

**August 2015**

To date, the case of *Halstead-Cleak, Derek Anthony v Eskom Holdings Limited (26360/2014) [2015] ZAGPPHC* is the only case that deals with the extent of applications of the Consumer Protections Act 68 of 2008 (the Act) in respect of product liability. The judgment has far-reaching implications in respect of producers, importers, distributors and retailers of products.

Briefly, the facts were that the plaintiff claimed damages from Eskom as a result of being severely burnt when he was electrocuted by an overhanging line while out cycling with his friends. As a result of the electrocution, he sustained burns across his face, neck, arms and chest.

The plaintiff's legal team argued that Eskom was liable in terms of the provisions of the Act. While on the other hand, Eskom denied liability but acknowledged that it was responsible for the power line that was hanging low across the footpath. Further, Eskom has also admitted that it was both the manufacturer and distributor of the electricity generated through the power line.

Notwithstanding the above, Eskom argued that the Act was about the protection of consumers and, if the plaintiff was injured at home while utilising his electricity, then and in that event the Act would have been applicable.

Therefore, the only dispute that stood to be adjudicated by the court was whether Eskom is strictly liable in terms of section 61 of the Act, or not. In coming to his decision, Baqwa J recapped all the applicable provisions of the Act that would have been applicable to the issue at hand. After doing so, Baqwa held that the Act was applicable in this instance having regard to the preamble and relevant provision(s) of the Act. Significantly, he held that:

"The CPA provides protection to and redress for 'any persons' in a number of its provisions, that is, not only in respect of 'consumers' or a 'consumer'. An example regarding the application of the CPA to 'consumers' as defined in section 1, is section (5) (5) which provides that sections 60 and 61 are applicable and even in respect of transactions exempt from the provisions of the CPA. The submission therefore, by the defendant that an innocent third party is not necessarily a 'consumer' strict *sensu*, who suffers loss (such as a dependant of a breadwinner who is or may be a consumer who is killed by a defective product) cannot claim redress because he or she is not the consumer would be contrary to the spirit and purpose of the CPA."

In arriving to his conclusion and more specifically meaning of consumer in the Act, Baqwa held that:

"With regard to the third consideration ie the relationship in which the plaintiff stands to the defendant and the 'goods', the wording of section 61(5) makes it clear that liability arises not only in respect of 'consumers' as defined in the CPA or consumers in the general sense, but to any 'natural person' (section 61(5)(a)). The plaintiff need not, therefore be a 'consumer' in the contractual sense as defined in order for the defendant to be liable to him."

The view expressed by Baqwa J in relation to the preceding paragraph with regard to interpretation of section 61(5)(a) of the Act is also shared by *Loubser & Reid: Commentary on the Consumer Protection Act*. Furthermore, De Stadler in the same publication expresses the same view with regard to the application of the Act to bystanders:

"The definition of 'consumer' alone does not appear to extend the application of the Act to a bystander. This question is relevant in the context of section 61. It is entirely conceivable that a bystander may suffer harm as a result of unsafe goods. Goods will be unsafe if they, due to a characteristic, failure, defect or hazard present an extreme risk of personal injury or property damage to the consumer or to other persons. In addition section 61(5) which prescribes the forms of harm for which a supplier may be liable in terms of section 61 refers to injury, death or illness of any natural person and damage or loss of any property and does not limit it to harm to consumers or consumers' property. It would therefore appear that section 61 at least extends protection to bystanders too."

At first glance the judgment appears not to be correct. With respect, this view can only be arrived at as Baqwa J did not embark on the concise and succinct analysis of the nuances of the Act and thus his thought process in arriving to the decision. But if one carefully examines the purpose, totality and commentary of the Act, the judgment appears to be correct. If one accepts that the judgment is correct, this outcome has far-reaching implications and will drastically increase the liability of role players in the supply chain. This exposure will not only be limited to role players in the supply chain, but also insurers who underwrite product liability products. As such, the insurers need to carefully consider the implications of this judgment for their underwriting purposes.

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