

**A Critical discussion of the impact of the right to fair value, good
quality and safety in terms of the
Consumer Protection Act 68 of 2008 on the Agricultural Industry in
South Africa**

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Chapter 1. Introduction

1.1 Background

The Consumer Protection Act 68 of 2008¹ was signed by the President on 24 April 2009 and was published in the Government Gazette on 29 April 2009². The Act was put into effect incrementally³ and came into full operation on 31 March 2011. I am of the opinion that the Act is a long, at times convoluted and often complicated piece of legislation. Its body comprises 7 chapters containing 122 sections, not mentioning its two schedules. The Act contains many provisions that are novel to our law and are yet to be tested by the courts, such as product liability which will be discussed in chapter 4. The Act also contains far-reaching provisions designed to protect consumers, such as the consumer rights set out in Chapter 2 of the Act and the introduction of product liability in section 61,⁴ leading some to conclude that it makes South African consumers the most protected in the world.⁵ The Act is both a major step forward and a watershed development in the field of consumer protection in South Africa.⁶

The Act is consumer centric and its purposes are to promote and advance social and economic welfare of consumers in South Africa⁷ by establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefits of consumers generally;⁸ reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by consumers;⁹ promoting fair business practices;¹⁰ protecting consumers from unconscionable, unfair, unreasonable, unjust practices and deceptive and misleading

¹ Herein after referred to as the CPA or the Act.

² Government Gazette No.32186 dated 29 April 2009.

³ Nagel *ea* 705.

⁴ See generally chapters 3 and 4 of this dissertation.

⁵ www.michalsons.co.za/the-consumer-protection-act-a-heads-up/138. The Consumer Protection Act – a heads up (accessed at 17h59 on 4 April 2012).

⁶ Van Eeden 24.

⁷ Botha & Joubert 305.

⁸ S 3(1)(a).

⁹ S 3(1)(b).

¹⁰ S 3(1)(c).

conduct;¹¹ improving consumer awareness and encouraging responsible and informed consumer behaviour;¹² promoting consumer confidence, empowerment and development of a culture of consumer responsibility, through individual and group training, vigilance, advocacy and activism;¹³ providing for a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions;¹⁴ and providing for an accessible, consistent, harmonised, effective and efficient system of redress for consumers.¹⁵ The Act places mammoth obligations on suppliers and authorities to ensure consumer protection.¹⁶

1.2 Purpose and objective of this dissertation

This dissertation will focus on Part H of Chapter 2 of the Act, the consumer's right to fair value, good quality and safety. The objective is to analyse and evaluate the rights awarded to consumers in Part H of the Act and specifically addresses certain issues and implication arising from the implied warranty and product liability imposed by the Act.

1.3 Delineation

This dissertation will proceed with analyses of the terminology, application, scope and exclusions of the Act, with a focus on the fundamental consumer rights in Chapter 2 of the Act.

Remedies where the Act does not apply will be discussed in order to compare the remedies of the Act to those available where the Act is not applicable, and thus determining whether the Act in fact was drafted in a manner to reach its purposes as set out in Chapter 3 of the Act.

¹¹ S 3(1)(d).

¹² S 3(1)(e).

¹³ S 3(1)(f).

¹⁴ S 3(1)(g).

¹⁵ S 3(1)(h).

¹⁶ Jacobs *ea* 304.

This is followed by an in-depth discussion on the implication arising from the implied warranty and product liability imposed by the Act. This dissertation is concluded with a critical discussion on the impact of the Act on the agricultural industry in South Africa in order to determine the impact of the Act the very consumer it set out to protect.

Chapter 2. Terminology, application, scope and exclusions in terms of the Consumer Protection Act

In order to fully understand the impact of the Act one first has to take a look at the application and scope of the Act and ensure an understanding of the terminology used throughout the Act.

2.1 The Act

The Act came into operation on 31 March 2011, as discussed in chapter 1 of this dissertation. The Act must be interpreted in a manner that gives effect to the purposes set out in Section 3 of the Act.¹⁷

2.2 Enforcement of consumer rights

In terms of section 4(1) of the Act a person acting on his or her own behalf, an authorised person acting on behalf of another person who cannot act in his or her own capacity, a person acting as a member of, or in the interest of a group or class of affected persons, a person acting in the public interest,¹⁸ associations acting in the interest of its members may approach a court, the Tribunal¹⁹ or the Commission²⁰ alleging that a consumer's rights have been infringed, impaired, threatened or that a prohibited conduct has occurred.

2.3 The application of the Act and possible exemption from its provisions

In terms of section 5(1), the Act applies to every transaction occurring within the Republic, unless it is exempted by section 5(2), or sections 5(3) and (4).²¹ The Act applies to the promotion of any goods or services, or to the supply of any goods or services, within the Republic, unless those goods or services could not reasonably be the subject of a transaction to which the Act applies or the promotion of those goods or services has been

¹⁷ S 2.

¹⁸ With leave of the tribunal or court.

¹⁹ The National Consumer Tribunal.

²⁰ The National Consumer Commission.

²¹ S 5(1)(a).

exempted in terms of subsections (3) and (4).²² The Act further applies to these transactions, irrespective of whether any of those goods or services are offered or supplied in conjunction with any other goods or services, or separate from any other goods or services.²³ To the extent provided for in subsection (5),²⁴ the Act also applies to a transactions where the goods that are supplied in terms of a transaction that is exempt from the application of the Act.

However, the Act does not apply to a transaction in terms of which goods or services are promoted or supplied by the state,²⁵ or where the consumer is a juristic person whose asset value or annual turnover exceeds the threshold value of R2 million,²⁶ or if the transaction falls within an industry wide exemption granted at the instance of a regulatory authority,²⁷ or to a credit agreement under the National Credit Act,²⁸ or pertaining to services supplied under an employment contract,²⁹ or giving effect to a collective bargaining agreement.³⁰

Section 5(5) provides that, if any goods are supplied within the Republic to any person in terms of a transaction that is exempt from the application of the Act, those goods, and the importer or producer, distributor and retailer of those goods, respectively, are nevertheless subject to sections 60 and 61 of the Act.

2.4 Definitions

²² S 5(1)(b).

²³ S 5(1)(c).

²⁴ S 5(1)(d).

²⁵ S 5(2)(a).

²⁶ S 5(2)(b). The Minister of Trade and Industry has by notice in the Government Gazette No 34181, dated 1 April 2011 determined the monetary threshold to the size of the juristic person. The Minister has published the threshold at R2 million. The Consumer Protection Act therefore does not apply to a transaction where the consumer is a juristic person whose asset value or annual turnover, at the time of the transaction equals or exceeds the threshold value of R2 million.

²⁷ S 5(2)(c). In terms of Section 5(3), a regulatory authority may apply to the Minister for an industry-wide exemption from one or more provisions of the Act on the grounds that those provisions overlap or duplicate a regulatory scheme administered by that regulatory authority in terms of any other national legislation, any treaty, international law, convention or protocol.

²⁸ 34 of 2005. S 5(2)(d).

²⁹ S 5(2)(e).

³⁰ S 5(2)(f) and (g).

An essential part of the correct determination of the field of application of the Act is a thorough analysis and understanding of the definitions in terms of Section 1. The most important definitions will forthwith be discussed.

The term “transaction” is central to the application of the Act and is defined in wide and all-encompassing terms. It refers to a transaction in the ordinary course of business between or among a person and one or more other persons for the supply or potential supply of any goods or services in exchange for consideration.³¹

“Consumer” is defined in respect of any goods or services and means a person to whom those particular goods or services are marketed in the ordinary course of the supplier’s business; a person who has entered into a transaction with a supplier in the ordinary course of the supplier’s business;³² If the context so requires or permits, a user of those particular goods or a recipient or beneficiary of those particular services, irrespective of whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those particular goods or services; and a franchise in terms of a franchise agreement.

The definition of “person” also includes a juristic person.³³ The inclusion of juristic persons in the definition of “consumer” might be seen as somewhat surprising, giving the overt emphasis of the Act on the protection of consumers and their interests, in which the consumer as an individual is clearly the focus.³⁴ The inclusion of juristic persons extends the protection of the Act. Small and medium businesses³⁵ will in light of the inclusion of juristic persons also enjoy protection under the Act. It can be asked whether the purpose of the Act should include the protection of small and medium businesses. There are however instances where the protection of the Act will not apply to juristic persons, this will be in the

³¹ S 1, sv “transaction”.

³² S 1, sv “consumer”.

³³ S 1 defines a “juristic person” as including a body corporate, a partnership or association or a trust as defined in the Trust Property Act 1988 of 1988.

³⁴ Van Eeden 41.

³⁵ Businesses with an annual turnover of less than R2 million.

event of transactions where the consumer is a juristic person whose asset value or annual turnover exceeds the threshold determined by the Minister.³⁶

“Goods” are anything marketed for human consumption, any tangible object including any medium on which anything is or may be written or encoded; any literature, music, photograph, motion picture, game information, data, software, code or other intangible product written or encoded on any medium, or licence to use any such intangible product; a legal interest in land or any other immovable property other than an interest that falls within the definition of “service”³⁷; and gas water and electricity.

Irrespective of whether a person promoting, offering or providing services participates in, supervises or engages directly or indirectly in the service, “service” includes any work or undertaking performed by one person for the direct or indirect benefit of another. It is the provision of any education, information, advice or consultation, any banking service or related or similar financial services.³⁸ Service further includes the undertaking, underwriting or assumption of any risk by one person on behalf of another, the transportation of an individual or any goods, the provision of accommodation or sustenance and any entertainment or similar intangible product.³⁹ It is access to any electronic communication infrastructure, access or right of access to any event, premises, activity or facility, or access to any property in terms of a rental and a right of occupancy of, or power or privilege over or in connection with any land or other immovable property other than in terms of a rental.⁴⁰ Lastly service also includes the right to franchise in terms of a franchise agreement.⁴¹

“Supplier” is defined as a person who markets any goods or services. It should be noted that “market” when used as a verb means to promote or supply any goods or services⁴².

³⁶ S 5(2)(b). The threshold is currently R2 million.

³⁷ S 1.

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² S 1.

The word “market” is also used in the definition of “consumer”. It is thus important to understand what it entails to promote or supply goods or services. The Act defines “promote” as being to advertise, display or offer to supply any goods or services in the ordinary course of business, to all or part of the public for consideration; to make any representation in the ordinary course of business that could reasonably be referred to as expressing a willingness to supply any goods or services for consideration; to engage in any other conduct in the ordinary course of business that may reasonably be construed to be an inducement or attempted inducement to a person to engage in a transaction.

2.5 Consumer rights

The innovation of Chapter 2 of the Act is its introduction of a formal set of consumer rights into our law. This chapter creates eight specific fundamental consumer rights, namely:

2.5.1 Equality in the consumer market

Equality in the consumer market is dealt with in Part A, this right is intended to protect against discriminatory marketing, price differentiation, exclusive supply, discriminatory access and the like. Both the Commission and the equality courts have concurrent jurisdiction over contraventions of this Part;⁴³

2.5.2 Privacy

Privacy is mainly directed at protecting consumers against the evils of direct marketing.⁴⁴ It is important to note that a consumer has the right to a "cooling-off" period with regard to transactions resulting from direct marketing. Section 16 of the Act makes provision for a consumer to rescind a transaction resulting from any direct marketing without reason or penalty, by mere notice to the supplier in writing within 5 business days after the date that the transaction was concluded or the goods were delivered.

⁴³ See generally Sections 8 to 10.

⁴⁴ See generally Sections 11 to 12.

Section 32 determines that a person who is directly marketing any goods or services, and who concludes a transaction or agreement with a consumer, must inform the consumer, in the prescribed manner and form of the right to rescind that agreement.

"Direct marketing" means to approach a person, either in person or by mail or electronic communication, for the direct or indirect purpose of –

- a) promoting or offering to supply, in the ordinary course of business, any goods or services to the person; or
- b) requesting the person to make a donation of any kind for any reason.

2.5.3 Consumer's right to choose

This part prohibits mandatory bundling arrangements, provides for a cooling-off period after direct marketing, deals with the expiry and renewal of fixed-term agreements, the right to cancel any advance booking, reservation or order for any goods or services to be supplied, as well as the consumer's right to choose or examine goods;⁴⁵

2.5.4 Disclosure and information

This encompasses the consumer's right to information in plain and understandable language, the disclosure of prices of goods or services, the regulation of product labelling and trade descriptions to prevent misleading consumers, and the like;⁴⁶ In the event that a contract is not in plain and understandable language, it will be regarded as unconstitutional conduct in terms of section 40 of the Act. This causes one to ask in which one of our official languages the information should be in order to be regarded as plain and understandable.

⁴⁵ See generally Sections 13 to 21.

⁴⁶ See generally Sections 22 to 28.

2.5.5 Fair and responsible marketing

This part sets the general standards for marketing, prohibits bait and negative option marketing, as well as regulates catalogue marketing, customer loyalty programmes, promotional competitions, alternative work schemes, and referral selling;⁴⁷

2.5.6 Fair and honest dealing

This part prohibits unconscionable conduct, false, misleading or deceptive representations, fraudulent schemes and offers, pyramid and related schemes; it creates an implied warranty that the supplier of goods has the legal right to supply those goods; it regulates auctions, overselling and overbooking;

2.5.7 Fair, just and reasonable terms and conditions

Apart from entrenching this right, this part requires limitation of liability, assumption of liability and like terms to be drawn to the attention of a consumer in a formal manner, authorises the Minister to prescribe categories of consumer agreements that are required to be in writing, prohibits certain transactions, agreements, terms and conditions (see for instance Regulation 45, which adds to the list), and provides for the powers of a court to ensure fair and just conduct, terms and conditions.⁴⁸

It is now important that a consumer's attention should be drawn to any terms and conditions that are extraordinary, and to have the consumer initial next to same in order to ensure proof that the consumer was in fact aware of the terms and conditions, may it be questioned at a later stage. Any limitation of

⁴⁷ See generally Sections 29 to 39.

⁴⁸ See generally Sections 49 to 52.

liability should also be clear, and cannot be in respect of gross negligence, or result in the consumer waiving his or her rights in terms of the Act.

2.5.8 Fair value, good quality and safety⁴⁹

This is the most controversial part of the chapter because of its provisions that, by all accounts, create strict liability on the part of suppliers who deal in goods that later cause harm in circumstances where the said suppliers would ordinarily not have attracted any liability.

In this respect, section 55 decrees that, unless the consumer has been expressly informed that particular goods were offered in a specific condition and has expressly agreed to accept the goods in that condition, or knowingly acted in a manner consistent with accepting the goods in that condition, he has a right to receive goods that are reasonably suitable for the purposes for which they are generally intended;⁵⁰ are of good quality, in good working order and free of any defects;⁵¹ will be useable and durable for a reasonable period of time, having regard to the use to which they would normally be put and to all the surrounding circumstances of their supply;⁵² and comply with any applicable standards set under the Standards Act, 1993,⁵³ or any other public regulation.⁵⁴

In a great departure from the common law, section 56(1) inserts an implied provision in any transaction or agreement pertaining to the supply of goods to a consumer that the producer or importer, the distributor and the retailer each warrant that the goods comply with the requirements and standards

⁴⁹ See generally Sections 53 to 61.

⁵⁰ S 55(2)(a).

⁵¹ S 55(2)(b).

⁵² S 55(2)(c).

⁵³ Act No. 29 of 1993. This also seems to ignore the fact that compliance with a national standard is not compulsory until it is converted into a compulsory specification.

⁵⁴ S 55(2)(d), read with Section 55(6).

contemplated in section 55, except to the extent that those goods have been altered contrary to the instructions, or after leaving the control, of the producer or importer, the distributor or the retailer, as the case may be.

In terms of section 56(2) a consumer may, within six months after the delivery of any goods to him, return the goods to the supplier, without penalty and at the supplier's risk and expense, if the goods fail to satisfy the requirements and standards contemplated in section 55. In that event, the supplier must, at the direction of the consumer, either repair or replace the failed, unsafe or defective goods, or refund to the consumer the price paid by the consumer for the goods.

In this context, a “*retailer*” is defined to mean, with respect to any particular goods, a person who, in the ordinary course of business, supplies those goods to a consumer,⁵⁵ while a “*supplier*” means a person who markets any goods or services.⁵⁶ In turn, the verb “*market*” means to promote or supply goods or services.⁵⁶

2.5.9 Section 61(1) provides that except to the extent contemplated in section 61(4), the producer or importer, distributor or retailer of any goods is liable for any harm, as described in section 61(5), caused wholly or partly as a consequence of supplying any unsafe goods;⁵⁷ a product failure, defect or hazard in any goods;⁵⁸ or inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any goods⁵⁹, irrespective of whether the harm resulted from any negligence on the part of the producer, importer, distributor or retailer, as the case may be.

⁵⁵ S 1, *sv* retailer.

⁵⁶ S 1, *sv* supplier.

⁵⁷ S 61(1)(a).

⁵⁸ S 61(1)(b).

⁵⁹ S 61(1)(c).

This provision imposes strict liability – without the need to prove fault – on the part of the producers, importers, distributors and retailers goods.

It should be noted that the producers, importers, distributors and retailers are subject to strict liability for damage caused. Section 1 of the Act defines the "supply chain" as follows:

"supply chain" with respect to any particular goods or services, means the collectivity of all suppliers who directly or indirectly contribute in turn to the ultimate supply of those goods or services to a consumer, whether as a producer, importer, distributor or retailer of goods, or as a service provider.⁶⁰

2.6 Important definitions relating to part H of the Act.

In terms of Section 53(1) of the Act the following definitions are relevant to part H:

- 2.6.1 “unsafe” means that, due to a characteristic, failure, defect or hazard, particular goods present an extreme risk of personal injury or property damage to the consumer or to other persons;⁶¹
- 2.6.2 “failure” means the inability of the goods to perform in the intended manner or to the intended effect;
- 2.6.3 “defect” means any material imperfection in the manufacture of the goods or components that renders the goods less acceptable than persons generally would be reasonably entitled to expect in the circumstances; or any characteristic of the goods or components that renders the goods or components less useful, practicable or safe than persons generally would be reasonably entitled to expect in the circumstances; and

⁶⁰ S 1, sv “supply chain”.

⁶¹ S 53(1)(d).

2.6.4 “hazard” means a hazard in terms of any other law⁶², or poses a significant risk of personal injury to any person, or damage to property when the goods are used.⁶³

Section 61(2) provides that a supplier of services, who, in conjunction with the performance of those services, applies, supplies, installs or provides access to any goods, must be regarded as a supplier of those goods to the consumer for the purposes of this section.

Section 61(3) provides that of, in a particular case, more than one person is liable in terms of section 61, their liability is joint and several.

2.7 Exclusion of liability

A supplier will not be held liable in terms of Section 61 of the Act in the following instances:

2.7.1 The unsafe product characteristic, failure, defect or hazard that results in harm is wholly attributable to compliance with any public regulation,⁶⁴

2.7.2 The alleged unsafe product characteristic, failure, defect or hazard either did not exist in the goods at the time it was supplied by that person to another person alleged to be liable; or was wholly attributable to compliance by that person with instructions provided by the person who supplied the goods to that person;⁶⁵

2.7.3 It is unreasonable to expect the distributor or retailer to have discovered the unsafe product characteristic, failure, defect or hazard, having regard to that person’s role in marketing the goods to consumers;⁶⁶ or

2.7.4 The claim for damages has become prescribed.⁶⁷

Provided that liability attaches, the harm for which a person may be held liable in terms of section 61 includes the death of, or injury to, any natural person,⁶⁸ an illness of any natural

⁶² S 53(1)(b)(i).

⁶³ S 53(1)(c)(ii).

⁶⁴ S 61(4)(a).

⁶⁵ S 61(4)(b).

⁶⁶ S 61(4)(c).

⁶⁷ S 61(4)(d).

person,⁶⁹ any loss of, or physical damage to, any property, irrespective of whether it is movable or immovable⁷⁰ and any economic loss that results from death or injury to a natural person, on the one hand, or loss of or damage to property on the other.⁷¹

Another important moderating tool in this respect is section 61(6)(c), which provides that section 61 does not limit the authority of a court to apportion liability among persons who are found to be jointly and severally liable. Accordingly, while it may be that a supplier and other participants in the upstream value chain may be held to be jointly and severally liable for the harm caused by the goods concerned, the court would be able to use the normal principles of delictual liability to determine each party's respective share of blame proportionately to each other.

It should once again be noted that the Act is a new piece of legislation and therefore there is still a great deal of uncertainty surrounding it. For purposes of this discussion the focus will be on the Part H of Chapter 2 of the Act, the consumer's right to fair value, good quality and safety.

⁶⁸ S 61(5)(a).

⁶⁹ S 61(5)(b).

⁷⁰ S 61(5)(c).

⁷¹ S 61(5)(d).

Chapter 3. Remedies where the Consumer Protection Act does not apply

Prior to the enactment of the CPA, there existed no statutory provisions for strict product liability in South African Law.⁷² In instances where the Act does not apply the remedies to the aid of the consumer were found in the common law. In such instances the liability for harm caused to a consumer resulting from a defective product can be found in either contract or delict.⁷³

3.1 The Consumer Protection Act

The legislature has established strict liability in terms of section 61 of the Act on producers, importers, distributors and retailers. The implementation of strict liability by the Act is justified on economic analysis in that it minimises the social costs of product related injuries, as well as from a moral perspective in that an enterprise causing loss should be legally obliged to pay compensation to the victim.⁷⁴ The design, manufacture and distribution of products may result in death, disease or injury for a various number of consumers.⁷⁵ In certain circumstances there might not be a contractual nexus between the purchaser of a certain product and the end user or injured party.⁷⁶ The manner in which and the extent to which the Act introduces strict liability into South African law will be discussed in chapter 3 of this dissertation.

Where the Act is not applicable the consumer will be left with nothing more than the common law liability regime. Even in the instances where the Act applies the consumer can still exercise any rights offered in terms of the common law.⁷⁷

3.2 The Common law

⁷² Botha & Joubert 305.

⁷³ Botha & Joubert 306.

⁷⁴ Van Eeden 241.

⁷⁵ Van Eeden 237.

⁷⁶ *Ibid.*

⁷⁷ S 2(10) of the CPA determines that no provision of the Act must be interpreted so as to preclude a consumer from exercising any rights afforded in terms of the common law.

Van Eeden argues that the common law liability regime for defective products has been seen lacking due to the absence of strict liability.⁷⁸ In the case of *Wagener v Pharmacare Ltd*⁷⁹ it was argued that in the absence of a contractual relationship between the parties fault had to be proved and accordingly that the time was now ripe to impose strict liability and it was the courts that were in a better position than the legislature to do so. The court however differed in that it found that it was up to the legislature to impose strict liability.⁸⁰

In the circumstances where the Act is not applicable, a consumer will not be able to rely on the strict liability imposed by the Act. In such circumstances the consumer will have to rely on the particular requirements of the common law for establishing liability in respect of product liability incidents. The common law embodies the private law and thus the laws of delict and contract.⁸¹ The law of delict is relevant to the consumer when it comes to product liability, and in particular in identifying recognised interests as well as identifying when such interests are infringed and how it may be restored.⁸² The law of contract is relevant to the consumer with regards to the creation of obligations through voluntary co-operative conduct by way of agreement.⁸³

3.1.1 Law of Contract

A contract is an agreement reached with the intention of creating legal obligation with resulting rights and duties.⁸⁴ In order to conclude a contract there has to be consensus between the parties, the parties must have contractual capacity, the contract must be lawful, the performance in terms of the contract must be possible and sometimes the contract must comply with formalities.⁸⁵ When the relationship between the manufacturer and the consumer is governed by a contractual exemption from liability, the unmitigated doctrines of

⁷⁸ Van Eeden 242.

⁷⁹ (2003) 2 All SA 167 (SCA) at 171.

⁸⁰ (2003) 2 All SA 167 (SCA) at 176.

⁸¹ Van Eeden 59.

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ Nagel *ea* 41.

⁸⁵ *Idem* 42.

freedom of contract and *pactum sunt servanda*⁸⁶ would in many cases be effective in shielding the manufacturer from liability and accountability for harm caused by a defective product.⁸⁷ Parties can by agreement limit or exclude liability.⁸⁸ In the alternative, specific warranties can also be made contractually. If a contract exists between the parties and damage is suffered due to a defect in the product the prejudiced party can use his or her contractual remedies to recover losses.⁸⁹

The concept of strict liability already existed in Roman law⁹⁰ and Roman-Dutch law in for example the aedilician actions.⁹¹ In terms of the *aedilician actions* the seller warrants to the purchaser that the merx is free from defects.⁹² The *actio rehibitoria* is an action for setting aside the contract and claiming restitution.⁹³ The *actio quanti minoris* is an action for the return of portion of the purchase price.⁹⁴ These actions are available if at the time of the sale, the merx suffered from any disease or defect not declared by the seller, even if it was one of which the seller had no knowledge; or if a thing is sold in contravention of the edict; or where a thing was sold in contravention of what was stated or promised.⁹⁵ The *actio rehibitoria* and the *actio quanti minoris* are common law remedies that are still available in South African law.⁹⁶

⁸⁶ Requires the contract to be enforced, however informal the contract may be – Christie 199.

⁸⁷ Van Eeden 66.

⁸⁸ Van Eeden 63.

⁸⁹ Botha & Joubert 307.

⁹⁰“The early Roman Law did not cast on the seller any general duty of warranting the absence of latent defects, and if the buyer wished to protect himself he had to do so by stipulation, which came to be the usual course. Later, the aedilician protection was introduced, and by Justinian’s time it applied to every kind of sale; but the relief claimable under the relevant actiones was limited to a reduction of the price or to rescission against restoration of the price. Hence the relief did not extend to consequential damages. Similarly as regards the Roman-Dutch Law in Holland, it is not disputed that, according to the writers of that country, a seller was not liable for consequential damages caused by latent defect of which he was unaware, save for an exception made by Voet, 21.1.10, in regard to artificers.” - *Kroonstad Westelike Boere Ko-operatiewe Vereniging v Botha* 1964 (3) SA 651 (A) at 548.

⁹¹ Botha & Joubert 307.

⁹² Kerr 109.

⁹³ Kerr 113.

⁹⁴ Kerr 127. The amount awarded is the difference between the purchase price and the actual value of the merx sold – Kerr 129.

⁹⁵ Kerr 114.

⁹⁶ *Phame (Pty) Ltd v Paizes* 1973 3 SA 397 (A).

Warranties implied by law should be distinguished from contractual warranties. Implied warranties form part of the *naturalia*⁹⁷ of a contract, such as a warranty against latent defects. Parties specifically need to exclude these warranties should they not wish for it to form part of their contract.⁹⁸

Where an implied warranty is not explicitly excluded, a merchant seller could be liable for consequential damages in terms of the Pothier-rule, which entails that liability for consequential damage caused by latent defect attaches to a merchant seller, who was unaware of the defect, where he publicly professes to have attributes of skill and expert knowledge in relation to the kind of goods sold.⁹⁹ The manufacturer on the other hand, will incur liability caused by a latent defect in the thing sold without having made any declaration that he has expert knowledge of the product sold.¹⁰⁰

In *Kroonstad Westelike Boere Ko-operatiewe Vereniging v Botha*¹⁰¹ the court stated that the in order for a seller to be liable for damages caused due to a latent defect the seller must have acted as a dealer and must have professed in public to have expert knowledge of the product sold.¹⁰²

A brief discussion of the following cases will illustrate the circumstances in which a merchant can be liable for damages under the common law:

- a) *Kroonstad Westelike Boere Ko-operatiewe Vereniging Bpk v Botha*¹⁰³;
- b) *Holmende Brickworks (Pty) Ltd v Roberts Construction Co Ltd*¹⁰⁴;
- c) *Langerberg Voedsel Bpk v Sarculum Boerdery*¹⁰⁵; and

⁹⁷ Pothier described *naturalia* as things which are only of the nature of the contract are those which without being the essence, form part of it, though not expressly mentioned – Christie 159.

⁹⁸ Nagel *ea* 117.

⁹⁹ *Kroonstad Westelike Boere Ko-operatiewe Vereniging Bpk v Botha* 1964 (3) SA 651 (A) at 553.

¹⁰⁰ Kerr 211. *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 3 SA 670 (A).

¹⁰¹ 1964 (3) SA 651 (A).

¹⁰² 1964 (3) SA 651 (A) at 547. *Botha & Joubert* 307.

¹⁰³ 1964 (3) SA 651 (A).

¹⁰⁴ 1977 (3) SA 670 (A).

¹⁰⁵ 1996 (2) SA 565 (A).

d) *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd*¹⁰⁶.

Kroonstad Westelike Boere Ko-operatiewe Vereniging Bpk v Botha¹⁰⁷

Botha and another, the respondents, jointly carried on operations as kaffircorn farmers. Kroonstad Westelike Boere Ko-operatiewe Vereniging, sold to them a toxic pesticide, known as Metasystox, with which to spray kaffircorn for the destruction of lice. It was an implied term of the contract that the pesticide was fit for the purpose for which it was bought and free from latent defects rendering it unfit for such purpose and injurious to the crops. However, in breach of this warranty the pesticide suffered from a latent defect rendering it injurious and unsuitable for the purpose for which it was bought, and as a result it grievously damaged the respondents' kaffircorn crops after having been sprayed thereon.¹⁰⁸

The respondents' cause of action was that under the so-called *Pothier* rule, the appellant was liable for consequential damages caused by latent defect, as a merchant whose business it was to deal in toxic pesticides.¹⁰⁹ The appellant pleaded that *Pothier's* rule was not part of our law or, if it was, that it applied only where the merchant had expert knowledge of the subject matter of the sale, and that the appellant did not have such expert knowledge.¹¹⁰

In this country there have been many decisions in which sec. 214 of Pothier on *Sale* has been recognised or referred to with apparent approval in so far as it refers to a merchant seller. The cases are not entirely harmonious as to the precise field of application, but there is no decision rejecting what is conveniently called the *Pothier* rule.”

Mr Coetzee proceeded to examine the decisions on the *Pothier* rule. To indicate how the Court came to refer to *Pothier* he dealt with the decision in *Erasmus v. Russell's*

¹⁰⁶ 2002 (2) SA 447 (SCA).

¹⁰⁷ 1964 (3) SA 651 (A).

¹⁰⁸ At 547.

¹⁰⁹ At 548.

¹¹⁰ At 548.

*Executor*¹¹¹. The executor of an estate sold by public auction to a farmer ten apparently healthy cows which, unknown to the parties, were latently suffering from tick fever. A few days later they exhibited symptoms of the disease and nine of them died. Other cattle, with which they were running on the farm, were also infected and sixteen of these died. The farmer sued for cancellation of the sale in respect of the nine cows which had died, and the return of the price, and also for the value of the sixteen other cows. Only the latter claim for consequential damages was contested. The plaintiff founded on an alleged express warranty at the time of the sale that the cows were sound and free from disease and infection. The Court “express representation” made at the time of the sale, as the claim was brought under the *actio redhibitoria*, consequential damages were not recoverable. With regard to the argument that the “express representation” made all the difference, the Court, relying on *Grotius* 3.15.7., *Voet* 21.1.10, and Pothier on *Sale*, held that consequential damages are not recoverable where the seller was unaware of the defect. At p. 374 the Court referred, *obiter*, to *Voet’s* exception of the artificer, and to *Pothier’s* exception of the merchant who sells work of his own manufacture or “articles of which he professes to have special knowledge”; and indicated that in these exceptional cases the seller is taken to have had knowledge of the defect. There was an *obiter* recognition of the so-called Pothier rule in relation to merchant sellers.¹¹² This recognition was accorded in cases to follow.¹¹³

The court found that sec. 214 of Pothier on *Sale*, in so far as it deals with the liability of a merchant seller, is recognised as being part of our law. As to the field of application of the rule, the court stated that there is insufficient judicial support for the wide view that a merchant, who sells goods in which it is his business to deal, is

¹¹¹ 1904 T.S. 365.

¹¹² 1964 (3) SA 651 (A) at 550.

¹¹³ *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A); *Langeberg Voedsel Bpk v Sarculum Boerdery* 1966 (2) SA 565 (A); and *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd* 2002 (2) SA 447 (SCA).

merely on that account liable for consequential damages caused to the purchaser by a latent defect, of which the seller was unaware, in the thing sold.¹¹⁴

The court held that the preponderant judicial view, and which this Court should now approve, is that liability for consequential damage caused by latent defect attaches to a merchant seller, who was unaware of the defect, where he publicly professes to have attributes of skill and expert knowledge in relation to the kind of goods sold.¹¹⁵ (It is not intended here to draw any distinction between the words “merchant” and “dealer”. Whether a seller falls within the category mentioned will be a question of fact and degree, to be decided from all the circumstances of the case.¹¹⁶ Once it is established that he does fall within that category, the law irrebuttably attaches to him the liability in question, save only where he has expressly or by implication contracted out of it.¹¹⁷

It should be noted that where the seller breached an implied warranty the purchaser will only be able to sue for damages using the aidilition actions in instances where the seller also acted as manufacturer or where he publicly professed to have skill and expert knowledge.¹¹⁸ In all other instances the purchaser will have to will have to prove fault on the part of the seller before he will be able to sue for damages.¹¹⁹

Holmende Brickworks (Pty) Ltd v Roberts Construction Co Ltd¹²⁰

R, a firm of construction engineers, had bought bricks from H, who manufactured and sold bricks. R wanted the bricks to build a factory. When the building was complete, it appeared that some of the walls had to be demolished and rebuilt because the bricks sold by

¹¹⁴ 1964 (3) SA 651 (A) at 553.

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ 1964 (3) SA 651 (A) at 554.

¹¹⁸ Botha & Joubert 308.

¹¹⁹ *Kroonstad Westelike Boere Ko-operatiewe Vereniging v Botha* 1964 3 SA 566 (A). Botha & Joubert 308.

¹²⁰ 1977 (3) SA 670 (A).

Holmdene had been defective. R's claim for consequential damages against H succeeded in the court a quo, but then Holmdene appealed.

The court determined whether a seller who was also the manufacturer of bricks could be held liable for the consequential damages caused by the latent defect. Depending on each case, the cause of action can either be contractual in nature or delictual in nature. In this case the cause of action was one of contractual basis, and the court held that consequential damages could be recovered upon a contractual basis. Therefore the sufferer should be placed in the position he would have occupied had the contract been properly performed.

The fact that the seller had no knowledge of the defect is of no avail to him. If the seller of the merx is also the manufacturer of such merx, he is liable for latent defects without further ado, unless agreed to the contrary. Apart from consequential damages, the sufferer is also entitled to restitution. The appeal was dismissed because the defect was a latent one, and general damages had been proved.

Langerberg Voedsel Bpk v Sarculum Boerdery¹²¹

Langeberg was a processor of canned fruit and vegetables which it purchased in unprocessed form from the producers. Langeberg supplied sweet corn seed to Sarculum (one of the producers), a farmer, on the understanding that Langeberg would purchase the unprocessed sweet corn from Sarculum once it had be grown. Sarculum's crop failed due to a latent defect in the seed supplied by Langeberg.

Langeberg's system of supplying the seed to the producers and then buying the raw material was in place for a while now, and Langeberg would sent his field workers to regularly visit the producers and assist them with advice on the production process. Sarculum had successfully sued Langeberg in the court a quo for consequential damages, then Langeberg appealed. The court here had to discuss whether the liability of Langeberg for consequential

¹²¹ 1966 (2) SA 565 (A).

loss resulting from a latent defect of which he was unaware depended on whether Langeberg was a merchant seller; and whether he professed to have attributes of skill and expert knowledge in relation to the goods sold. The court refused Langeberg's defence and held that the mere fact that Langeberg's trade in seed was limited to the sale of seed to producers such as Sarculum, and not to the general public clearly did not deprive Langeberg of the status of a merchant trader for the purpose of the determination of its liability for consequential damages. The court held Langeberg's conduct undoubtedly created the impression that it possessed expertise in the field. Thus the court a quo had come to the correct conclusion.

***Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd*¹²²**

The appellant, C, was the manufacturer of a herbicide. Lushof bought this herbicide from Van Staden, a merchant seller. The herbicide caused both physical and economic damages to Lushof's pear trees, with the young trees dying and the mature trees yielding less fruit. Lushof claimed damages from C and Van Staden. The Court a quo held C liable to both Lushof and Van Staden. C appealed.

The Supreme Court of Appeal held that the herbicide did indeed, because of a latent defect, cause the above damage through a process of inhibiting photosynthesis in the leaves. The court stated that a merchant seller who publicly professes to have expert knowledge and skill regarding the product sold by him will be liable to a purchaser for consequential damages in all latent defects in the merx. Van Staden did possess this kind of knowledge which he also professed in public, thereby satisfying the prerequisites for the liability of an expert merchant seller against the purchaser of wares tarnished by a latent defect. The court held that Van Staden as a merchant seller was liable to Lushof because of his breach of a contractual

¹²² 2002 (2) SA 447 (SCA). Also see discussion under delict, as it was found that C was liable in delict against Lushof because it was negligent in the manufacture, testing and distribution of a potentially dangerous herbicide.

guarantee. Under the *actio empti*, the purchaser, L, was entitled to cancellation of the contract and damages.

The court held that a direct contractual relationship existed between Van Staden and C in terms of which C warranted that the herbicide complied with the manufacturer's specifications; no presentations were made or any guarantees given regarding the saleability or suitability of the herbicide; Van Staden undertook not to give any warranty or make any representation over and above the warranties and representations that appeared in C's printed material; and Van Staden was obliged to distribute the herbicide for C's specified purposes only.

3.1.2 The Law of Delict

Where there is no contractual relationship between the parties and the prejudiced party suffers damage caused by a defective product liability will be based on the law of delict.¹²³ A delict is a culpable, wrongful act by a person, also referred to as the wrongdoer, that causes patrimonial loss to another or which impairs the latter's personality.¹²⁴

An injured party may institute three possible actions against the wrongdoer to claim damages, the action legis Aquiliae, the action iniuriarum and the action for pain and suffering.¹²⁵ For purposes of this discussion only the Actio legis Aquilliae will be discussed in further detail.

3.1.2.1 Actio legis Aquiliae

This important part of the Roman law still has application when it comes to delictual liability for patrimonial loss.¹²⁶ The action legis Aquiliae is not only applicable in instance of

¹²³ Botha & Joubert 309. This is often the situation as there is no contract concluded between the manufacturer of a product and the eventual consumer of that product – Botha & Joubert 309.

¹²⁴ Nagel *ea* 27.

¹²⁵ Nagel *ea* 39 and Neethling *Delict* 7.

¹²⁶ Neethling *Delict* 8.

damages to goods, but over the course of time the field of its application extended to recover patrimonial loss as a result of bodily injury.¹²⁷ The Aquillian action was thus expanded into a general remedy for all patrimonial loss caused wrongfully. Neethling concluded that, despite a few decisions to the contrary, there is a very strong tendency in case law to recognize Aquillian liability for all patrimonial loss caused wrongfully and culpably.¹²⁸

The actio legis Aquiliae provides for damages on account of the unlawful and culpable causing of any patrimonial loss.¹²⁹ Patrimonial loss can be defined as:¹³⁰

“The diminution in the utility of a patrimonial interest in satisfying the legally recognized needs of the person entitled to such interest; or

The loss or reduction in value of a positive asset in someone’s patrimony or the creation or increase of a negative element of his or her patrimony.”

Non-patrimonial loss can be defined as:

“The diminution, as the result of a damage-causing event, in the quality of the highly personal interest of an individual in satisfying his or her legally recognized needs, but which does not affect his or her patrimony.”¹³¹ This loss is better known as immaterial damages.

The distinction between patrimonial and non-patrimonial damage for purposes of this discussion is only of significance when it comes to determining the limits of the Aquilian liability and breach of contract, as damages for patrimonial loss is the only damages that can be claimed with the Aquilian actions or as a result of breach of contract.¹³² Damages for patrimonial loss do not include consequential damages.

¹²⁷ *Idem* 9.

¹²⁸ *Idem* 11.

¹²⁹ Visser and Potgieter 6.

¹³⁰ *Idem* 51.

¹³¹ *Idem* 103.

¹³² Visser and Potgieter 38.

If a person's actions causes harm to another, the victim will be entitled to claim compensation if the victim can show that the wrongdoer acted in a wrongful and culpable way which caused harm to the victim.¹³³ South African law relating to culpability has been firmly based on the fault theory.

“Fault is concerned with a person's attitude or disposition and either comprises intent or negligence, as reflecting a blameworthy attitude or reprehensible state of mind of someone who has acted wrongfully for the purpose of the law of delict. Negligence is understood to mean an attitude or conduct of carelessness, thoughtlessness or imprudence, because by giving insufficient attention to his actions he failed to adhere to the standard of care legally required of him.”¹³⁴

The maxim *res ipsa loquitur* embodies the rule where the only known facts relating to negligence, consists of the occurrence itself, and the facts of the matter justify an inference of negligent conduct, take note merely and inference not a presumption.¹³⁵ Once there was *prima facie* proof that the product was defective at the required times of the action, it is virtually inevitable that the *res ipsa loquitur* will apply and will require an answer from the manufacturer, as found by the court in *Wagener v Pharmacare Ltd.*¹³⁶ The maxim *res ipsa loquitur* only comes into play if the plaintiff's evidence is such that it can be said that the event would not ordinarily occur without there having been a negligent manufacturer.¹³⁷

The Aquilian or “fault” liability system in respect of product liability is in practical terms not too far removed from a no-liability system.¹³⁸

The above view of van Eeden is in my view correct and best perceived as such in light of various case-law illustrating the practical application of the Aquilian action. The application of the Aquilian action can be seen in the following cases:

¹³³ Van Eeden 63.

¹³⁴ *Ibid.*

¹³⁵ *Idem* 64.

¹³⁶ [2003] 2 All SA 167 (SCA) at 173.

¹³⁷ At 174.

¹³⁸ Van Eeden 66.

- a) *Wagener v Pharmacare Ltd*¹³⁹;
- b) *Ciba-Geigy (Edms) Bpk v Lushof Plase (Edms) Bpk*¹⁴⁰;
- c) *D & H Piping Systems (Pty) Ltd v Trans Hex Group Ltd and another*¹⁴¹; and
- d) *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd*¹⁴².

Wagener v Pharmacare Ltd¹⁴³

This case illustrates the extent to which a manufacturer can be strictly liable in delict for unintended harm caused by defective manufacture of a product, where there is no contractual privity between the manufacturer and the injured person.¹⁴⁴

In order to understand the true application of this case a brief discussion of the facts is necessary. *Wagener and Cuttings*, the Appellants in this case, had undergone surgery and had become paralysed. Both had been administered a local anaesthetic manufactured by *Pharmacare Limited*, the Respondent.

The main issue before the Court was whether the Respondent was strictly liable for defects in the product (that is, whether the Respondent was liable even if fault in the form of negligence in the manufacture of the product had not been proved).

The Appellants argued that the existing common law remedy, the Aquilian action, was insufficient to protect and enforce their right to bodily integrity protected by the Constitution of the Republic of South Africa¹⁴⁵ (“the Constitution”). Their argument stemmed from the fact that fault, in the circumstances of the present case and cases similar to it, was most often extremely difficult to prove. The Appellants argued that the court was therefore obliged, in terms of the Constitution, to develop the common law to obtain a remedy which did

¹³⁹ (2003) 2 All SA 167 (SCA).

¹⁴⁰ 2002 (3) All SA 447 (SCA). Also see discussion under contract law as *Van Staden* was liable on contractual basis because of breach of a common law warranty against latent defects.

¹⁴¹ (2006) 3 All SA 309 (SCA).

¹⁴² (2011) SASCA 22.

¹⁴³ (2003) 2 All SA 167 (SCA).

¹⁴⁴ At169.

¹⁴⁵ Act 108 of 1996.

adequately protect the right, having regard to the spirit, objects and purpose of the Constitution.¹⁴⁶

The court, however, decided that the Aquilian action was sufficient for the protection of the right to bodily integrity. This right had been protected by means of the Aquilian action before the enactment of the Constitution and enjoyed the same protection, under the Constitution, as it had previously done at common-law. As is evident in the case of *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd*¹⁴⁷ the requirement of proof of fault in the Aquilian action had remained after the enactment of the Constitution.¹⁴⁸

The court found that:¹⁴⁹

“the applicability of res ipsa loquitur in cases where a plaintiff could prove that the product had been defective at the material times, and the possibility of a reverse onus, militated against the conclusion that the Aquilian remedy was insufficient to protect the right to bodily integrity in cases such as the present.”

Therefore Aquilian liability was really satisfactory provided only that the onus of proof was placed on the manufacturer and further provided that an extended rule of res ipsa loquitur was brought to bear in product liability.

Ciba-Geigy (Edms) Bpk v Lushof Plase (Edms) Bpk¹⁵⁰

The court found that where a manufacturer produces and markets products without conclusive prior tests, and when the product is then utilised in the recommended manner which is potentially hazardous to a consumer, such negligence exposes the manufacturer to delictual liability to the consumer.¹⁵¹

¹⁴⁶ (2003) 2 All SA 167 (SCA) at 167.

¹⁴⁷ 2002 (3) All SA 447 (SCA).

¹⁴⁸ At 468.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*

¹⁵¹ Botha & Joubert 309.

A contractual nexus between the manufacturer and the consumers is not required and liability will arise from the manufacturing and distribution of the product. This liability is extended via the distributor thereof in favour of the consumer who suffers damages upon utilising the product in the prescribed manner.¹⁵²

It was therefore held that the conduct of a manufacturer in distributing a product commercially, which causes damage to a consumer as a result of a latent defect, will be considered wrongful according to the legal convictions of the community.

What the aforementioned boils down to is that although a manufacturer is under no contractual obligation towards the consumer, the manufacturer is still under a legal duty in delict to avoid reasonable foreseeable harm resulting from defectively manufactured products and will be held liable if such a duty is breached.

D & H Piping Systems (Pty) Ltd v Trans Hex Group Ltd and another¹⁵³

In this matter the Supreme Court of Appeal determined the liability of a manufacturing seller for consequential loss arising out of a latent defect in goods sold by him to a customer.¹⁵⁴

The Supreme Court of Appeal held that the respondent manufactured the sand and aggregate and that because it was a manufacturing seller it did not have to possess skill to be liable for consequential loss.¹⁵⁵

Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd¹⁵⁶

This case deals with the international recall of Nando's bottled sauces by Chickenland, the plaintiff / respondent, a wholly owned subsidiary of Nandos Group Holdings Limited. This

¹⁵² 2002 (3) All SA 447 (SCA) at 470. Botha & Joubert 309.

¹⁵³ (2006) 3 All SA 309 (SCA).

¹⁵⁴ At 311.

¹⁵⁵ At p323.

¹⁵⁶ (2011) SASCA 22.

recall was necessary as Hirsch, the defendant / appellant, who supplied spice packs to the respondent, used in Nando's bottled sauces, included a banned substance, Sudan 1, in such spice packs which made the sauces unfit for human consumption.

The Court mainly considered four factors in determining whether policy considerations indicated that Hirsch should be held liable in this instance.

The spectre of the imposition of liability in an indeterminate amount for an indeterminate time to an indeterminate class. The evidence established that Hirsch was aware not just of the existence of the country based distributors, but also of the pivotal role that they played in the distribution of Chickenland's products. The Court thus found that the loss claimed was by a single identifiable plaintiff and was not likely to bring in its wake a multiplicity of actions.¹⁵⁷

As there was no privity of contract, the country wide distributors were unable to protect themselves by contract.¹⁵⁸ The imposition of liability imposes no additional burden on Hirsch than that already imposed by law and good practice internationally in the industry.¹⁵⁹ In accordance with the general principles of product liability law that a manufacturer has a general duty to ensure that defective products do not enter the market.¹⁶⁰

3.3 Sufficient protection under the common law

Many aspects of the Act relate to amend rules of the law of obligations, particularly Parts A – G of Chapter 2, while Part H of Chapter 2 fundamentally transforms the law of delict with regard to product liability.¹⁶¹ The question can be asked whether the law of delict with regard to product liability has in fact been transformed fundamentally as stated by van Eeden.

¹⁵⁷ (2011) SASCA 22 Page 22 par 40.

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

¹⁶¹ Van Eeden 59.

Whilst the Act was seen as the “be all and end all” for product liability law, the judgment in *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd*¹⁶² highlights that the common law still has a place in our law. Whilst the legislature took up the invitation as stated in *Wagener v Phamacare Ltd* by introducing the Act, this legislation does not deal with claims of a purely financial nature. A product liability claim that results in a pure economic loss will still have to be prosecuted in accordance with the common law.¹⁶³ In the event where the Act is not applicable a consumer will have sufficient remedies in the *actio legis Aquilliae*, the *actio rehibitoria*, the *actio quanti minoris* and the Pothier – rule. It can therefore be argued that the Act on face value merely creates an illusion of being the “be all and end all” for product liability, which is set aside upon the realisation of the consumer’s protection under the common law. It should also be noted that by imposing strict product liability the elimination of fault as requirement does not mean that all risk of harm automatically transfers to the manufacturer or the supplier.¹⁶⁴ An assessment of reasonableness is still required.¹⁶⁵

¹⁶² (2011) SASCA 22

¹⁶³ Webber Wentzel, Suppliers in hot sauce page 3.

¹⁶⁴ Loubser & Reid 422.

¹⁶⁵ Botha & Joubert 310.

Chapter 4. Implications of the implied warranty imposed by the Consumer Protection Act

The Act imposes an implied warranty of quality on services and goods performed or delivered to a consumer.¹⁶⁶ A consumer who purchases a product will be able to rely upon a legislatively created, implied warranty against defects, notwithstanding the absence of specific warranties against defect in product displays or terms of supply.¹⁶⁷

4.1 Consumer's right to quality service

In terms of section 54 of the Act a consumer has the right to demand quality service. More specifically, when a supplier undertakes to perform any services for or on behalf of a consumer, the consumer has a right to the timely performance and completion of those services, and timely notice of any unavoidable delay in the performance of the services,¹⁶⁸ the performance of the services in a manner and quality that persons are generally entitled to expect,¹⁶⁹ the use, delivery or installation of goods that are free of defects and of a quality that persons are generally entitled to expect, if any such goods are required for performance of the services¹⁷⁰, and the return of any property or control over any property of the consumer in at least as good a condition as it was when the consumer made it available to the supplier for the purpose of performing such services¹⁷¹, having regard to the circumstances of the supply, and any specific criteria or conditions agreed between the supplier and the consumer before or during the performance of the services.

In the event that a supplier fails to perform a service to the standards contemplated in Sections 54(1)(a) to (d), the consumer may require the supplier to either remedy any defect

¹⁶⁶ S 56.

¹⁶⁷ Monty 33.

¹⁶⁸ S 54(1)(a).

¹⁶⁹ S 54(1)(b).

¹⁷⁰ S 54(1)(c).

¹⁷¹ S 54(1)(d).

in the quality of the services performed or goods supplied¹⁷², or refund to the consumer a reasonable portion of the price paid for the services performed and goods supplied, having regard to the extent of the failure. It does not appear that Section 54 limits the consumer to exercise the remedies of Section 54(2) within a specific period, thus leaving same available to the consumer for the normal period of prescription.¹⁷³ One tends to agree with Jacobs, Stoop & van Niekerk that this might have been an oversight as it leaves room for abuse by the consumer.¹⁷⁴

4.2 Consumer's right to safe, good quality goods

In terms of Section 55 of the Act a consumer has the right to safe, good quality goods¹⁷⁵. Every consumer has a right to receive goods that are reasonably suitable for the purposes for which they are generally intended¹⁷⁶, are of good quality, in good working order and free of any defects¹⁷⁷, will be useable and durable for a reasonable period of time, having regard to the use to which they would normally be put and to all the surrounding circumstances of their supply¹⁷⁸ and comply with any applicable standards set under the Standards Act 29 of 1993, or any other public regulation.¹⁷⁹

The rights that Section 55 awards to a consumer are, however, not applicable to a transaction should the consumer have been expressly informed that particular goods were offered in a specific condition¹⁸⁰, and have expressly agreed to accept the goods in that

¹⁷² S 54(2)(a).

¹⁷³ Jacobs *ea* 205.

¹⁷⁴ *Ibid.*

¹⁷⁵ S 55(1) – Section 55 does not apply to goods bought at an auction, as contemplated in Section 45 of the Act.

¹⁷⁶ S 55(2)(a). Section 55(3) further indicates that in addition to the right set out in Section 55(2)(a), if a consumer has specifically informed the supplier of the particular purpose for which the consumer wishes to acquire any goods, or the use to which the consumer intends to apply those goods, and the supplier ordinarily offers to supply such goods, or acts in a manner consistent with being knowledgeable about the use of those goods, the consumer has a right to expect that the goods are reasonably suitable for the specific purpose that the consumer has indicated.

¹⁷⁷ S 55(2)(b). Take note that this section refers to “any defects” and not only material defects.

¹⁷⁸ S 55(2)(c).

¹⁷⁹ S 55(2)(d).

¹⁸⁰ S 55(6)(a).

condition, or knowingly acted in a way compatible with accepting the goods in that condition.¹⁸¹

In determining whether any particular goods satisfied the requirements of Section 55(2) or (3) all of the circumstances of the supply of those goods must be considered, including but not limited to the manner in which, and the purposes for which, the goods were marketed, packaged and displayed, the use of any trade description or mark, any instructions for, or warnings with respect to the use of the goods¹⁸², the range of things that might reasonably be anticipated to be done with or in relation to the goods¹⁸³ and the time when the goods were produced and supplied.¹⁸⁴ Section 55(5) provides greater certainty in the application of Section 55(4) when clearly stipulating that it is irrelevant whether a product failure or defect was latent or patent, or whether it could have been detected by a consumer before taking delivery of the goods¹⁸⁵ and a product failure or defect may not be inferred in respect of particular goods solely on the grounds that better goods have subsequently become available from the same or any other producer or supplier.¹⁸⁶ This is a deviation from the common law on *actio redhibitoria* actions which only make provision for latent defects.¹⁸⁷

An implied warranty against latent defects has always been part of the *naturalia*¹⁸⁸ of a contract of sale.¹⁸⁹ Accordingly the seller is deemed to have warranted to the purchaser that the goods are sold free from any defects that may render them completely or significantly unfit for their normal purpose, or a specific purpose as contemplated by the parties.¹⁹⁰

¹⁸¹ S 55(6)(b).

¹⁸² S 55(4)(a).

¹⁸³ S 55(4)(b).

¹⁸⁴ S 55(4)(c).

¹⁸⁵ S 55(5)(a).

¹⁸⁶ S 55(5)(b). Loubser & Reid 422; Jacobs *et al.* 370.

¹⁸⁷ Naudé 2011 341.

¹⁸⁸ "Things which are only of the nature of the contract are those which, without being the essence, form a part of it, though not expressly mentioned....and they may be excluded by express agreement of the parties." – Pothier as in Christie 159.

¹⁸⁹ Christie 159;.

¹⁹⁰ De Beer 610 – 611.

Whether a consumer obtains goods for normal use or for a specific purpose, the goods must be free from latent, hidden and patent, visible defects.¹⁹¹ De Beer is of the view that where the seller inspected the goods the warranty only covers latent defects.¹⁹² Cornelius differs from this view point in that he is of the view that it makes no difference if the defects could have been detected by the consumer before taking delivery of the goods.¹⁹³ The implied warranty against latent defects can be expressly excluded with the voetstoots clause.

Does this mean that the supplier can merely excluded the consumer's rights as awarded in Section 55 with a voetstoots clause? In terms of Section 48(1)(c) of the Act a supplier may not require a consumer , or other person to whom any goods or services are supplied at the direction of the consumer to waive any rights, assume any obligation or waive any liability of the supplier on terms that are unfair, unreasonable or unjust to impose any such terms as a condition of entering into a transaction. Section 51(1)(b) of the Act prohibits a supplier from making a contract or transaction subject to any term or condition if it directly or indirectly purports to waive or deprive the consumer of a right in terms of the Act. Accordingly a supplier cannot require a consumer to waive any rights; accordingly the use of the voetstoots clause will not be permitted in a contract that falls within the application of the Act.¹⁹⁴ In the event that the voetstoots clause is part of a contract or transaction to which the Act applies, it will be void.¹⁹⁵

It is also clear that the supplier expressly has to inform the consumer of the specific condition of the goods and the consumer has to expressly agree to accept the goods in that condition, or knowingly act in a way compatible with accepting the goods in that condition.¹⁹⁶ The voetstoots is not going to be applicable anymore and therefore the suppliers must have

¹⁹¹ Cornelius 103.

¹⁹² De Beer 611.

¹⁹³ Cornelius 103.

¹⁹⁴ Melville 106

¹⁹⁵ S 51(3).

¹⁹⁶ S 55(6)(a) & (b). Otto 2011; Jacobs *ea* 368. Naudè 2011 344.

proof that they did explain the defects to the consumer.¹⁹⁷ There are more liberal views indicating that the individual defects does not even have to be listed before the supplier can escape liability as long as it is clear from the description of the goods that the consumer understands and takes the risk that the goods may be defective.¹⁹⁸

Gobalt J stated as follows¹⁹⁹:

“the term ‘voetstoots’ only excludes liabilities for latent defects of a physical nature in the merx but does not apply to the lack of certain qualities or characteristics which the parties agree the merx should have.”

Where a supplier expressly informs a consumer of the specific condition of the goods and the goods are accepted in such a condition, the general rule as per Goldblatt J²⁰⁰ prior to the implementation of the Act remains unchanged, in that where a buyer has the opportunity to inspect the property before buying it, and nevertheless buys it with its patent defects, he or she will have no recourse against the seller.²⁰¹

4.3 Implied warranty of quality

Section 56(1) provides that in any transaction or agreement pertaining to the supply of goods to a consumer there is an implied provision that the producer or importer, the distributor and the retailer each warrant that the goods comply with the requirements and standards contemplated in Section 55. However, the implied warranty does not exist to the extent that those goods have been altered contrary to the instructions, or after leaving the control, of the producer or importer, a distributor or the retailer.

Section 56 should be read together with Section 55 in order for it to be fully understood and correctly interpreted. The provision in Section 55 is strengthened by Section 56 due to the

¹⁹⁷Naudè 2011 341.

¹⁹⁸*Idem* 344. Van Eeden 225

¹⁹⁹ *Van Nieuwkerk v Mc Crae* 2007(5) SA (WLD) at 2. Smith 2009 48.

²⁰⁰*Van Nieuwkerk v Mc Crae*.

²⁰¹ Smith 2009 48.

rights contained in Section 55 creating an *ex lege* warranty.²⁰² The implied warranty is extended to the producer or importer and the distributor and the retailer,²⁰³ but service providers have been omitted from Section 56(1) which only deals with the supply of goods.²⁰⁴ The implied warranty also requires that a transaction²⁰⁵ or an agreement²⁰⁶ pertaining to goods should exist.

In the event of the requirements and standards as set out in Section 55 not being met, Section 56(2) creates drastic rights for consumers as the consumer may return the goods to the supplier within six months after the delivery of the goods to the consumer.²⁰⁷ The consumer may return such goods to the supplier, without penalty and at the supplier's risk and expense and the supplier must, at the direction of the consumer, either repair or replace the failed, unsafe or defective goods²⁰⁸ or refund to the consumer the price paid by the consumer, for the goods.²⁰⁹ Naude is of the view that Section 56(2) is too unbalanced in favour of the consumer as the consumer's choice is unqualified with reference to the seriousness of the defect.²¹⁰

It is important to note that Section 56(4) specifically indicates that the implied warranty imposed by Section 56(1) and the right to return goods set out Section 56(2), are each in addition to any other implied warranty or condition imposed by the common law, this Act or

²⁰² Otto 2011 538.

²⁰³ S 56(1).

²⁰⁴ The general terms "supplier" is used in the remainder of Section 56(2) and 56(3) and in most of the other sections of the Act. Jacobs, Stoop and van Niekerk is of the opinion that the implied warranty may for example respectively apply between the retailers, the distributor, the producer or importer and the consumer – see Jacobs *ea* 372.

²⁰⁵ S1 sv "transaction" and see discussion in chapter 1 of this dissertation.

²⁰⁶ S1 sv "agreement" and see discussion in chapter 1 of this dissertation.

²⁰⁷ S 56(2). Naudè 2011 346.

²⁰⁸ S 56(2)(a); Section 56(3) indicates that in the event of the consumer electing to return the goods or any component of the goods, and within three months after that repair, the failure, defect or unsafe feature has not been remedied, or a further failure, defect or unsafe feature is discovered, the supplier must replace the goods or refund to the consumer the price paid by the consumer for the goods.

²⁰⁹ S 56(2)(b).

²¹⁰ Naudè 2011 347.

any other public regulation²¹¹ and any express warranty or condition stipulated by the producer or importer, distributor or retailer, as the case may be.²¹²

Naudè notes that the fact that such a warranty of quality is implied into every contract does not mean that full damages are payable simply because the good do not comply with Section 55.²¹³ The consumer will still have to rely on the normal remedies for breach of contract, including damages.²¹⁴

Otto mentions that it is interesting, almost upsetting, that the Section 56(4) provides for any implied and express warranties, but omits to include tacit warranties.²¹⁵ The legislatures' omission should not be regarded as an amendment of the common law and as doing away with actions based on tacit warranties.²¹⁶ Jacobs, Stoop & van Niekerk ascribes this omission to the fact that tacit and implied terms are sometimes confused.²¹⁷

Section 56 poses many interpretational problems and is one of the most controversial sections in the Act in view of its potential extensive impact on the common law.²¹⁸ Concerns were raised over the possible application of Section 56 to the sale of land and immovable property,²¹⁹ as well as whether Section 56 will apply to exchange transactions.²²⁰ For purposes of this paper an in depth discussion of same will not be provided.

²¹¹ S 56(4)(a).

²¹² S 56(4)(b).

²¹³ Naudè 2011 346.

²¹⁴ *Ibid.*

²¹⁵ Otto 2011 539.

²¹⁶ *Ibid.*

²¹⁷ Jacobs *ea* 374.

²¹⁸ *Idem* 370.

²¹⁹ *Idem ea* 374.

²²⁰ Otto 2011 539.

Chapter 5. Product liability

An important dimension to the reform and protection of consumers as envisaged in the Act is the creation of a strict liability framework to provide redress for consumers who have suffered harm due to defects in products.²²¹ As indicated in chapter 2 of this dissertation, until now a consumer who was injured or who sustained property damage because of a safety defect in a product, obtained redress from the producer or distributor only where it could be proved that the latter was at fault.²²² Product liability could thus only be established under the law of contract or the law of delict,²²³ as discussed in chapter 2 of this dissertation. In *Wagener v Pharmacare Ltd*²²⁴, the Supreme Court of Appeal confirmed the fault requirement and noted that the legislature must impose strict liability.²²⁵ With the introduction of strict liability South Africa is brought into line with many other jurisdictions in the developed and developing world.²²⁶ The framework chosen for South Africa appears to follow the European Directive and much of the wording appears to derive from the Directive and UK consumer Protection Act 1987.²²⁷ Strict liability entails that liability is attributed to people in certain instances, and no fault, be it intent or negligence is required to hold them liable.²²⁸

5.1 Liability for damage caused by goods

In terms of Section 61 the producer or importer, distributor or retailer of any goods is liable for any harm, as described in Section 61(5), caused wholly or partly as a consequence of supplying any unsafe goods²²⁹, a product failure, defect or hazard in any goods²³⁰ or inadequate instructions or warnings provided to the consumer pertaining to any hazard

²²¹ Loubser & Reid 412.

²²² Botha & Joubert 2011 (74) THRHR at 310.

²²³ Jacobs ea 382.

²²⁴ 2003 4 SA 285 (SCA).

²²⁵ *Wagener v Pharmacare Ltd* 2003 4 SA 285 SCA par 38.

²²⁶ Loubser & Reid 413.

²²⁷ *Ibid.*

²²⁸ Botha & Joubert 2011 (74) THRHR at 310.

²²⁹ S 61(1)(a).

²³⁰ S 61(1)(b).

arising from or associated with the use of any goods²³¹, irrespective of whether the harm resulted from any negligence on the part of the producer, importer, distributor or retailer, as the case may be.

The “supply” of goods includes selling, renting, exchanging and hiring goods in the ordinary course of business for a consideration.²³² Unsafe goods are those that present an extreme risk of personal injury or property damage to the consumer or to other persons due to a characteristic, failure, defect or hazard thereof.²³³

Producers, importers, distributors and retailers of goods are subject to the product liability regime.²³⁴ A “producer” is defined as a person who grows, nurtures, harvests, mines, generates, refines, creates, manufactures or otherwise produces the goods within the Republic with the intention of making the goods available for supply in the ordinary course of business.²³⁵ If a person, by applying a business name, trade mark, trade description or other visual representation on or in relation to the good, creates or establishes a reasonable expectation that he is the producer; such a person will also be regarded as a producer for purposes of the Act.²³⁶ An “importer” is a person who brings those goods, or causes them to be brought, from outside the Republic into the Republic, with the intention of making them available for supply in the ordinary course of business.²³⁷ A “distributor” means a person who in the ordinary course of business is supplied with those goods by a producer, importer or other distributor and in turn, supplies those goods to either another distributor or to a retailer.²³⁸ A “retailer” means a person who in the ordinary course of business, supplies those goods to a consumer.²³⁹ All of the aforementioned roll players makes up the “supply

²³¹ S 61(1)(b).

²³² S 1 Definition of “supply”.

²³³ S 53(1)(d).

²³⁴ S 61.

²³⁵ S 1 definition of “producer”.

²³⁶ S 1 definition of “producer”.

²³⁷ S 1 definition of “importer”.

²³⁸ S 1 definition of “distributor”.

²³⁹ S 1 definition of “retailer”.

chain”, as defined in chapter 1 of the dissertation.²⁴⁰ The supply chain will be liable jointly and severally.²⁴¹ The agricultural industry will be impacted by product liability either in its roll as producer, importer, distributor and even retailer in some instances. The Act, and specifically product liability has a direct and fairly severe impact of the agricultural industry.

A supplier of services, who, in conjunction with the performance of those services, applies, supplies, installs or provides access to any goods, must be regarded as a supplier of those goods to the consumer, for the purposes of this section.²⁴² If, in a particular case, more than one person is liable in terms of this section, their liability is joint and several.²⁴³

As stated this liability is joint and several in that a consumer is empowered to join each person in the supply chain to the relevant action for damages. This removes the material evidential burden on the part of the consumer when the consumer approaches a court with a claim for damages.²⁴⁴ In these circumstances the consumer only has to prove that the goods were supplied in consequence of which the consumer suffered damages. This has a significant impact on the common law in that due to negligence not being required the consumer will only have to prove that a product, that was defective, caused damage or harm,²⁴⁵ wrongfully.²⁴⁶

5.2 The test for a defect

The definition of “defect” was touched on in chapter 1 of this dissertation. Defect turns on what a consumer is generally entitled to expect. Loubser & Reid deemed it necessary to consider the European experience of the “consumer expectations” or legitimate

²⁴⁰ S 1 definition of “Supply chain”.

²⁴¹ Botha & Joubert 313.

²⁴² S 61(2).

²⁴³ S 61(3).

²⁴⁴ Monty 2011 52.

²⁴⁵ Loubser & Reid Liability 418.

²⁴⁶ For a complete discussion on the linkage between wrongfulness and defectiveness see Loubser & Reid 418 to 423.

expectations” approach to determining defectiveness.²⁴⁷ According to Loubser & Reid the application of the “consumer expectation” or “legitimate expectations” test for defectiveness as prescribed in the UK legislation, and also in some American product liability cases, presents obvious difficulties such as:²⁴⁸

- a. Are consumers entitled to expect more than the exercise of reasonable care, skill and knowledge;
- b. The test is an objective normative standard, but the courts conduct an objective enquiry into attributes, risks and benefits of a product;
- c. The application of the test involves a value judgment;
- d. It is impossible to define just what an ordinary consumer expects of the technical design characteristics of a product.

Loubser and Reid are of the view that what the consumer is “entitled” to expect is in contrast to the consumer’s actual expectations.²⁴⁹ The wording of Section 61 tends to lean back to a standard of reasonableness, and suggests that a general standard of reasonableness, assessed with hindsight should be applied instead of the consumer’s expectation test.²⁵⁰ In my view such an approach will circumvent the obvious difficulties as illustrated in the American product liability cases. It is also in line with Section 61(6) that confirms the authority of the courts. One can therefore agree with van Eeden that the liability regime that the Act introduces is not an unqualified “strict liability” model, and can rather be regarded as a regime that attempts to strike balance between fault and no fault liability.²⁵¹

²⁴⁷ Loubser & Reid 424. Also see Botha & Joubert 2011 (74) THRHR at 315 .

²⁴⁸ Loubser & Reid 424.

²⁴⁹ *Idem* 426.

²⁵⁰ Loubser & Reid 427 – 428.

²⁵¹ Van Eeden 246.

Unless a supplier is able to formulate a defence based on the grounds as set out in Section 61(4), the Supplier may be held strictly liable to a consumer together with some, or all of the other persons in the supply chain.²⁵²

5.3 Limitation of liability

Section 61(4) excludes liability of a particular person in terms of Section 61 if the unsafe product characteristic, failure, defect or hazard that results in harm is wholly attributable to compliance with any public regulation²⁵³, the alleged unsafe product characteristic, failure, defect or hazard did not exist in the goods at the time it was supplied by that person to another person alleged to be liable²⁵⁴ or was wholly attributable to compliance by that person with instructions provided by the person who supplied the goods to that person,²⁵⁵ it is unreasonable to expect the distributor or retailer to have discovered the unsafe product characteristic, failure, defect or hazard, having regard to that person's role in marketing the goods to consumers.²⁵⁶

Accordingly it becomes important to rely on the defences to qualify the responsibility of the supplier from a contractual point of view.²⁵⁷ The general terms and conditions between the consumer and the supplier as well as the manner in which the instructions are drafted will be material aspects.²⁵⁸ Suppliers will now have to give attention in preparing instruction manuals, ensuring that safe and reliable goods are sold and that adequate public liability insurance is in place.²⁵⁹ Other aspects that will need consideration include revising and replacing product labels with those that comply²⁶⁰, purchasing components and raw materials from suppliers who are equally committed to complying with the provisions of the

²⁵² Monty 2011 52.

²⁵³ S 61 (4)(a)

²⁵⁴ S 61(4)(b)(i)

²⁵⁵ S 61(4)(b)(ii). In this case Section 61(b)(i) does not apply.

²⁵⁶ S 61(4)(c). Naudè 2011 346

²⁵⁷ Monty 33.

²⁵⁸ *Ibid.*

²⁵⁹ *Ibid.*

²⁶⁰ S 22; S 58(2).

Act, post-sale monitoring and prompt address of defects.²⁶¹ Cornelius adds to the “to do” list of the entire supply chain when correctly mentioning that as a result of these provisions, it would be advisable to for them to reconsider all quality control measures and to ensure that they adhere to the highest standards.²⁶² Suppliers will not be able to contract out of liability; however, potential liability can be limited by procuring that supply agreements with its suppliers contain sufficient warranties, undertakings and indemnities.²⁶³ A potential side effect may be that manufacturers and suppliers will build the increased production and insurance cost into the sale price, resulting in the consumers bearing the burden.²⁶⁴ Thus strict liability might not always achieve optimal economic efficiency.²⁶⁵ Strict liability might also lead to manufacturers taking excessive precautions, also pushing prices up beyond the level which reflects the potential costs to society for product defects, or driving producers out of the market.²⁶⁶ Product novation might also be inhibited by the threat of high damage awards based on strict liability.²⁶⁷

Section 61(4) further excludes liability in the event that the claim for damages is brought more than three years after the death or injury of a person contemplated in Section 61(5)(a)²⁶⁸, earliest time at which a person had knowledge of the material facts about an illness contemplated in Section 61(5)(b)²⁶⁹ or earliest time at which a person with an interest in any property had knowledge of the material facts about the loss or damage to that property contemplated in Section 61(5)(c),²⁷⁰ or the latest date on which a person suffered any economic loss contemplated in Section 61(5)(d).²⁷¹

5.4 Authority of the courts

²⁶¹ Maphosa 36.

²⁶² Cornelius 104.

²⁶³ Monty 33.

²⁶⁴ Maphosa 36.

²⁶⁵ Loubser & Reid 416.

²⁶⁶ *Ibid.*

²⁶⁷ *Ibid.*

²⁶⁸ S 61(4)(d)(i).

²⁶⁹ S 61(4)(d)(ii).

²⁷⁰ S 61(4)(d)(iii).

²⁷¹ S 61(4)(d)(iv). Section 61(5)(d) - any economic loss that results from harm due to the death of, or injury to, any natural person, an illness of any natural person, any loss of, or physical damage to, any property, irrespective of whether it is movable or immovable.

It is important to note that the legislature did not merely provide the consumer with *carte blanche*, Section 61(6) still equips the courts with the authority to assess whether any harm has been proven and adequately mitigated²⁷², determine the extent and monetary value of any damages, including economic loss²⁷³ or apportion liability among persons who are found to be jointly and severally liable.²⁷⁴ Nothing in Section 61 limits the above mentioned authority of the courts.²⁷⁵

The Act fails to make provision for contributory negligence on the part of the consumer. Loubser and Reid find this logical in statute providing for strict liability.²⁷⁶ However, it is arguable that the contribution of the consumer should be taken into account where due care has not been observed.²⁷⁷

5.5 Large players

Section 5(5) of the Act states that if any goods are supplied within the Republic to any person in terms of a transaction²⁷⁸ that is exempt from the application of the Act, those goods, and the importer or producer, distributor and retailer of those goods, respectively, are nevertheless subject to Sections 60 and 61. Accordingly large juristic entities will receive the protection granted in Sections 60 and 61 of the Act notwithstanding the fact that they are exempt.

The question arises whether a person in the supply chain can, apart from invoking the provisions of Section 61 to prove an apportionment of damages or defence as against other members of the supply chain, invoke the provisions of Section 61 as consumers

²⁷² S 61(6)(a).

²⁷³ S 61(6)(b).

²⁷⁴ S 61 (6)(c).

²⁷⁵ S 61(6).

²⁷⁶ Loubser & Reid 452.

²⁷⁷ *Ibid.*

²⁷⁸ ²⁷⁸ "Transaction" includes the supply of goods to a distributor or retailer. Suppliers will need to ensure that they take out adequate product liability insurance to cover all potential risk.

themselves.²⁷⁹ This would enable a large player in the supply chain, such as a retailer, in its capacity as a consumer in relation to the balance of the supply chain, to hold the distributor, importer and manufacturer of those goods liable for damages without proving fault.²⁸⁰ The exposure for persons further up in the supply chain is thus increased.

Depending on where exactly you fall with in this supply chain, the above argument can either increase or decrease your scope of liability in terms of the Act. If one takes a look at the agricultural industry, those player involved in the initial produce of raw materials will obtain an increased liability in that the retailers selling end products made up out of raw materials, will be regarded as consumers and will thus be able to hold the producer of the raw materials liable for damages without proving fault.

The benefit of such an interpretation can be illustrated in a recent matter within the agricultural retail industry.

²⁷⁹ Monty 2011 52.

²⁸⁰ *Ibid.*

Chapter 6. Impact of the Consumer Protection Act on the agricultural industry

While the CPA provides extensive protection to consumers as set out in chapters 3 and 4, it may have unforeseen and far reaching consequences such as increased prices, as retailer, manufacturers and wholesalers take steps to minimise potential losses and pay for lawsuits.²⁸¹ The agricultural industry is a role player as retailer, manufacturer and wholesaler and thus the influence of the CPA on the agricultural industry should be evaluated. This can only be done once writer and reader is on the same page as to what the South African agricultural industry is.

6.1 The South African agricultural industry

South Africa has a dual agricultural economy, with both well-developed commercial farming and more subsistence-based production in the deep rural areas.²⁸² Agricultural activities range from intensive crop production and mixed farming in winter rainfall and high summer rainfall areas to cattle ranching in the bushveld and sheep farming in the arid regions. Maize is most widely grown, followed by wheat, sugar cane and sunflowers. Citrus and deciduous fruits are exported, as are locally produced wines and flowers.²⁸³ South Africa is not only self-sufficient in virtually all major agricultural products, but is also a net food exporter.²⁸⁴ It is also the leading exporter of protea cut flowers, which account for more than half of proteas sold on the world market.²⁸⁵ Other important export groups are wine, citrus, maize, grapes, sugar, apples, pears and quinces. Important export products include agro processing products, such as under matured ethyl alcohol and hides and skins.²⁸⁶

²⁸¹ www.hahnlaw.co.za/consumer-food-law "Consumer and food law" (accessed at 20h31 on 27 December 2012).

²⁸² www.southafrica.info/business/economy/sectors/agricultural-sector. South African Agriculture (accessed at 10h32 on 03 January 2013).

²⁸³ *Ibid.*

²⁸⁴ *Ibid.*

²⁸⁵ *Ibid.*

²⁸⁶ www.southafrica.info/business/economy/sectors/agricultural-sector. South African Agriculture (accessed at 10h32 on 03 January 2013).

In the WWF²⁸⁷ Report on the agricultural facts and trends in South Africa, it shows that South Africa's population is growing at almost 2% per year.²⁸⁸ The population of 49 million in 2009 is expected to grow to 82 million by the year 2035.²⁸⁹ Food production or imports must more than double to feed the expanding population, and production needs to increase using the same or fewer natural resources.²⁹⁰

Sustainable farming is about meeting the needs of South Africans today and in the future. The recent global rise in food prices and repeated reports about social unrest in a large number of countries reveal the strategic and basic importance of the agricultural sector for social and economic stability.²⁹¹

The agricultural industry as can be seen from the definitions above is a wide industry. The food industry and retail industry is directly linked to the agricultural industry. This discussion will focus on the influence of the implied warranty and product liability on the agricultural industry. The industry has widely been affected and will continue to be influenced by the CPA. Effected areas within the industry include the inspection and delivery of goods, the labelling and marketing of goods, the right to safe and good quality goods.

6.2 Implied warranty

In chapter 3 the implied warranty imposed by the Act, of quality on services and goods performed or delivered to a consumer, was set out in detail.²⁹² The consumer's right to quality service²⁹³ and right to safe, good quality goods²⁹⁴ place a heavy burden on the

²⁸⁷ Word Wild Fund for Nature.

²⁸⁸ Goldblatt 3.

²⁸⁹ *Ibid.*

²⁹⁰ *Ibid.*

²⁹¹ *Idem 2.*

²⁹² S 56.

²⁹³ S 54.

²⁹⁴ S 55(1) – Section 55 does not apply to goods bought at an auction, as contemplated in Section 45 of the Act.

agricultural industry. The implied warranty in section 56 is extended to the producer or importer and the distributor and the retailer.²⁹⁵

In practice this has led to more extensive supply agreements being entered into within the agricultural industry. Suppliers and manufacturers now explicitly state that they do not warrant the suitability of the product for the purpose for which it is bought.²⁹⁶ Role players within the agricultural industry now ensure that they obtain contractual warranties from the suppliers and manufacturers.²⁹⁷ Writer is of the view that uncertainty regarding the risk pertaining to the CPA and changed supply agreements leads to higher legal and compliance expenditure.

6.3 Product liability

Product liability is defined as the liability imposed on the seller, manufacturer or supplier of a product for harm caused to a consumer, user or any other person affected by the use of a defective product.²⁹⁸ As discussed in chapter 4 section 61 imposes a no fault liability on any producer or importer, distributor or retailer of any goods for damage caused wholly or partly as a consequence of supplying any unsafe goods, irrespective whether the harm resulted from any negligence on the part of the importer, distributor or retailer.²⁹⁹ The consumer may

²⁹⁵ S 56(1).

²⁹⁶ S 55(2)(a).

²⁹⁷ Clauses inserted in supply agreements are for example: 1. "The supplier warrants to X that for the duration of this agreement the supplier shall –supply, package and transport the products in a safe manner and strictly in accordance with the provisions of the CPA; assume full responsibility for all claims, loss and liabilities arising from any defect, failure and/or hazards in the products, or in the manufacture, packing, labelling, identification, storage and/or distribution of the products to the delivery point, except where the defect, failure and/or hazard occurs solely as a result of the incorrect handling and storage by X and which incorrect handling and storage is not as a result of incorrect or insufficient instructions or warnings provided on the products by the supplier, and in the event of a dispute between parties in respect thereof the onus will be on the supplier to prove that it is not liable to X in respect thereof." 2. The supplier acknowledges that the CPA may apply to the supply of the products by X and that X may thus be exposed to wide potential statutory liability to any consumer. It is agreed that in addition to any remedy which X may have – all statutory obligations imposed upon X *vis a vis* consumers under the CPA are hereby equally imposed as contractual obligations upon the supplier *vis a vis* X; and X shall have the same rights against the Supplier as any consumer may have against X pursuant to the CPA" – practical examples.

²⁹⁸ Botha & Joubert 305.

²⁹⁹ www.hahnlaw.co.za/consumer-food-law. Consumer and food law (accessed at 20h31 on 27 December 2012).

hold at its whim any or all persons in the supply chain liable for damages, the one paying the others to be pardoned.³⁰⁰

The whole supply chain can now be held strictly liable and the agricultural industry, being a role player as supplier, manufacturer, importer, distributor and retailer, has several potential risks that it should now cover and indemnify itself against. Therefore the CPA has led to a wide spread consciousness of indemnities in supply agreements³⁰¹ as well as an increase in the cost of insurance.³⁰²

6.4 Conclusion

Until recently, the real price of food has been fairly stable or has declined, benefiting both the national and household economies. The situation has now changed: food prices are increasing rapidly due to increased transport, electricity and fertiliser costs. Rising prices are a bigger burden for the poor, who spend about 33% of their income on food, as opposed to the more affluent shoppers, who spend about 2% of their income on food. In addition, rural consumers (who are the majority of South Africa's poor) pay more for selected food items.³⁰³

I am of the view that compliance to the CPA will also have an impact on the input cost of agriculture and therefore the price of food and ultimately food security. This is due to the increase in insurance cost, the requirements pertaining to product labelling³⁰⁴ of the end

³⁰⁰ www.hahnlaw.co.za/consumer-food-law. Consumer and food law (accessed at 20h31 on 27 December 2012).

³⁰¹ An example of such an indemnity clause is: "The parties acknowledge that in terms of Section 61 of the CPA, X, its customers and/or the supplier, may be jointly and severally liable for any harm (as defined in the CPA) ("Harm") caused wholly or partly as a consequence of – supplying any unsafe product; or a product failure, defect or hazard in any product; or inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any of the products, irrespective of whether the Harm resulted from any negligence on the part of X, its customers and/or the Supplier, as the case may be. The Supplier indemnifies X against all loss, liability, damage and expense of every nature whatever which X may suffer or incur as a result of and/or which may be directly or indirectly attributable to any – breach by the supplier of the Product Warranty; and/or breach of any of any of the other warranties given by the supplier; and/or breach by the Supplier of any of the provisions hereof; and/or claim which any customer of X and/or any Consumer may have against X as a result of or arising out of any Harm suffered by such person as contemplated in Section 61 of the CPA" – practical examples.

³⁰² Botha & Joubert 318.

³⁰³ Goldblatt 29.

³⁰⁴ S 24.

product and the potential cost of obtaining expert views and opinions on compliance with the CPA.

A possibly interesting and unintended effect of the CPA on the agricultural industry might be that retailers and role players towards the end of the supply chain start making the decision to rather use local, thus South African suppliers and manufacturers. This might turn out to be less expensive although the initial supply or manufacture of the goods itself does not compare to import prices. In the instance where a consumer has a claim against anyone in the supply chain, it is likely that the consumer will be advised to claim from those that are financially viable and situated within South Africa. Such a retailer if faultless in the cause or existence of the defect will have a right of recourse against the party within the supply chain that is at fault. Say the manufacturer was at fault and is a foreign company; the claim for recourse will in all likelihood be in a foreign jurisdiction. This might have a positive effect on the local agricultural industry as the supplier or manufacturer within the supply chain.

Other than the CPA there are numerous Provincial and Local Authority Laws and Bye-Laws which regulate various aspects of consumer protection and which provide for procedures to be incorporated at every level of the supply chain.³⁰⁵ Thus in addition to the burdens imposed by the CPA the products should always comply with all agricultural product standards³⁰⁶, food labelling requirements³⁰⁷, compulsory specifications and hazardous substances³⁰⁸ requirements. For purposes of this discussion these additional burdens will not be explored.

One should therefore consider who is picking up the real cost of compliance with the CPA. Is it the supplier and manufacturer or does the burden fall with the consumer in the end.

³⁰⁵ www.hahnlaw.co.za/consumer-food-law. Consumer and food law (accessed at 20h31 on 27 December 2012).

³⁰⁶ Agricultural Products Standards Act.

³⁰⁷ Foodstuffs Act.

³⁰⁸ Hazardous Substances Act.

While it is very difficult to isolate the monetary effect of implied warranty and strict liability on the agricultural industry it is evident that it will lead to an increase in production costs. The ripple effect of for example a rise in insurance cost is in fact detrimental to the consumer in that it will in return impact the production cost and therefore the price of food. In a country, such as South Africa, where food security is already a pressing issue³⁰⁹, one cannot help but wonder whether the Act therefore not disadvantages the very consumer it set out to protect.

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³⁰⁹ Goldblatt 29.

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