



The New Consumer Protection Act, 2008: Liability of the manufacturer for defective products – an update.

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Legal Brief

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The shift across the world appears to be towards the entrenchment of consumer rights. The trend has seen the introduction of new legislation to scupper unscrupulous manufacturers and better protect hapless consumers who often find themselves without legal remedy when faced with damage caused by the purchase of defective products.

The new Consumer Protection Act (due to be introduced into our law later this year) consolidates the rights of consumers and attempts to promote what has been termed a fair, accessible and sustainable market place for consumer products and services. The Act sets national standards for consumer protection and deals with the protection of consumers from injuries or hazards caused to such consumers from the sale of defective and inferior goods. The consumer's right to fair value, good quality and safety of products purchased will now be entrenched by the new legislation.

South African courts have long debated issues surrounding product liability. Our courts have dealt with products containing harmful ingredients and foreign objects, deterioration of products prior to sale, bad design, poor preparation of products and the lack of proper instructions or warnings contained on packaging.

Historically and in order to prove damages, consumers would have had to prove "wrongfulness" in terms of the manufacturer's legal duty to reasonably prevent defective products from reaching the market... and the "fault" of the manufacturer, which in the main constitutes negligent behaviour on the part of the manufacturer. The most difficult element to prove is that of the fault of the manufacturer which

caused damage to the consumer (this evidence is simply not available to the consumer as the cause of the defective nature of the product would occur in the production process).

However the consumer's position has now been significantly enhanced by the introduction of the Consumer Protection Act.

The consumer can now rely on the Act (when it becomes operational), for protection against damage caused from the purchase of defective products. The Act introduces a reasonable expectation on the part of the consumer to expect that goods purchased are reasonably suitable for the specific purpose indicated by the supplier at the point of purchase.

The Act introduces an "implied warranty of quality" in respect of the products purchased by a consumer. A consumer who purchases a product can now rely on an implied warranty against defects, notwithstanding the fact that product displays, or terms of supply may not contain specific warranties against defects. Therefore every consumer can purchase a product on the basis that such product is reasonably suited for the purposes for which it was originally intended and is of good quality, in good working order and free of defects. The consumer can further rely on the fact that the product is deemed to be useable and durable for a reasonable period of time, having regard to the use to which it would normally be put and to all the surrounding circumstances of their supply.

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.

Moreover, strict liability is now introduced in Section 61 of the Act. It states that any producer, importer, distributor or retailer of a good is liable for any harm caused wholly or partly as a

consequence of a product failure, defect or hazard in a good or as a result of inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from the use of such goods.

Consumers will be able to sue for damages based on the Consumer Protection Act (once operational) 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.

The Consumer Protection Act will come into force during the course of 2010. The exact date at this stage is uncertain. The Act will bring South Africa in line with foreign jurisdictions in respect of the recognition of strict liability for manufacturers.

Many would argue that it is all very well for consumers to have these rights, but it will be imperative that they understand the opportunities offered by the Act when it comes to enforcing claims for damages. If consumers do not understand the limitations on the part of manufacturers introducing defective products to the market or are unwilling to enforce them, then the new provisions as contained in the Act will be rendered largely meaningless.

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Widely experienced in litigation in banking, finance, insolvency, company restructuring and technology and intellectual property, Eric makes a point of keeping his knowledge current. After researching the then National Credit Bill in 2005, he was invited to provide submissions to the Parliamentary hearings on the Bill. Eric has given many presentations on the provision of reckless credit and regularly writes media articles on the topic. He is named as a recommended lawyer in restructuring and insolvency by PLC Which Lawyer and the PLC Cross Border Handbook, and is a member of the Association of Insolvency Practitioners of South Africa and of INSOL, a worldwide group of insolvency practitioners. Eric has BCom and LLB degrees, Higher Diplomas in Company Law and Tax and a Diploma in Insolvency Law.

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