



The Consumer Protection Act: an opportunity for class action suits in South Africa?

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Don't be left in the dark when the new Consumer Protection Act comes into full effect.

The Consumer Protection Act (CPA), scheduled to become operational in April of this year, is likely to have far-reaching effects. The Department of Trade and Industry has stated that the CPA will, "introduce general principles of consumer protection and serve as an overarching governing statement on consumer protection matters in South Africa". In line with international trends, the CPA is aimed at increasing protection afforded to consumers, most notably with regard to products which are found to be defective, hazardous, or are likely to cause potential harm to consumers.

Section 61 of the CPA now introduces the concept of "strict liability" for suppliers. Essentially, this means that there will be no requirement for the consumer to prove fault / negligence on the part of the supplier or manufacturer; rather, all that the consumer is required to show is a causal link between the defective product and the resultant harm suffered by him or her.

This dramatically alleviates the burden of proof on the part of the consumer. He or she no longer has to obtain evidence and information about the manner in which the product was manufactured and which caused the harm / damage to the consumer.

To obtain this type of evidence prior to the commencement of legal action would make it extremely costly and difficult for the consumer. In the ordinary course of events, this information would only become available after pleadings have been exchanged and when the discovery process results in the exchange of documentation and information. Historically, prohibitive cost and the difficult burden of proof have resulted in a large number of potential claims being discarded from the outset. However, with the introduction of Section 61 and the shifting in the burden of proof, the consumer effectively can sit back and call upon the manufacturer to prove that the product which caused the harm was not defective.

It is envisaged that the strict liability provisions, will increase the likelihood that possible class action suits will be launched against manufacturers and suppliers of defective products in South Africa. These are actions which allow a large number of claimants to have their matter heard in the course of one proceeding.

The CPA specifically caters for the possibility of class actions. In Section 76(1)(c), the CPA states, "a court can award damages against

a supplier for collective injury to all or a class of consumers generally, to be paid on any conditions that the court considers just and equitable to achieve the purpose of the Act”.

This is the first time that such a provision will be incorporated into legislation in South Africa. It affords consumers in South Africa the opportunity to collectively, together with a multitude of claimants, proceed against a supplier who has introduced defective products into the South African market.

There is no doubt that classes of consumers who have cumulatively suffered damage, will be targeted by lawyers who are au fait with this section. These consumers will no doubt be persuaded to join forces and consider targeting a specific supplier or manufacturer which has allowed defective products to be sold in the market. Reduction and sharing of costs in class actions, coupled with lawyers being able to act on a contingency basis (as approved by the Law Society) might possibly result in a proliferation of litigation centred around substantial claims for damages.

At this stage, South Africa has only really seen class actions brought against the mining industry in respect of damage caused to miners as a result of the inhalation of asbestos

and silicon dust. The asbestos case against Cape PLC was settled in 2001, and the silicosis litigation against Anglo American is still pending.

Damage caused by defective products, including motor vehicle recalls, defective pharmaceutical products and smoking diseases, could all find their way into court under the confines of the CPA, with the result that manufacturers and suppliers in South Africa may be faced with mounting legal expenses in defending these claims. Not only will they be potentially liable to pay out substantial damages to consumers who have suffered harm, but they will also have to bear the cost of the research and development needed to understand aspects of their products which might render them potentially dangerous.

Clearly product liability issues are potentially one of the biggest threats to a company's bottom line. The costs of payouts in respect of claims for product liability, as seen in the United States, can be crippling, and in addition to reputational damage, could force a business to close its doors.

In order to properly reduce the prejudice that could be caused by the new legislation, suppliers and manufacturers are strongly

advised to ensure that they have adequate monitoring measures in place to quickly become aware of any defect in their products. Suppliers and manufacturers should also be ready to conduct proper and effective product recalls at the earliest opportunity in order to alleviate potential damage.

The longer a company delays before instituting a recall once it is aware of a fault in its product, the larger the exposure to further liability and eventual claims for damages. The CPA will police product recalls through the National Consumer Commission (NCC). The NCC will be empowered to regulate the process of product recalls in South Africa and may also, by written notice, force those suppliers who have not yet initiated a recall on faulty products to do so.

It is therefore crucial for suppliers to be aware of the forthcoming changes and their impact. There is a strong probability that litigation will increase and companies need to be prepared for this eventuality. To do otherwise, would result in suppliers and manufacturers being held liable in the strictest sense and being exposed to substantial levels of unnecessary litigation.

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