, S. 61(6) provides guidance as to the authority of the courts in that a court may assess whether any harm has been proven or mitigated.¹⁰¹ The court may furthermore determine the extent of the monetary damages including economic loss and may apportion liability among persons who are found to be jointly and severally liable.¹⁰²

Through the jurisprudence since the introduction of S. 61, the hope has always been that the courts will provide clarity on some of the issues highlighted above and finally put a judicial stamp on the implementation of s 61. (After all, it was the courts that expressed the need for this change in

⁹⁵ S 61(2) CPA.

⁹⁶ (2017) 1 SA 333 (SCA).

⁹⁷ S 61(4)(a) CPA.

⁹⁸ S 61(4)(b) CPA.

⁹⁹ S 61(4)(c) CPA.

¹⁰⁰ S 61(4)(d) CPA; If the claim is brought ‘(i) death or injury of a person contemplated in sub-s (5) (a); (ii) earliest time at which a person had knowledge of the material facts about an illness contemplated in sub-S. (5) (b); or (iii) earliest time at which a person with an interest in any property had knowledge of the material facts about the loss or damage to that property contemplated in sub-s (5) (c); or (iv) the latest date on which a person suffered any economic loss contemplated in sub-s (5) (d).’

¹⁰¹ S 61(6)(a) CPA.

¹⁰² Ss 61(6)(b) and (c) CPA.

approach in the first place in *Wagener*.) Unfortunately, and regrettably this has not happened. Very few product liability claims have made it to the courts. Understandably, suppliers would want to avoid large product liability claims and though S. 61 (seemingly) provide a more balanced approach.

Suppliers have done everything in their power to avoid the issue and the courts seem to agree. The Supreme Court of Appeal decision of *Eskom Holdings Ltd v Halstead-Cleak*¹⁰³ is exactly such an example and has been severely criticised by legal scholars.¹⁰⁴ Instead of providing clarity, the decision created more questions than answers. The product liability claim was based on severe physical injuries (including burn injuries) of a cyclist (consumer) from a low-hanging, live electric cable whilst driving on a public road. The product liability claim was against Eskom, the only electricity supplier in South Africa.

It seemed that the application of S. 61 would finally be viewed in action especially because fault is no longer a requirement, and the liability of Eskom was confirmed by the High Court.¹⁰⁵ However, the decision was overturned on Appeal with a curious judgment where the court seemed to avoid the application of S. 61 altogether by focussing on the general application of the CPA and separating the S. 61 product liability claim from the delictual claim which was claimed in the alternative.¹⁰⁶

The court confirmed that, although fault is no longer a requirement, the other elements of a delict (in particular the causal link between the act and the damage) must still be proven.¹⁰⁷ The court further held (incorrectly) that there was no “consumer-supplier relationship” and therefore S. 61 and the CPA for that matter could not apply.¹⁰⁸ Ironically the only option open to the consumer was a delictual action where the fault of Eskom had to be proven and it seems we are right back where we started a decade after the implementation of the CPA. Van Heerden and Barnard correctly argue:¹⁰⁹

¹⁰³ C.M. Van Heerden and J. Barnard, ‘Narrowing the Reach of the Strict Product Liability Provisions in Section 61 of the Consumer Protection Act 68 of 2008 in view of Eskom Holdings Ltd v Halstead-Cleak 2017 1 SA 333 (SCA)’ (2019) THRHR 444-465, 445.

¹⁰⁴ C.M. Van Heerden and J. Barnard, ‘Narrowing the Reach of the Strict Product Liability Provisions in Section 61 of the Consumer Protection Act 68 of 2008: *Eskom Holdings Ltd v Halstead-Cleak* 2017 1 SA 333 (SCA)’ (2019) THRHR 444-465.

¹⁰⁵ *Halstead-Cleak v Eskom* (2016) 2 SA 141 (GP).

¹⁰⁶ *Eskom v Halstead-Cleak* (2017) 1 SA 333 (SCA) 341.

¹⁰⁷ *ibid* 340.

¹⁰⁸ *Eskom v Halstead-Cleak* (2017) 1 SA 333 (SCA), 340.

¹⁰⁹ C.M. Van Heerden and J. Barnard, ‘Narrowing the Reach of the Strict Product Liability Provisions in Section 61 of the Consumer Protection Act 68 of 2008: *Eskom Holdings Ltd v Halstead-Cleak* 2017 1 SA 333 (SCA)’ (2019) THRHR 444-465, 460.

‘An interpretation that the product liability provisions in section 61 can only be relied upon by a “consumer” as defined in the Act, would not only negate the fact that delictual product liability has been created *especially* to provide redress to persons such as innocent bystanders who have no privity of contract with the supplier of defective goods. It would also mean that the product liability provisions in S. 61, despite their extended reach in terms of sections 5(5) and 5(8) and also 61(1) which imposes liability on the *whole* supply chain, actually have a *narrower* reach from a plaintiff’s perspective than under the common law of product liability *ex delicto* that provides a remedy to any “person” harmed by a defective product.’

At time of writing this contribution there have not been any significant case laws on S. 61 except for the unreported case of *Griessel v Monsanto*.¹¹⁰ The court confirmed that ‘the provisions of S. 61 do not appear to be limited to consumers who suffered harm as from a reading of the definition of “consumer” the plaintiff (Monsanto) fall within that definition’ and that the CPA ‘would be applicable to Monsanto as an importer, producer, distributor or retailer.’¹¹¹

G. Commercial Practices Relevant to Consumer Safety

Though not directly relevant to consumer safety and product liability, there are certain commercial practices by suppliers governed by the CPA, that have the potential to play a role nonetheless. These provisions will not be comprehensively discussed but deserve mentioning. The consumer has a right to fair and responsible marketing and the representations made by suppliers specifically regarding the safe use of goods should not be false or misleading.¹¹² The way in which suppliers conduct themselves in the supply of goods,¹¹³ the display of prices,¹¹⁴ and whether notices, documents or visual representations regarding risks, safety and hazards are in plain and understandable language¹¹⁵ can all play a role in consumer safety. The South African legislature attempted to do this by way of the introduction of S. 61 - ‘Liability for damage caused by goods’.

¹¹⁰ *Griessel No v Monsanto South Africa (Pty) Ltd* 2020 JDR 0882.

¹¹¹ *ibid* [19]-[20].

¹¹² Pt E, S.S. 29 and 41 of the CPA. For a general discussion of all provisions refer to under III.G above, see E. Van Eeden and J. Barnard, *Consumer Protection Law in South Africa* (2nd edn, LexisNexis 2017); T. Naudé and S. Eiselen (eds), *Commentary on the Consumer Protection Act* (Juta 2019).

¹¹³ CPA 2008, Pt F.

¹¹⁴ CPA 2008, s 23.

¹¹⁵ CPA 2008, s 22.

IV. SUMMARY AND CONCLUSION

‘Given the scourge of widespread consumer exploitation, it is no surprise that consumer protection has gained immense importance worldwide. In the age of the globalization consumer protection guidelines and legislations are necessary at the international and national level to ensure the safety of consumers’.¹¹⁶

Patil aptly summarises above how important product safety and product liability are, not only within a particular jurisdiction but also in relation to a global consumer community. South Africa is no different. It is clear that an efficient regulatory framework for consumer safety and product liability requires the co-operation between regulatory bodies and also a multi-tiered and multi-legislative approach.

As explained above,¹¹⁷ the CPA is a comprehensive overarching piece of legislation with a broad application and scope with its core purpose being to develop, nurture and protect the safety and well-being of consumers and their consumer rights. The CPA should not be interpreted in isolation and it is clear that a concurrent and harmonizing approach should be followed for the effective application of the Act. This is also in relation to other legislation (such as the Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972), case law and also with respect to various regulatory bodies under the CPA as well as the consumer safety framework (such as the DoH and NRCS).¹¹⁸

The contribution attempted to provide an overview of the provisions most relevant to the consumer safety and product liability regime in South Africa and in particular the CPA. It is clear that definitions and the correct application of such definitions play an important role. Certain provisions and rights were critically discussed to provide a snapshot of the current framework in South Africa in terms of the CPA.

This was done by firstly acknowledging the role of all suppliers in the supply chain and also the importance of sufficient regulation of goods throughout their whole lifecycle.¹¹⁹ The collective strength of consumers whose rights to consumer safety and product liability haven’t been infringed is clear from the introduction of the class action of corrective redress.¹²⁰ However it seems

¹¹⁶ A. Patil, ‘A Study on Consumer Protection through Maintenance of Product Safety & Standards in India’ (Asian Law Institute, Working Paper Series 23, 2011) 1 <<https://law1.nus.edu.sg/asli/pdf/WPS023.pdf>> accessed 11 July 2021.

¹¹⁷ See II.A above.

¹¹⁸ See III.B above.

¹¹⁹ See I. above .

¹²⁰ See III.A above.

that procedural clarity is still needed for this to be truly effective in South Africa. Like many other jurisdictions, South Africa aligns itself with the UN Sustainable Development Goals of 2030.

Throughout the contribution it is clear how interconnected the issues of consumer safety truly are and sufficient regulation and implementation of the one would also amount to sufficient regulation and implementation of the other. The opposite is also true when it comes to the responsibility and liability of suppliers. If, for example, suppliers do not comply with the provisions governing product labelling and warning of risks, suppliers could become liable in terms of a product liability claim. Where goods are defective and unsafe or where suppliers conduct commercial practices in a way that is unfair, misleading and deceptive, product liability could follow.

The discussion above illustrates that the CPA addresses the most crucial stages of the lifecycle of goods to ensure a truly effective consumer safety framework. These are: the introduction of a consumer class action for collective redress as a vehicle to enforce consumer safety; product labelling, trade descriptions and the warning of risks; goods that comply with a standard of good quality (defective goods); recovery and safe disposal of harmful products and components; product recall; and product liability.¹²¹

However, it is also clear that the provisions and practical application thereof is problematic and inconsistent.¹²² Some of the issues included: the reluctance of the judiciary to implement the provisions of the CPA;¹²³ inconsistent interpretation by regulatory bodies and scholars; non-compliance of suppliers; the shortfall and gaps regarding the enforcement and redress framework, co-operation between regulatory bodies and concurrent application with the CPA and other legislation.¹²⁴

In conclusion, the premise for a very effective consumer safety and product liability regime in South Africa (particularly, in terms of the CPA) has been established but it will only be truly effective on a national, regional and international level if the issues as highlighted above are constantly reworked, role players work together and the protection of consumers remains the primary objective.

¹²¹ See discussion of each in contribution above.

¹²² See II.C above.

¹²³ See III.F above.

¹²⁴ See III.E above.