

the consumer protection act



LIABILITY FOR HARM OR DAMAGE CAUSED BY GOODS

Applicable sections of the Consumer Protection Act, 68 of 2008: S 5(5), 61, Schedule 2 clause 3(4)

Applicable sections of the Consumer Protection Act Regulations: R 44(3)(a)

The provisions contained in Section 61 of the Consumer Protection Act already became effective on the early effective date of the Act, i.e. 24 April 2010. Section 61 applies to the supply to any person of any goods within the borders of South Africa, irrespective whether the transaction is exempted from the provisions of the Act or not. All products supplied to anyone on or since 24 April 2010 are thus subject to these provisions irrespective of whom it was supplied to or whether the transaction is exempted or not. For example, generally a transaction with a juristic person with a turnover or asset value of R2M or above would fall outside of the ambit of the Act. Section 61 will still apply irrespective of whether the consumer is a juristic person, large or small.

The producer or importer, distributor or retailer of any goods is jointly and severally liable for any harm caused, wholly or in part attributable to the supply of unsafe goods, a product failure, defect or hazard in any goods, or inadequate instructions or warnings pertaining to any hazard arising from or associated with the use of the goods. It is irrelevant whether there was any negligence on the part of the producer, importer, distributor or retailer in causing the harm. A consumer who had suffered harm would thus not be required to prove any negligence on the part of anyone in the supply chain, but merely show that the product was unsafe, defective, hazardous or failed and because of this the consumer suffered harm. Alternatively, the consumer would have to prove that the harm was caused due to inadequate instructions or warnings relating to the use of the goods issued by the supplier.

For the purposes of product liability, a service provider who together with the performance of services applies, supplies, installs or provides access to any goods will be regarded as the supplier of those goods to the consumer. An electrician who fits a circuit breaker provided by the consumer will therefore be regarded as the supplier of the circuit breaker. Should the circuit breaker be defective and cause a fire, then the electrician will be in the sights of the consumer's rifle when looking for targets to recover damages in terms this section of the Act.

Harm for which a supplier may be held liable in terms of this section includes:

- death or injury of a natural person;
- illness of a natural person;
- loss of or physical damage to any property; and
- resultant economic loss resulting from the above three points. There must be a causal link between resultant economic loss and the death, injury, illness or damage to property.

Any term in a consumer agreement excluding or limiting the liability of the supplier for death or personal injury caused to the consumer through an act or omission of that supplier will be deemed unfair and will be of no effect. You may thus not exclude your liability for harm caused through agreement.

A supplier will not be held liable if:

- the unsafe characteristic, failure, defect or hazard that results in harm was entirely caused due to compliance with any public regulation;
- the unsafe product characteristic, failure, defect or hazard did not exist when it was supplied by that supplier to another person alleged to be liable or was entirely due to compliance by the supplier with the instructions of its own supplier;
- it is unreasonable to expect the distributor or retailer to have discovered the unsafe characteristic, failure, defect or hazard considering their role in the marketing chain; or
- the claim for damages has prescribed. A claim prescribes if the claim is brought more than three years after the:
 - death or injury;
 - earliest time at which a person had knowledge of the material facts about an illness; or
 - earliest time at which a person had knowledge of the material facts about the loss or physical damage to property; or
 - latest date on which economic loss is suffered.

Importers of poor quality, low price items should take particular care as it would be very difficult for a consumer to hold the overseas manufacturer liable and would thus choose to try and hold the local importer and distributor liable for any harm suffered. Poor and broken “English” instructions, in most cases incomprehensible, also do not meet the requirements of the Act. Importers should consider rewording the instructions and warnings in plain and understandable language.

Quality control processes must be robust, both at manufacturer and retailer level. Only supply good quality, reliable and safe products. There is no recognition in this section of the act “that you get what you pay for”. It would seem that the intention is to rid the South African marketplace of inferior quality, unsafe products that could cause unsuspecting consumers and users harm.

Although this section relates to goods, service providers should take cognisance of the fact that poorly performed service or maintenance work could cause harm to the consumer through product failure, unsafe, hazardous or defective goods. This would potentially place the service provider in the supply chain for product liability in terms of Section 61 of the Act. The use of poor quality parts or components in the performance of service or maintenance work or the use of unskilled and unqualified service technicians should be avoided at all costs. For example, a service technician forgets to re-fit a sump plug to a vehicle after draining the oil. Soon afterward, the engine seizes and the vehicle becomes inoperative. All of this happens in a very bad area of town resulting in the consumer being robbed and beaten in the process. The manufacturer of the vehicle in this case carries no blame in the harm suffered by the consumer and liability will rest with the service provider. Please take note that Section 61 of the Act dealing with product liability already became effective on 24 April 2010 and not on 1 April 2011 as most other provisions of the Act.

Quality parts and components, preferably original equipment from the manufacturer, should be used in effecting repair, service or maintenance work.

Goods should undergo a thorough pre-delivery inspection as per manufacturer guidelines before delivery to the consumer and an accurate record hereof should be kept.

So, yes, there are various measures that an importer or producer, distributor or retailer can take in order to mitigate the likelihood of being held liable.

Unfortunately though, not all risks can be mitigated to non-existent and thus the need for proper and adequate “product liability in terms of Section 61 of the Consumer Protection Act” insurance. Current insurance policies which provide for a wide array of events to be covered under public liability cover will not suffice. A supplier’s liability for harm suffered by a consumer due to an unsafe product characteristic, failure, defect and hazard or inadequate warnings or instructions will not be covered under this part of a short-term insurance policy. Product liability as introduced by Section 61 of the Act poses an entirely new risk and suppliers should as a matter of extreme urgency consult their brokers or underwriters to obtain appropriate and adequate cover.

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The views and opinions expressed above do not represent qualified legal opinion, but is merely a personal view based on my understanding and interpretation of the Consumer Protection Act.