

Liability of the supplier in terms of the Consumer Protection Act

by Simone Monty, a partner at Eversheds

The Consumer Protection Act (the act) is particularly far reaching, extending to almost all areas of supply of goods and services in South Africa. Suppliers must accordingly endeavour to familiarise themselves with the provisions of the act so that they are aware of the extent of their potential liability as well as the nature and extent of compliance required by the particular supplier.

Concerning liability of the supplier, the consumer's position has now been significantly enhanced by the introduction of the act.

The consumer will be able to rely on the act for protection, in particular, against damage, loss and/or injury caused as a result of the purchase and/or use of defective products and/or hazardous goods.

Various aspects of liability obligations of suppliers created by the act are summarised below.

Implied warranty

The act introduces an 'implied warranty of quality' in respect of the products purchased by a consumer. A consumer who purchases a product will be able to rely upon a legislatively created, implied warranty against defects, notwithstanding the absence of specific warranties against defects in product displays or terms of supply.

Therefore, consumers are entitled to rely on the fact that products purchased by them will be reasonably suitable for the purposes for which such products were originally intended and will be of good quality, in good working

order and free of defects. In addition, the consumer will be able to rely upon products being useable and durable for a reasonable period, having regard to the use for which such product would normally be put and to all the surrounding circumstances of their supply.

Since this is an implied warranty created by legislation, a supplier will not be entitled to contract out of such liability and any attempt to do so will constitute a contravention of the act. Accordingly, suppliers must ensure that the quality of goods and/or raw materials supplied to them are superior and in line with relevant standards.

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Strict liability

One of the primary objectives of the act is to ensure the safety of consumers. In this regard, there are various sections dealing with defects and hazards as well as safety in respect of goods and services. These sections include section 58 and 61 of the act.

Section 61 of the act provides for liability of each party within the supply chain without requiring a consumer to prove fault on the part of such person, consequently introducing the concept of strict liability.

Section 61(1) of the act is the section that potentially has the most drastic effect for businesses. Now a supplier of any goods is liable, without proof of negligence on the part

of the supplier of the goods, for any harm caused by the goods. The same applies to a supplier of services who supplies, installs or provides access to goods.

Consumers will be able to sue for damages based on the act without having to prove the fault in the manufacturing process on the part of the manufacturer, i.e. the manufacturer is strictly liable for damages caused by the supply of defective goods. This removes a major evidential burden on the part of the consumer when the consumer approaches the court with a claim for damages.

If more than one party is potentially liable, the consumer can sue any of them, as their liability is joint and several.

The act will bring South Africa in line with foreign jurisdictions in respect of the recognition of strict liability for manufacturers.

Where harm may arise from a product failure, defect, hazard, inadequate instructions, or warnings regarding any hazard arising from or associated with the use of any goods: it is sufficient to show that damages were suffered only partly as a consequence of these shortcomings.

The type of harm for which a person may be held liable includes:

- death, injury or illness
- loss of or damage to any property
- any economic loss that results from any of the types of harm listed above.

It is a defence against a claim to show that it is unreasonable to expect the distributor or retailer to have discovered the shortcomings of the goods or that the shortcoming:

- arose from complying with any public regulation
- did not exist in the goods at the time they were supplied
- arose from complying with the instructions provided to the supplier.

Accordingly, it becomes extremely important to rely on the defences to qualify the responsibility of the supplier from a contractual point of view. The manner in which the instructions are drafted is material, as are the general terms and conditions of contract, which need to be drafted between the consumer and the supplier in respect of goods sold and delivered.

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It is imperative therefore to take every precaution in preparing the instruction manuals, and ensuring that only safe, reliable goods are sold, and that suppliers have adequate public liability insurance.

Once again, suppliers will not be able to contract out of liability pursuant to section 61; however, potential liability can be limited by procuring that supply agreements with its suppliers containing sufficient warranties and undertakings in respect of the products supplied. Sufficient indemnities should be sought in these supply agreements, which indemnify the supplier concerned from any potential harm caused to a consumer as a result of a defect or hazard in the products supplied to that supplier and in respect of which that supplier is not in control.

Safety precautions

Furthermore, section 58(2) of the act requires the manufacturer of goods to package goods in a manner that clearly displays on or within the packaging, a notice that prescribes standards and which provides the consumer with adequate instructions for the safe handling and use of those goods.

This will necessitate that packages containing any hazardous or unsafe goods must have adequate instructions advising the consumer on the safe handling and use of any of those goods. Accordingly, any instructions or instruction manuals in respect of goods supplied must take this into account. It must be further borne in mind that the definition includes the use of goods or recipient of services, irrespective of whether they were a party to the transaction with the supplier or not (for example, an installer).

Retailers will be subject to certain obligations regarding the manner in which they marketed and sold goods to consumers that were potentially hazardous.

Suppliers will be obliged to ensure that consumers were fully aware of any risks of an unusual character in any products that they marketed. Such risks will be those that consumers could not reasonably be expected to be aware of, or which ordinarily alert consumers could not reasonably be expected to contemplate. It could even be a risk that could result in serious injury or death.

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Retailers of certain products identified as potentially hazardous will need to ensure that all adequate warning labels appeared on such products. The labels must be in plain and simple language and there should be instructions for the safe handling and use of such products. The consumer must acknowledge that he or she has been made fully aware of the potential risks.

Retailers will also have to bear in mind their obligations to ensure that there were adequate instructions or warnings about any hazard that might arise from the use of any goods sold (despite the fact that the retailer did not originally produce or package those goods).

The labels, which currently exist on identified potentially hazardous products, must be reviewed in order to ensure that all products are properly labelled under the act.

Retailers must be advised as to where such a label should be placed on the specific product to be best placed to bring the contents of the warning label to the consumer's specific attention.

It is clear that newfound liability has been created in terms of the act, which needs to be borne in mind by the persons in the supply chain as an integral part of conducting their business and drafting their documentation.

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Should you require more information on the Consumer Protection Act and specific advice on the application of its provisions to your business, please do not hesitate to contact Simone Monty on 011 775 6335 or simonemonty@eversheds.co.za **M&J**