

OPINION

TO: Richard

FROM: Venetheo

DATE: 15th October 2010

RE: Electric safety net on cargo carrying trucks

1. THE CONSUMER PROTECTION ACT 68 OF 2008:

The Consumer Protection Act applies to all transactions in the ordinary course of business of the supplier for the supply of goods or provisions of services to a consumer occurring in South Africa, unless exempted.

The definition of goods includes nearly everything that can be sold as it includes anything marketed for human consumption, any tangible object or any intangible object.

2. SECTION 61 OF THE CONSUMER PROTECTION ACT:

The Act prescribes liability for damage caused as a result of **unsafe**, defective or hazardous goods. At common law only the manufacturer or a distributor who professed to have expertise and knowledge about the goods he was supplying, could be held liable for the defective goods in delict.

Section 61 casts the net of liability wider than at common law, and provides that the producer, importer, distributor and retailer are all jointly and severally liable for defective goods, irrespective of whether or not negligence could be ascribed to the particular supplier.

Section 61 provides for liability on each person within the supply chain without requiring a consumer to prove fault on the part of such person, thus introducing the concept of strict liability. This liability is stated in section 61 as being joint and several, and the consumer is empowered to join each person in the supply chain to the relevant action

for damages. In these circumstances, all that is required to be proven by the consumer is that goods were supplied to it in consequence of which it suffered damage.

3. LIABILITY FOR DAMAGE CAUSED BY GOODS

The CPA imposes joint and several liability on the supply chain of goods (which includes the importers, producers, distributors and retailers) for any harm caused by **unsafe** or defective goods or inadequate operation manuals and **warnings** relating to **hazardous** goods. The burden is now on the person along the supply chain being sued to disprove their liability as opposed to the consumer proving it. This includes harm resulting from death, injury, damages and any economic loss.

Section 61(1) of the Act holds any producer or importer, distributor or retailer of any goods liable for any harm caused wholly or partly as a consequence of: -

- supplying any **unsafe** goods;
- a product failure, defect or hazard in any goods;
- **inadequate instructions or warnings** provided to a consumer pertaining to any hazard associated with the use of the goods;

irrespective of whether such harm resulted from any negligence on the part of the producer, importer, distributor or retailer.

4. EXCEPTIONS:

There are certain exceptions to the strict liability imposed under Section 61, namely:

- the unsafe product, defect or failure is wholly attributable to compliance with any regulation;
- the unsafe product, characteristic, defect or hazard did not exist at the time that it was supplied by that person to another person; or was wholly attributable to the compliance of instructions provided by that person who supplied the goods;
- it is unreasonable to have expected the distributor or retailer to have discovered the unsafe product or characteristic or defect having regard to the supplier's role in the market.

Consumers may claim under section 61 for "harm" which includes death, injury or illness to any natural person, any loss of or physical damage to any property, and any contemplated economic loss that results from that harm.

Unless a supplier is able to formulate a defence based on one of the grounds referred to as aforesaid, he may be held strictly liable to a consumer in terms of this section together with some or all the other persons in the supply chain. As a result, where a consumer suffers damages as a result of the supply of, for example, a defective product and institutes an action for damages against one party in the supply chain, that party would typically join one or more of the other parties in the supply chain to the action in order to seek an **apportionment of liability** or to prove a defence based on the liability of that party.

5. CASE LAW:

In **Wagener & Cuttings v Pharmacare Ltd & Others**, [2002] 1 All SA 66 (C), the plaintiff in instituting a product liability claim in delict (not contract) not only alleging negligence on the part of the pharmaceutical manufacturer, but also in the alternative claimed strict liability on the part of the manufacturer for the defective product.

The plaintiff sued, *inter alia* the manufacturer, seller and distributors of a local anaesthetic for physical injuries suffered which she alleged arose from the use of the anaesthetic.

It was alleged that the defendant publicly represented that:

- 1.) It possessed skill and expert knowledge in respect of the anaesthetic; and
- 2.) It was a safe and appropriate substance for use as a local anaesthetic.

The anaesthetic caused necrosis of the underlying body fibres and nerves. The plaintiff contended that the South African Law had reached a stage of development where strict liability should be imposed, and that the imposition of strict liability was appropriate because it:

- 1.) Should be limited to the manufacturer of pharmaceutical products;
- 2.) Will only be applicable in cases where a product causes physical injury to a person;
- 3.) Will be limited to circumstances where the product was represented as being safe and suitable (as it was on the facts of the case) for the particular use.

The plaintiff submitted that:

-Notwithstanding the rules of precedent the Constitution provided the opportunity, in fact placed an obligation, on courts to develop the common law to give effect to constitutional rights and values.

-Physical injuries through the manufacture of a defective product constituted unlawful contravention of the right to bodily integrity enshrined in s12 (2) of the Constitution.

The plaintiff argued that for the following reasons strict liability ought to be imposed:

- 1.) In the case of dog bites the **Pauperian** action imposes strict liability.
- 2.) The courts have also developed the law so as to impose strict liability for unlawful detention.
- 3.) The courts not only consider fault but also risk creation in determining liability.
- 4.) Modern developed legal systems apply strict liability based on generally accepted public policy grounds for injuries caused through defective products.
- 5.) There are sufficient policy reasons for the imposition of strict liability.
- 6.) Strict liability will overcome difficulties the plaintiff will have in proving fault, which must be proved against an inaccessible and faceless organisation.
- 7.) The judicial manipulation of the *res ipsa loquitur* (the thing speaks for itself) doctrine so as to hold manufacturers liable for defective products is merely a device to hold manufacturers strictly liable but created the illusion of fault.
- 8.) It is anomalous that in contract law there is strict liability (as per the **Pothier** Rule), but not in the law of delict.

6. CONCLUSION:

The implications of section 61 of the Consumer Protection Act for entities forming part of the manufacturing process or the supply chain appear to be quite severe.

Manufacturers and suppliers need to therefore ensure that their products are safe and contain adequate instructions and warnings of any potential hazard, (preferably in

English and Xhosa). As a safeguard the warning signs need to display sufficient information advising that in the event of contact with the electric safety net, done at their own risk, the perpetrator will be subjected to "X" volts of electric current.

Furthermore manufacturers and suppliers they will need to procure adequate insurance against any claims arising under section 61.