Narrowing the reach of the strict product liability provisions in section 61 of the Consumer Protection Act 68 of 2008 in view of *Eskom Holdings Ltd v Halstead-Cleak* 2017 1 SA 333 (SCA)

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OPSOMMING

Beperking van die toepassingveld van streng produkte-aanspreeklikheidsbepalings van artikel 61 van die Wet op Verbruikersbeskerming 68 van 2008 in die lig van *Eskom Holdings Ltd v Halstead-Cleak* 2017 1 SA 333 (HHA)

Die fokus van hierdie bydrae is op sekere aspekte van die produkte-aanspreeklikheids-bepalings vervat in artikel 61 van die Wet op Verbruikersbeskerming 68 van 2008. Dit sluit spesifiek persone in wat ingevolge die Wet *locus standi* het om bevoegde instansies te nader om regshulp waar nadeel of skade opgedoen is as gevolg van onveilige en defektiewe produkte. Die geskiktheid van regshulp en remedies in die konteks van produkte-aanspreeklikheid moet onder andere deur die prisma van die trefwydte van die betrokke produkte-aanspreeklikheidsregime beskou word. Dit is belangrik om te bepaal *wie* 'n produkte-aanspreeklikheidseis kan instel en dit is deurslaggewend by die bepaling van die vraag of die betrokke produkte-aanspreeklikheidsregime effektief is en behoorlike beskerming bied. Die bydrae ondersoek die oënskynlike streng produkte-aanspreeklikheidsregime wat deur die Wet op Verbruikersbeskerming ingestel is, wat insluit die aanspreeklikheid (al dan nie) van al die verskaffers in die verskaffingsketting asook die tipes skade wat by produkte-aanspreeklikheid in hierdie verband ingesluit word. Vir sover 'n persoon egter kwalifiseer om 'n eiser in 'n produkte-aanspreeklikheidsaak te wees, blyk dit dat die wetgewer (opsetlik of onopsetlik) die omvang van die bepalings van artikel 61 van die Wet in hierdie verband teenstrydig met die doel van die Wet beperk het. Hierdie kwessie is onlangs in die eerste produkte-aanspreeklikheidsaak ingevolge die Wet in *Eskom Holdings Ltd v Halstead-Cleak* aangespreek en vorm deel van die kritiese analise van die bydrae.

1 INTRODUCTION

Product liability as a species of the law of delict has evolved rapidly over the

course of the last century, as a mind-blowing array of products that have become increasingly sophisticated and complex continue to flood the consumer market.[1] This area of the law has been developed to specifically deal with the problem of harm caused by defective, unsafe products.[2] In order to ensure better redress for the victims of harm caused by defective products, many jurisdictions have transitioned from fault-based product liability regimes to strict product liability regimes that have discarded the need for the victim to prove that the manufacturer of the defective goods had acted in a negligent manner.[3] In its purest form, strict product liability implies that the focus is turned away from the conduct of the manufacturer and the investigation into liability and concerned only with the question whether the product was defective and whether such defectiveness was the cause of the harm suffered by the victim.[4] Although beyond the scope of this contribution, it has to be pointed out that many of these purportedly "strict" product liability regimes such as that contained in the 1985 EU Product Liability Directive[5] and Part 3 to 5 of Schedule 2 of the Australian Competition and Consumer Act (ACL),[6] in fact allow for certain statutory defences to be raised by the supply chain thus making them hybrid, rather than strict, product liability regimes. South Africa has also recently, with the enactment of the Consumer Protection Act,[7] transitioned to such a "strict" product liability regime that operates parallel to the common law fault-based product liability regime that has been preserved by virtue of section 2(10) of the Act.[8]

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1 Geistfeld *Principles of product liability* (2011) 7 remarks that: "Product risk is pervasive, increasingly so in the modern economy. Automobiles can crash. Drugs can cause harmful side effects. Chemicals can be carcinogens. Even seemingly benign products pose the risk of serious physical harm. Food, the most basic of all products, can be contaminated. Or a bottle of soda can explode." See also Van Eeden and Barnard *Consumer protection law in South Africa* (2017) 381 (hereafter Van Eeden and Barnard).

2 Keeton "Product liability and the meaning of defect" 1973 *St Mary's LJ* 30; Owen "Products liability: Principles of justice for the 21st Century" 1990 *Pace LR* 63; Stapleton "Products liability in the United Kingdom: The myths of reform" 1999 *Texas LJ* 45; Borra "Products liability in the 21st century" 2013 *Juridical R* 1.

3 Howells *Comparative product liability* (1993) 7 remarks that there are essentially four types of product liability standards: The contractual or warranty standard involves products which fail to meet the promised standard or to comply with a term implied by law. The negligence standard judges the conduct of the defendant in light of the risks and benefits which result from his conduct. The strict liability-standard focuses on the product and not on the conduct of producer. The last standard he mentions is the absolute liability standard although he submits this standard is not applied in practice.

4 Goldberg "The strict liability in fault and the fault in strict liability" 2016 *Fordham LR* 23; Alexander "Is there a case for strict liability?" 2017 *Univ San Diego Legal Studies Research Paper* Series Paper No 17–281. In its purest form strict product liability is unforgiving as it concentrates on the objective determination of whether a product contained a defect that caused harm to a person regardless of whether the manufacturer's negligence was the cause of the defect or not.

5 European Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, as amended by Directive 1999/34/EC.

6 The Australian Consumer and Competition Act 2010, commonly referred to as the Australian Consumer Law (ACL).

7 68 of 2008 (CPA).

8 See the discussion in para 3 below.

The focus of this contribution is on certain aspects of the product liability regime set out in section 61 of the CPA that impact on *locus standi* for purposes of redress to persons who have been harmed by defective, unsafe products.[9] The adequacy of redress in the context of product liability has to be viewed *inter alia* through the prism of the reach of the product liability regime concerned. As such, the question of who may institute a product liability claim as plaintiff, is pivotal in determining the multi-faceted question of whether the product liability regime concerned has an adequate radius of application and protection. As is discussed in more detail below, the strict product liability regime introduced by the CPA has a wide reach in the sense that it apparently imposes faultless liability on the whole supply chain for a broad range of harm occasioned by products that are unsafe at various levels. However, insofar as who would qualify to be a plaintiff in a product liability case is concerned, it appears that the legislature may have (intentionally or unintentionally) narrowed down the reach of the strict product liability provisions in section 61 of the CPA by limiting the range of plaintiffs who may institute such claims. This troublesome aspect was recently brought to the fore in the first product liability case under the CPA in *Eskom Holdings Limited v Halstead-Cleak.*[10]

This contribution therefore critically considers the impact of the decision of the Supreme Court of Appeal in the *Eskom* matter on product liability claims instituted in terms of section 61 of the CPA. In order to contextualise the discussion a brief overview of the common law of product liability *ex delicto* as well as an overview of the new product liability regime under the CPA that co-exists with the common law, is provided.

2 OVERVIEW OF FAULT-BASED PRODUCT LIABILITY UNDER THE COMMON LAW

The common law of product liability *ex delicto* in South Africa developed as a species of the law of delict which requires the presence of five elements to found such liability, namely, conduct, wrongfulness, negligence, causation and harm.[11] According to De Jager the "conduct" element is found in the voluntary control and supervision exercised by a manufacturer over, and the organisation of, the complex process of industrial production which includes the design, manufacturing and distribution of the product.[12] Simply put, the release of a defective product onto the consumer market constitutes an "act" or "conduct" as an element of common law product liability *ex delicto*. The concept of a "defective" product is central to product liability and was extensively dealt with in the common law of sale where it was applied to goods that contained latent

9 Although the term "defective" is broad enough to encompass unsafe products the authors will use the terms "defective, unsafe products" to emphasize the fact that the products concerned are defective and that the feature that makes them defective from a product liability perspective is specifically that they are unsafe.

10 2017 1 SA 333 (SCA); hereafter referred to as *Eskom v Halstead-Cleak* or the *Eskom* case.

11 Neethling-Potgieter-Visser *Law of delict* (2015) 229 (hereafter Neethling *et al*); Loubser and Reid *Product liability in South Africa* (2012) 32 (hereafter Loubser and Reid (2012)).

12 De Jager "Die grondslae van produkte-aanspreeklikheid *ex delicto* in die Suid-Afrikaanse Reg" 1978 *THRHR* 41. De Jager describes the process of industrial production to include the design, manufacturing and distribution of a product.

defects at the time of their supply.[13] In *Dibley v Furter*[14] and subsequently in *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd*[15] it was held that a "latent defect" is a

> "defect in the thing sold which is of such a nature that it rendered the *merx* unfit for the purpose for which it was bought or normally used, and which defect was not known to the buyer at the time of conclusion of the contract, and could not be discovered by him upon a reasonable examination of the thing sold".[16]

The buyer had the onus to prove that the defect existed at the time of conclusion of the contract and that the buyer had not been aware of such a defect.[17] This common law of sale definition of a defective product was also applied for purposes of product liability *ex delicto* with the added feature that the defect should have made the product unsafe and potentially harmful.[18] The South African common law of product liability *ex delicto* also makes use of a "consumer expectations test" although strictly speaking this test is broader than merely referring to the expectations of consumers as it is pegged on the expectations of society, thus on what "persons generally" can expect with regard to products.

Insofar as the element of wrongfulness is concerned, Neethling *et al* point out that an act which causes harm to another is in itself insufficient to give rise to delictual liability as such liability will only follow if such act is wrongful.[19] They further remark that in essence "wrongfulness lies in the infringement of a *legally protected interest* (or an interest worthy of protection) in a *legally reprehensible way*".[20] Whether an interest is worthy of protection, as well as whether its infringement is legally unacceptable, is *ex post facto* determined by reference to the legal convictions of the community, the *boni mores* and public policy.[21]

The element of negligence entails that a person is blamed for 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

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13 This was due to the operation of the implied warranty against latent defects afforded by the common law to a buyer of goods (movable or immovable) entitling a purchaser to either claim a reduction in the purchase price of the goods or to cancel the agreement of sale if goods sold was found to be defective. See also Barnard "The influence of the Consumer Protection Act 68 of 2008 on the warranty against latent defects, voetstoots clauses and liability for damages" 2012 *De Jure* 455.

14 1951 4 SA 73 (C).

15 1977 3 SA 670 (A). See also *Schwarzer v John Roderick's Motors Pty Ltd* 1940 OPD 170 180 where it was stated that a defect is considered latent if "the defect was such that a normally intelligent individual could not discern it after careful inspection by a normal trial run". See further *Waller v Pienaar* 2004 6 SA 303 (SCA).

16 Nagel *et al Commercial law* (2015) para 14.52 remark that "[t]he criterion is not whether an expert would have discovered the defect, or whether it would only be discovered upon an unusually thorough examination". See Barnard *The influence of the Consumer Protection Act 68 of 2008 on the common law of sale* (LLD thesis UP 2013) 358 (hereafter Barnard *Thesis*).

17 Barnard *Thesis* 358.

18 See, eg, *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd* 2002 2 SA 447 (SCA).

19 Neethling *et al* (2015) 33.

20 *Premier of the Province of the Western Cape v Fair Cape Property Developers (Pty) Ltd* 2003 6 SA 13 (SCA) para 33; Neethling *et al* (2015) 33.

21 *Mukheibir v Raath* 1999 3 SA 1065 (SCA) para 25; *Premier of the Province of the Western Cape v Fair Cape Property Developers (Pty) Ltd* 2003 6 SA 13 (SCA) para 39.

legally required of him.[22] Accordingly, the criterion adopted by our law to establish whether a person has acted carelessly and thus negligently, is the objective standard of the reasonable man (person), the so-called *bonus paterfamilias*.[23] Negligence therefore indicates failure to apply the degree of care that a reasonable person would have exercised in the same situation and his failure to avoid causing "foreseeable" harm.[24] The importance of establishing negligence by the manufacturer in a product liability claim *ex delicto* under the common law was confirmed in *A Gibb & Son (Pty) Ltd v Taylor & Mitchell Timber Supply Co (Pty) Ltd*[25] where it was stated that "South African law has chosen . . . to make fault [negligence] the cornerstone of legal liability for defective products".[26]

From the aforementioned, it is further clear that there is a close interrelation between wrongfulness and negligence as elements of common law product liability *ex delicto* given that both negligence and wrongfulness involve the application of a standard of reasonableness.[27] Loubser and Reid point out that whereas the test for negligence assesses *conduct of the manufacturer* on the basis of the foreseeability and preventability of harm, the test for wrongfulness evaluates whether the causing of harm by distribution of the product, with its particular qualities and potentially harmful effect, constitutes an *unreasonable infringement of rights* and deserves the intervention of the law of delict.[28]

With respect to the element of causation the general rule is that liability can only follow if the defective product was the "cause" of the plaintiff's harm. The plaintiff in a product liability case is required to prove both factual and legal causation. Factual causation entails asking whether, *but for the defendant's conduct*, the harm would have occurred? Once factual causation is established, the aspect of legal causation has to be evaluated in order to determine whether it

22 Neethling *et al* (2015) 137. The abstract or general test for negligence was set out in *Kruger v Coetzee* 1966 2 SA 428 (A) where it was held that the defendant *in casu* was negligent because "(a) a *diligens paterfamilias* in the position of the defendant – (i) would foresee the reasonable possibility of his conduct injuring another in his person and property and causing him patrimonial loss; and (ii) would take reasonable steps to guard against such occurrence; and (b) the defendant failed to take such steps".

23 Neethling *et al* (2015) 137. See also *Herschel v Mrupe* 1963 SA 464 (A) 490.

24 Neethling *et al* (2015) 137.

25 1975 2 SA 457 (W) 464–465.

26 Loubser and Reid "Liability for products in the Consumer Protection Bill 2006: A comparative critique" 2006 *Stell LR* 422.

27 Boberg *The law of delict* (1984) 269–279 offers the following explanation: "When wrongfulness is in issue, the question is whether it was objectively unreasonable for the actor to bring about the consequence that he did, judged *ex post facto* and in the light of all relevant circumstances including those not foreseeable by the actor or beyond his control. Here the emphasis is upon the effect of the actor's conduct, and a finding of wrongfulness expresses the law's disapproval of the result that he produced. With negligence, on the other hand, the enquiry is whether the actor behaved himself unreasonably, judged in the light of his actual situation and what he ought to have foreseen and done in the circumstances that confronted him. Here the emphasis is upon the actor's role in bringing about a consequence that has already been branded wrongful and a finding of negligence expresses the law's disapproval of the part that he personally played in producing it". Boberg's view that wrongfulness always entails an *ex post facto* assessment has, however, been criticised – see Fagan "Rethinking wrongfulness in the law of delict" 2005 *SALJ* 90.

28 Loubser and Reid (2012) 50.

is of sufficient significance to justify liability in the legal sense.[29] Following the judgment in *S v Mokgethi*,[30] South African courts accept that legal causation involves the basic question whether there was a close enough relationship between the wrongdoer's conduct and the ensuing consequence in order for such consequence to be imputed to the wrongdoer, taking into account policy considerations based on reasonableness, fairness and justice.[31] In order to determine the closeness of the connection, the courts apply a combination of criteria as subsidiary tests including those of "direct consequences", "adequate causation" and "reasonable foreseeability".[32]

Regarding the element of harm, Neethling *et al* point out that the law of delict has a "compensation function", which may take the form of compensation for damage or satisfaction.[33] Damage includes patrimonial (pecuniary) as well as non-patrimonial (non-pecuniary) loss.[34] The remedy for patrimonial harm caused by a defective product is the Aquilian action which aims to restore the plaintiff to the position he would have been in had the delict not been committed.[35]

Liability under the common law of product liability *ex delicto* was thus generally imposed on a manufacturer who negligently and wrongfully released a defective, unsafe product onto the consumer market that caused harm to a person injured by such a product. Notably the common law of product liability *ex delicto* availed relief for such harm to "any person" harmed by a defective product and hence also to innocent bystanders who suffered injury caused by such a product.[36] The common law further allowed a number of defences that a manufacturer could rely on to ward off a product liability claim, *inter alia* consent, contributory negligence and prescription.[37] Despite the South African common law of product liability *ex delicto* being available to persons, including innocent bystanders, who suffered harm occasioned by defective products, proof of negligence was the main impediment to successfully pursuing a product liability claim.[38]

3 STRICT PRODUCT LIABILITY REGIME INTRODUCED BY THE CPA

Over the years calls for a move to a strict product liability regime increased, more so with South Africa's transition to a democracy and the enactment of the

29 See *International Shipping Co (Pty) Ltd v Bentley* 1990 1 SA 680 (A).
30 1990 1 SA 32 (A) 40–41.
31 Loubser and Reid (2012) 107.
32 Midgley and Van der Walt *Principles of delict* (2016) para 132.
33 Neethling *et al* (2015) 221.
34 *Ibid.*
35 *Ibid.* The common law imposes a duty on the plaintiff to mitigate or limit his losses and this duty accordingly impacts on the amount of damages that is eventually awarded. See further Loubser and Reid (2012) 99.
36 Neethling and Potgieter "The continued importance of common law product liability *ex delicto* – *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* 2011 4 SA 276 (SCA), [2011] 3 All SA 362 (SCA)" 2014 *THRHR* 502 510. An "innocent bystander" should be understood to be a person who sustains personal injury from an alleged product defect despite not using (or buying) the product.
37 Regarding consent see Neethling *et al* (2015) 108; regarding contributory negligence, see *idem* 167 and regarding prescription, see the Prescription Act 68 of 1969 and the discussion by Loubser and Reid (2012) 130.
38 Alheit "Delictual liability arising from the use of defective software: comparative notes on positions of parties in English law and the South African law" 2006 *CILSA* 269.

Constitution.[39] It was argued that notions of fairness and justice which permeate the Constitution should form the basis for the development of a new "*boni mores*" which would inter alia serve to develop the common law, in accordance with section 39(2) of the Constitution, in order to "protect vulnerable consumers against dangerous or defective products, by imposing strict liability on manufacturers for consequential damages irrespective of privity of contract".[40] The argument was that strict product liability would ensure better protection for consumers by removing the onerous obligation of having to prove negligence by the manufacturer and that it would cause manufacturers to produce safer products.[41]

The question whether to introduce strict product liability *ex delicto* into South African law eventually reached a tipping point in *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd*[42] where the Supreme Court of Appeal indicated that due to the numerous complexities posed by designing an appropriate strict product liability regime it was a task best left to the legislature.

A "strict" product liability regime was subsequently introduced by the CPA as South Africa's first comprehensive general consumer protection framework which came into general effective operation on 31 March 2011.[43] The purpose of the CPA is stated in section 3 as the promotion and advancement of the social and economic welfare of consumers through various measures listed in the section. The Act is accordingly required to be interpreted in a manner that gives effect to these purposes set out in section 3.[44] As alluded to above, section 2(10) preserves the common law rights of consumers by providing that "[n]o provision of this Act must be interpreted so as to preclude a consumer from exercising any rights afforded in terms of the common law". The CPA covers a wide range of consumer rights[45] and *inter alia* sets out a statutory product liability regime in sections 60[46] and 61, contained in Part H of Chapter 2 of the Act, that deals with the right to fair value, good quality and safety. These two sections came into operation on the CPA's "early effective date", 24 April 2010.

The CPA generally applies to the promotion[47] and supply[48] of goods[49] and

39 Constitution of the Republic of South Africa, 1996.

40 MacQuoid-Mason *Consumer law in South Africa* (1997) 108. S 39(2) of the Constitution provides that "[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights".

41 Neethling *et al* (2015) 326.

42 [2003] 2 All SA 167 (SCA) 168 171. See also the discussion of *Wagener* in Van Eeden and Barnard (2017) 390.

43 See GN 467 in *GG* 32186 regarding the early effective date; and GN 917 in *GG* 33581 regarding the general effective date, namely, 31 March 2011.

44 S 2 CPA.

45 Consumer rights covered by Ch 2 of the CPA include the right of equality in the consumer market (Part A); the consumer's right to privacy (Part B); the consumer's right to choose (Part C); the right to disclosure and information (Part D); the right to fair and responsible marketing (Part E); the right to fair and honest dealing (Part F); the right to fair, just and reasonable terms (Part G) and conditions and the right to fair value, good quality and safety (Part H).

46 S 60 governs safety monitoring and recall.

47 S 1 definition: "promote" entails a number of activities which include amongst others advertise, display or offer to supply any goods or services or make any representations in the ordinary course of business and also concludes the conduct of the supplier.

services[50] (after its early or general effective date) by suppliers[51] to consumers, in the ordinary course of the supplier's business.[52] For purposes of the discussion that follows the emphasis will be on the concept of "consumer" who is defined in section 1 as:

> "(a) a person to whom goods or services are marketed in the ordinary course of the supplier's business;
> (b) a person who has entered into a transaction with a supplier in the ordinary course of the supplier's business, unless the transaction is exempt from the application of this Act by section 5(2) or in terms of section 5(3);
> (c) 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
> (d) a franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5(6)(b) to (e)."

Consumers for purposes of the CPA include both natural persons and small juristic persons with an asset value or annual turnover of less than R2 million.[53] The Act defines a transaction to include an agreement, supply or performance in the ordinary course of business by a "person" (broader than supplier) of goods and services for consideration.[54] It also includes interactions or arrangements in

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48 S 1 definition: "supply" also refers to a broad range of activities, and "when used as a verb, in relation to goods, includes to sell, rent, exchange and hire in the ordinary course of business for consideration". When "supply" is used as a verb in relation to services it means "to sell the services, or to perform or cause them to be performed or provided, or to grant access to any premises, event, activity or facility in the ordinary course of business for consideration".

49 S 1 definition: "goods" have been non-exhaustively defined in s 1 to include anything marketed for human consumption; other tangible objects, literature, music, photographs, information, data, software, a legal interest in land or other immovable property, and gas, water and electricity. Although not specifically mentioned, the definition of goods is wide enough to include component parts fitted into those goods.

50 S 1: "services" is also non-exhaustively defined in s 1 including any work or undertaking performed by one person for the direct or indirect benefit of another; education, transportation of goods or individuals, the provisions of accommodation and entertainment, the use of premises and the right of occupancy to name a few.

51 "Supplier" is defined in s 1 to mean "a person who markets any goods or services." More light on this definition is shed by the definition of "market" in s 1 which "when used as a verb, means to promote or supply any goods or services."

52 Notably, the CPA provides no definition for the term "ordinary course of business", hence the question whether the supplier in a specific instance promoted or supplied goods or services in the ordinary course of his business would have to be determined with reference to the facts of each specific instance. Van Eeden and Barnard (2017) 32 point out that the phrase "ordinary course of business" has often been interpreted over the years in the context of the phrase "disposition in the ordinary course of business" in terms of s 29 of the Insolvency Act 24 of 1936. See further Jacobs *et al* "Fundamental consumer rights under the Consumer Protection Act 68 of 2008" 2010 *PELJ* 309–316 (hereafter Jacobs *et al*); Barnard *Thesis* 3–33 39–43; and Eiselen in Naudé and Eiselen (eds) *Commentary on the Consumer Protection Act* (2014ff) 4-1–4-19 for a detailed discussion of the CPA's scope of application. See also the remarks of the court in *Eskom Holdings v Halstead-Cleak* as discussed in para 5 below.

53 Monetary threshold as published in GN 294 in *GG* 34181 of 1 April 2011. See also s 5(2)(b).

54 S 1(a) definition "transaction".

terms of section 5(6), which broadens the definition of transaction extensively. The section attempts to provide greater certainty regarding the application of the CPA. The Act will apply where goods or services are provided in the ordinary course of business by a club, trade union, association, society or other collectivity (corporate or unincorporated or voluntarily associated for a common purpose) to its members for fair value consideration or otherwise.[55] The CPA will apply in such instances regardless "of whether there is a charge or economic contribution demanded or expected in order to become or remain a member of that entity".[56] Section 5(6)(b) to (e) further includes into the application of the CPA circumstances surrounding the solicitation, offer, conclusion and supply of goods and services pertaining to franchise agreements.

Part H covers various aspects of the right to fair value, good quality and safety and spans from section 53 to 61. Under the heading "[L]iability for damage caused by goods" section 61(1) introduces the new "strict" product liability regime by providing that, except to the extent contemplated in section 61(4), the producer,[57] importer,[58] distributor[59] or retailer[60] of any goods is liable for harm caused wholly or partly as a consequence of the supply of unsafe[61] goods; a product failure,[62] defect[63] or hazard[64] in any goods; or inadequate instructions or warnings[65] provided to the consumer pertaining to any hazard arising from or associated with the use of any goods, and that such liability follows regardless of

55 S 1(b) definition "transaction" read together with s 5(6).

56 S 5(6)(a).

57 A "producer" is defined as a person who: "grows, nurtures, harvests, mines, generates, refines, creates, manufactures or otherwise produces the goods within the Republic, or causes any of those things to be done, with the intention of making them available for supply in the ordinary course of business;" or "(b) by applying a personal or business name, trade mark, trade description or other visual representation on or in relation to the goods, has created or established a reasonable expectation that the person is a person contemplated in paragraph (a)".

58 An "importer", with respect to any particular goods, means "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".

59 A "distributor" in relation to any particular goods, means "a person who, in the ordinary course of business, (a) is supplied with those goods by a producer, importer or other distributor; and, (b) in turn, supplies those goods to another distributor or to a retailer".

60 A "retailer", in respect of any particular goods, means "a person who, in the ordinary course of business, supplies those goods to a consumer".

61 "Unsafe" is defined in s 53(1)(d) to mean: "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."

62 "Failure" is defined in s 53(1)(b) to mean "the inability of the goods to perform in the intended manner or to the intended effect".

63 "Defect" is defined in s 53(1)(a) to mean: "(i) any material imperfection in the manufacture of the goods or components, or in performance of the services, that renders the goods or results of the service less acceptable than persons generally would be reasonably entitled to expect in the circumstances; or (ii) 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."

64 "Hazard" is defined in s 53(1)(c) to mean "a characteristic that (i) has been identified as, or declared to be, a hazard in terms of any other law; or (ii) presents a significant risk of personal injury to any person, or damage to property, when the goods are utilised".

65 The CPA does not define the concepts "instruction" and "warning".

whether the harm resulted from any negligence by the defendant.[66]

Section 61 thus apparently imposes faultless liability on the whole supply chain. It also applies to service providers[67] and where more than one person is liable in terms of section 61, their liability is joint and several.[68] Section 61(4)(a) to (d) further introduces four statutory defences, namely that the defect in the product was wholly attributable to compliance with any public regulation; or that the defect did not exist in the goods at the time of supply by the person raising the defence or was wholly attributable to compliance by that person with instructions provided by a prior supplier; or that it is unreasonable to expect the distributor or retailer to have discovered the defect having regard to that person's role in marketing the goods to consumers; or that the claim has prescribed.

"Harm" for which a person may be held liable, includes:[69]

> "(a) the death of, or injury to, any natural person;
> (b) an illness of any natural person
> (c) any loss of, or physical damage to, any property, irrespective of whether it is movable or immovable; and
> (d) any economic loss that results from harm contemplated in paragraph (a), (b) or (c)."

Certain powers of the court are set out in section 61(6), namely, to determine whether "harm" has been established and adequately mitigated, to determine the extent and monetary value of any damages incurred, including economic loss, or to apportion liability between suppliers who are jointly and severally liable.[70]

It is further important to note that the legislature has made special provision for the application of the CPA in instances of product liability: in addition to taking effect already on the early effective date, section 5(1)(d),[71] read with section 5(5), extends the reach of the CPA's product recall and product liability provisions in sections 60 and 61 respectively, even to exempt transactions.[72] Section 5(8) further extends the application of the CPA, including the product liability provisions, to a matter irrespective of whether, *inter alia*, the supplier resides or has its principal office within or outside the Republic or operates on a for-profit basis or otherwise.

4 *HALSTEAD-CLEAK V ESKOM*: HIGH COURT

In *Halstead-Cleak v Eskom*[73] the facts were that on 11 August 2013 (thus after the product liability provisions in the CPA were already in operation) the plaintiff was riding his bicycle when he inadvertently came into contact with

66 Authors' emphasis.
67 In terms of s 61(2) 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 purposes of product liability as contemplated in s 61. See Jacobs *et al* 2010 *PELJ* 383 who indicate that this would, for example, include an electrician that installs a defective geyser or a surgeon who implants a defective pacemaker.
68 S 61(3).
69 S 61(5). Authors' emphasis.
70 S 61(6)(a)–(c).
71 S 5(1)(d).
72 See s 5(2)(a)–(e) for the transactions that are exempt from the application of the Act.
73 2016 2 SA 141 (GP).

some low hanging live power lines spanning a footpath adjacent to Bokmakierie Road in the Nooitgedacht area in Gauteng and as a result he was electrocuted and sustained "severe full-thickness" electrical burns.[74]

On trial before the High Court the parties agreed to limit the issue to whether the defendant was or was not strictly liable in terms of the product liability provisions of section 61 of the CPA (the so-called "CPA attack").[75] It was common cause that the defendant, Eskom, was at all material times a licensee in terms of and for purposes of the Electricity Regulation Act[76] and that as such Eskom was at all material times responsible for the power line in question. It was further accepted for purposes of the "CPA attack" that Eskom was both the producer and distributor of the electricity generated through the power line. Finally, it was accepted that at the time of the incident the plaintiff was riding his bicycle on a footpath and the power line in a low-hanging position was such that the plaintiff was able to come into contact with it. It was further common cause that Eskom was made aware of the incident involving the plaintiff on 14 August 2013. Eskom's employees inspected the accident scene on that day and upon finding the power line in the dangerous low hanging position they switched it off and made it safe.[77]

The High Court *inter alia* considered sections 53 and 61 of the CPA read in conjunction with the definitions of "consumer", "distributor", "goods", "market", "producer", "supplier" and "supply" as it appears in section 1 of the Act.[78] It also referred to section 25 of the Electricity Act which provides as follows:

> "In any civil proceedings against a licensee arising out of damage or injury caused by induction or electrolysis or in any manner by means of electricity generated, transmitted or distributed by a licensee, such damage or injury shall be presumed to have been caused by the negligence of the licensee, unless there is credible evidence to the contrary."

In its defence, Eskom contended that the CPA is about consumerism and the protection of consumers. It was submitted that, had the plaintiff suffered the electrical burns he sustained in the course of "utilising" the supply of electricity to his home, or otherwise in the course of his "use" of electricity then the CPA may well have applied. However, it was argued that the CPA and section 61 in particular, was not intended to apply to circumstances such as those that befell the plaintiff.[79]

In its reasoning, the court referred to injuries caused globally to consumers and innocent bystanders as a result of defective products. It stated that this informed the reasoning behind the formulation of the CPA and referred to the preamble to the Act in this regard.[80] The court then remarked that the

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74 Para 4.

75 Para 5. It was agreed that the delictual part of the claim and the quantum of damages be separated and postponed and that, insofar as the claim under the CPA was concerned, that possible contributory negligence on the part of the plaintiff was not relevant. See paras 6–8.

76 4 of 2006 ("the Electricity Act").

77 Paras 9.1–9.5.

78 See para 3 above for these definitions.

79 Para 14.

80 Paras 15 16.

> "CPA provides protection to and redress for 'any person' in a number of its provisions, that is, not only in respect of 'consumers' or a 'consumer'. An example regarding the application of the CPA to 'consumers' as defined in s 1, is s 5(5) which provides that ss 60 and 61 are applicable, even in respect of transactions exempt from the provisions of the CPA. The submission, therefore, by the defendant that an innocent third party who is not necessarily a 'consumer' stricto sensu, who suffers loss — such as a dependant of a breadwinner who is or may be a consumer who is killed by a defective product – cannot claim redress because he or she is not the consumer, would be contrary to the spirit and purpose of the CPA."[81]

The court thereupon referred to section 5(1) of the CPA which sets out its scope of application and also to section 5(8) as alluded to in paragraph 3 above. It pointed out that in terms of section 5(5), the provisions of section 61 apply even to exempt transactions which is indicative of its "wider" application, thus affording redress to persons who would not enjoy the advantage of other provisions of the CPA, and that serves to render liable those producers, suppliers, promoters and the like who would otherwise not be liable in terms of any other provision of the CPA.[82]

Moving from the premise that the product liability provisions in section 61 are to the avail of "any person" and not merely to persons who meet the definition of "consumer" the court indicated that it was further necessary to consider certain other aspects regarding the application of the CPA in more detail, namely:[83]

(a) whether goods or services as defined in the Act were involved;

(b) if so, the capacity in which the defendant stands in relation to such goods and/or services; and

(c) the relationship occupied by the plaintiff in relation to such goods or services.[84]

The court stated that it was clear from the definition of goods that it included electricity.[85] It held that Eskom met the definition of "producer" as it generated electricity for purposes of distribution and its intention at all times is and was to supply the electricity in the ordinary course of its business. Eskom also met the definition of "retailer" in respect of the electricity supplied to consumers in general but the court remarked that "[t]his does not mean that the 'consumer' has to be the injured party in this instance as such an interpretation would not be in accordance with the spirit and purpose of the CPA".[86] The court then considered the definitions of "supplier" and "supply" and stated that, taking all these definitions into consideration, it would appear that Eskom's claim that the CPA was not applicable to the plaintiff's claim had no merit.[87]

Regarding the relationship in which the plaintiff stands to the defendant and the goods, the court stated that

> "the wording of section 61(5) makes it clear that liability arises not only in respect of 'consumers' as defined in the CPA or consumers in the general sense, but to

81 Para 17.
82 Para 18.
83 Para 19
84 Para 19.
85 Para 19.1.1 (this paragraph is numbered incorrectly in the case and should be 19.3.1).
86 Para 19.2.1.2.
87 Para 19.2.1.3.

> 'any natural person' (as per section 61(5)(a)). The plaintiff need not, therefore be a 'consumer' in the contractual sense in order for Eskom to be liable to him".[88]

The court further considered the definition of "defect" in section 53[89] and stated that

> "[i]n the context of electricity being conducted along a line which is not required or used to supply any other consumer, this constitutes goods or results of the services less acceptable than persons generally would be reasonably entitled to expect in the circumstances".[90]

Further, considering the inherent dangers or characteristics of electricity, by permitting such a danger to exist, the court held that it constituted "goods or components less . . . safe than persons generally would be reasonably entitled to expect in the circumstances". It stated that logic accordingly dictates that Eskom cannot introduce a source of danger and thereafter seek exoneration when injury is caused as a result thereof.[91]

The court pointed out that it was common cause that Eskom allowed the presence of electricity in the lines spanning the footpath used by the plaintiff on the day of the incident. Upon learning of the incident, Eskom rectified the situation by causing electricity to be switched off and the lines dismantled. Consequently, the court indicated that it was fortified in using the principle used in *Coppejans v Bosman*[92] which concerned an action based on the *actio de pauperie* (which imposes strict liability on the owner of an animal that causes harm)[93] to establish Eskom's liability.[94] Given that proof of negligence was no longer a requirement, the court held that the plaintiff (who could for all purposes be regarded as an innocent bystander) had succeeded in proving that Eskom was liable in terms of section 61(1) of the CPA. Eskom subsequently appealed against the decision of the High Court.

5 *ESKOM V HALSTEAD-CLEAK*: SUPREME COURT OF APPEAL

The central question before the Supreme Court of Appeal was whether Eskom could be held strictly liable in terms of section 61 of the CPA for harm caused to the respondent, by a low hanging power line which was "not supplying or required to supply electricity to anyone".[95]

The Supreme Court of Appeal indicated that Eskom's plea was broadly that it was a licensee in terms of the provisions of the Electricity Act and responsible for the relevant power line through which it conducted electricity. However Eskom denied that, in the context of this particular accident, it was a "producer" or "supplier" as defined in the Act or that the plaintiff was a consumer as defined

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88 Para 19.3.1

89 See para 3 above for the definition of "defect".

90 Paras 20 21.

91 Para 22.

92 [2014] ZAGPHC 1833. The court stated that the same applies to Eskom as its actions after the incident in which the plaintiff was electrocuted reinforced the notion that Eskom had introduced the source of danger which led to the plaintiff's injuries

93 Neethling *et al* 381: "An action where a person may claim damages from the owner of a domestic animal which has caused harm", see full discussion 381–386.

94 Para 23.

95 Para 1. The parties agreed that this issue would be determined separately and that the remaining issues such as quantum would stand over for later determination, if necessary.

in the Act. Eskom further denied that the incident arose as a result of the supply of "unsafe" goods or a product "failure", "defect" or "hazard" in any goods or inadequate instructions or warnings. Furthermore, Eskom indicated that it could not have been expected to discover the state of the power line.[96]

The Supreme Court of Appeal referred to the common law position regarding product liability that required proof of negligence to found a product liability claim. It also referred to *Wagener* as alluded to in paragraph 3 above.[97] It stated that in interpreting the CPA, it was instructive to refer to the principles enunciated in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[98] and *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd*[99] that the interpretative process involves "ascertaining the intention of the legislature but considers the words used in the light of all relevant and admissible context, including the circumstances in which the legislation came into being". It referred also to the statement in *Endumeni* that "a sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results".[100]

The court further referred to the long title of the CPA and also to the Green Paper[101] which made it clear that a broad spectrum of consumers needed protection and which stated that:

> "[P]erhaps one of the greatest pitfalls in most consumer protection laws in South Africa, is the absence of a uniform definition of a consumer. This has resulted in a difficulty for enforcers to accurately identify individuals that the State seeks to protect. Consumers must be defined broadly as individuals who purchase goods and services, and must include third parties who act on behalf of the consumer."[102]

The court pointed out that section 2(1) requires the CPA to be interpreted in a manner that gives effect to the purposes of the Act as set out in section 3, which is to promote and advance the social and economic welfare of South African consumers, particularly vulnerable consumers.[103] It then moved to the application of the Act as per section 5 thereof and remarked that the relevant provisions apply to every "transaction" occurring within South Africa for the supply of goods or services or the promotion of goods or services. Like the High Court, the Supreme Court of Appeal pointed out that section 5(5) provides that if any goods are supplied within the Republic to any persons in terms of an exempt transaction, those goods and the producer thereof are nevertheless subject to section 61.[104] It subsequently dealt with the definition of "transaction" as well as the instances where consideration is not a requirement for a transaction as per section 5(6).[105]

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96 Para 7.
97 Para 8.
98 Para 8.
99 Para 8.
100 Para 9.
101 Draft Green Paper on the Consumer Policy Framework, GN 1957 in *GG* 26774 of 9 September 2004.
102 Para 11.
103 S 4(3) of the CPA. Para 12 of the judgment.
104 Para 13. The court in para 12 also pointed out that s 2(9) of the CPA specifically provides that if there is an inconsistency between the CPA and other legislation, both Acts apply concurrently, to the extent possible. If not possible, the provision that extends greater protection to a consumer prevails over the alternative provision.
105 Para 14. See discussion of "transaction" in terms of the Act in para 3 of the contribution above.

The court thereupon referred to the definition of "consumer", pointing out that it includes a person who is a user of the goods or a recipient or beneficiary of the particular service *irrespective* of whether that person was a party to a transaction concerning the supply of the goods or services. According to the court, this had the effect that the recipient of a gift from a consumer would also be considered a consumer in terms of the Act. It stated that the important features to note are that "*there must be a transaction to which a consumer is party, or the goods are used by another person consequent on that transaction*".[106]

The court remarked that from the definitions, the preamble and purpose of the Act, it is clear that the whole tenor of the CPA is to protect *consumers* and the CPA must therefore be interpreted keeping in mind that its focus is the protection of *consumers* (as defined in the Act).[107] Thereafter, the court dealt with the product liability provisions contained in section 61 of the CPA.[108] It quoted the definitions in section 53 of "defect", "failure", "hazard" and "unsafe"; pointed out that electricity is "goods" as defined in the CPA and quoted the other relevant definitions, namely "supply", "producer" and "market". It particularly indicated that although "ordinary course of business" is not defined in the CPA, it has been considered by our courts in the context of insolvency law and was found to entail an objective test requiring regard to be had to all the circumstances, including the actions of both parties, to the transaction.[109]

The court subsequently stated that, taking into account all the definitions and the wording of section 61, the plaintiff had to establish that, first in respect of that incident, the plaintiff came to harm and secondly, that Eskom was "a producer of electricity".[110] Furthermore, it had to be established that the harm was caused wholly or partly as a consequence of Eskom selling unsafe electricity in the ordinary course of its business, for consideration, or that there was a product failure, defect or hazard in the electricity. It stated that taking into consideration that section 61 is a section in Chapter 2 of the CPA dealing with "Fundamental *Consumer* Rights" it is clear that the harm envisaged in section 61 must be caused to a "natural person mentioned in section 61(5)(a), *in his or her capacity as a consumer*,"[111] remarking that "[t]his is the only businesslike interpretation possible". The court further stated that the reason why reference is made to a "natural person" in section 61(5)(a) is clearly to distinguish it from "person" which may include a "juristic person"; or "consumer" which may also include a "juristic person".[112]

The Supreme Court of Appeal stated that the High Court's view that the plaintiff need not be a "consumer" for purposes of imposing liability on the defendant in terms of section 61, loses sight of the fact that "there should be a *supplier and customer relationship* for Eskom to be strictly liable for harm, as

106 Para 15. Authors' emphasis.
107 Para 16. Authors' emphasis.
108 Para 17. It quoted the provisions of s 61(1)–(3), leaving out the defences as set out in s 61(4) on the basis that "it is common cause that the defences do not apply in this case" and further mentioning the provisions in s 61(5) and (6).
109 Paras 18–20.
110 Para 21.
111 Authors' emphasis.
112 Para 21.

the CPA's purpose is to protect *consumers*".[113] It stated in this instance the plaintiff was not a consumer *vis-à-vis* Eskom as "(a) he did not enter into any transaction with Eskom as a supplier or producer in the ordinary course of Eskom's business; and (b) he was not utilising the electricity, nor was he a recipient or beneficiary thereof".[114]

The court also stated that the supply of unsafe electricity also presupposes that Eskom sold the electricity in the ordinary course of business for consideration. It remarked that:

> "[S]imilarly, where section 61(1)(c) provides that inadequate instructions pertaining to any hazard attracts liability, it is restricted to inadequate instructions to a *consumer* who has entered into a transaction with Eskom. The respondent and Eskom were not in a consumer, producer or supplier relationship in respect of the electricity that caused harm to the respondent."[115]

The court further referred to section 61(1)(b) that makes provision for liability due to a product failure, defect or hazard in any goods and again remarked that "it is clear in the context of the Act that it is restricted to a supplier and consumer relationship". It stated that

> "in any event it cannot be found that the harm the respondent suffered was as a result of the electricity itself failing, or that the electricity had a defect. Failing in this context would be if the electricity were unable to perform in the intended manner. This was not the case. The electricity, in the context of the case did not suffer from a material imperfection in the manufacture of the goods. Likewise the electricity did not have a characteristic that rendered it less useful or safe than a person would generally expect in the circumstances. The same applies to the electricity not possessing a characteristic that presented a significant risk of injury to any person when the goods are utilised. *It is clear that the respondent was not utilising the electricity when he was harmed*".[116]

Thus, the court held that the plaintiff was not a consumer that was entitled to the protection of Part H of Chapter 2 of the Act and stated that, furthermore, "the circumstances of this case clearly fall outside the ambit of a consumer-supplier relationship to which the Act applies". Accordingly, the appeal was upheld.[117]

6 DISCUSSION

Generally, in order to successfully institute a claim based upon a right contained in the CPA it is clear that all the requirements for the Act to apply should be met, namely, the Act should have been in operation, the plaintiff should be a consumer as defined in the Act, the defendant should fall into one of the categories of suppliers as defined in the Act; the definition of "goods" or "services" must be met and there should have been a "promotion" or "supply" of goods or services in the ordinary course of the supplier's business, as contemplated in the Act. Absence of one of these criteria will mean that the CPA does not apply to the matter at hand. Accordingly, if the plaintiff for instance does not meet the definition of "consumer" he will not be able to base his claim on the CPA and obtain the extensive redress that the Act affords, even if he meets all the other requirements for the Act to apply.

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113 Authors' emphasis.
114 Para 22.
115 Para 23.
116 Para 24. Authors' emphasis.
117 Para 25.

The question that now arises is whether this formula for the application of the CPA applies unrestrained in *product liability cases* instituted under section 61 of the Act. Particularly, must the plaintiff in an action founded in product liability *ex delicto* (as opposed to product liability *ex contractu*) based on section 61 be a "consumer" as defined in the CPA and must he have entered into a "transaction" with the supplier whose defective product injured him or must he at least fit the definition of "consumer" as being a user or recipient or beneficiary of the defective goods that were supplied to an actual "consumer" pursuant to a transaction with a supplier? Was the narrow view taken by the Supreme Court of Appeal in *Eskom v Halstead-Cleak* correct?

As a point of departure it is important to note, as alluded to in paragraph 3 above, that the legislature realised that product liability falls into a class of its own compared to some of the other rights protected in the Act. Pertinently product liability deals with a specific type of conduct that is significantly more serious than that in cases where other rights such as for example unwanted direct marketing or unsolicited goods or overbooking are concerned. Given that it deals with scenarios where victims may sustain serious injury that may even lead to their death it appears that the legislature, taking heed of the need for a strict product liability regime in South Africa, made special provision for the application of the CPA in instances of product liability. These provisions, it is submitted, manifests the intention of the legislature to broaden the reach of the strict product liability provisions in the Act. Not only, did the product liability provisions in section 61 of the Act take effect on the "early effective date" (24 April 2010) but section 5(5) has extended their reach to exempt transactions and section 5(8) even imposes liability on suppliers resident or located outside South Africa. Notably, the provisions of section 61(1) also draw the whole supply chain into the net of liability.

An interpretation that the product liability provisions in section 61 can only be relied upon by a "consumer" as defined in the Act, would not only negate the fact that delictual product liability has been created *especially* to provide redress to persons such as innocent bystanders who have no privity of contract with the supplier of defective goods. It would also mean that the product liability provisions in section 61, despite their extended reach in terms of sections 5(5) and 5(8) and also 61(1) which imposes liability on the *whole* supply chain, actually have a *narrower* reach from a plaintiff's perspective than under the common law of product liability *ex delicto* that provides a remedy to any "person" harmed by a defective product. As pointed out, the application of product liability *ex delicto* has generally under the common law been to the avail of persons who are harmed by products in the absence of a contractual nexus or "transaction" between such a person and the manufacturer of the defective goods. Under the common law, the latter group of persons would include users, recipients and beneficiaries of goods but also innocent bystanders, all being persons who are not in privity of contract with the manufacturer of the defective, unsafe goods. The interpretation afforded by the Supreme Court of Appeal in the *Eskom* case would clearly lead to an anomaly insofar as treatment of persons who are not in privity of contract with the supplier of defective goods are concerned. Thus, if for example, a person buys a microwave oven from a retailer and that person's neighbour who happened to be visiting was injured when the *neighbour* used the microwave due to it having malfunctioned and exploded, the *neighbour* would

be regarded as a *user* and thus as a "consumer" for purposes of the application of the CPA even though he was not a party to the transaction. However, if the goods were bought by the consumer and upon being used by the *consumer*, the neighbour who was present in the kitchen when the microwave exploded, would not qualify as a user of the goods. Arguably, he would neither be a recipient nor beneficiary of the goods. Thus, he would be excluded from the delictual product liability redress offered by section 61 of the CPA. The neighbour would then have to resort to the common law with its onerous requirement of proof of negligence and would *inter alia* not have a claim against the whole supply chain as is the position under the CPA.

Given that the Act must be interpreted in a manner that gives effect to its purposes as stated in section 3, it may therefore be asked whether there are any other provisions in the CPA that aid a broader interpretation of the word "consumer" in the context of a product liability claim that would accommodate an interpretation of this concept that would also include innocent bystanders. The obvious starting point for this inquiry is to observe section 2 which requires an interpretation of the CPA that is consonant with the stated purposes of the Act. Having regard to section 3, some of the objectives of the CPA that may point in such a direction could arguably be the aim to establish a consumer market that is fair;[118] also to persons who suffer harm as a result of products released onto such a market even though the product was not supplied to them and even though they cannot be regarded as users, recipients or beneficiaries of that product. One could possibly also argue that the CPA's aim to reduce and ameliorate disadvantages (such as having to prove the onerous negligence element under the common law of product liability) for minors or vulnerable consumers[119] could aid a broader interpretation of the word "consumer". The same may be said of the Act's objective to provide an efficient or effective system of redress. The problem however remains that all the aforementioned purposes set out in section 3 specifically make reference to a "consumer" as narrowly defined in the Act.

Section 4(1) which provides for *locus standi* under the CPA also does not assist as it bears the heading "Realisation of *consumer* rights" and although it states that a "person" may approach a court, Tribunal or the Commission, it narrows the scope of the section by requiring that such person must allege that "a *consumer's* rights in terms of the [CPA] have been infringed, impaired or threatened, or that prohibited conduct has occurred or is occurring".[120] Section 4(2) which provides that in any matter brought before a court or the Tribunal in terms of the CPA, the court is obliged to promote the spirit and purposes of the Act and to make appropriate orders to give practical effect to the *consumer*'s right of access to redress, including but not limited to any order provided for in the CPA or any *innovative* order that better advances, protects, promotes and assures the realisation by *consumers* of their rights in terms of the Act, suffers from the same impediment as it limits these obligations of the courts and Tribunal to consumers as defined in the Act. Even section 4(3) which provides that if any provision of the CPA, read in its context, can reasonably be construed to have more than one meaning, the court or Tribunal is obliged to prefer the

118 S 3(1)(a).
119 S 3(1)(b).
120 Authors' emphasis.

meaning that best promotes the spirit and purposes of the Act, and will best improve the realisation and enjoyment of *consumer* rights generally, and in particular by persons contemplated in section 3(1)(b), is also pegged on the definition of "consumer" in section 1 of the Act.[121] Therefore, even if one could argue that section 61 is clearly ambiguous as it refers to both the concepts of person and consumer, section 4(3) would not assist in aiding a broader interpretation that makes section 61 applicable to persons generally (thus including innocent bystanders) and also to consumers (as narrowly defined in the Act).

Could one argue that section 2(10) comes to the rescue of the innocent bystander who was harmed by a defective, unsafe product? As pointed out, section 2(10) provides that no interpretation of the CPA may be interpreted so as to preclude a *consumer* from exercising any rights afforded in terms of the common law – thus, again hinging the parallel application of the common law on a consumer as defined in the CPA and thus also ostensibly foreclosing an innocent bystander who is patently excluded from such definition, from relying on the fact that he or she would have had *locus standi* under the common law. It may consequently be asked whether this is indeed what the legislature intended? Given the legislature's desire to preserve a consumer's common law rights, it is submitted that there is no basis on which it can be reasoned that the legislature intended to change the common law more than necessary by limiting the availability of the product liability regime in section 61 to "consumers" only, as opposed to "persons" as is the case under the common law.[122] No such intention appears from the Explanatory Memorandum[123] to the CPA either.

When one has specific regard to the product liability provisions in section 61 it appears that an interpretation that those product liability provisions are to the avail of a "person" and not merely to a "consumer" can be inferred from section 61(5)(a) and (b) of the CPA. This subsection allows for a claim on the basis of harm that includes the death of, or injury to, "any natural *person*" or an illness of "any natural *person*". It is submitted that the reference in section 61(1) to liability that follows upon inadequate instructions or warnings given to a "consumer" pertaining to any hazard arising from or associated with the use of any goods makes sense as a consumer would generally be in privity of contract with the supplier and would thus be entitled to warnings or instructions in respect of goods he acquires. However, these words cannot be used, as was done by the Supreme Court of Appeal, to bar a product claim by an innocent bystander under section 61, as such a bystander will never receive any instructions or warnings as contemplated by section 61(1) given that he stands in no contractual relationship to the supplier. Also the fact that section 61(5)(a) appears to allow claims by dependants for the death of a breadwinner as a result of a defective, unsafe product does not seem to be pegged on the requirement that such person should be a "consumer" as contemplated in the CPA, thus evidencing a broader reach for the product liability provisions in section 61 than merely being to the avail of consumers as defined in the Act. In any event the argument of the Supreme Court of Appeal that the words "natural person" is used in section 61(5)(a) to

121 Authors' emphasis.

122 See Botha *Statutory interpretation: An introduction for students* (2012) 77–80 164.

123 *Memorandum on the objects of the Consumer Protection Bill, 2008* B-19, 2008 *GG* 31027 of 5 May 2008 80–90.

distinguish it from a juristic person is incorrect, as such a distinction would not be relevant in the case of section 61(5)(a) because a juristic person cannot "die". Also, the section that would in any event be more relevant in the context of the *Eskom* case, is section 61(5) that deals with injury of a natural person as the plaintiff was merely injured and did not die as a result of the electric burns he sustained.

As one scans the Act, the rather arbitrary use of the word "consumer" and "person" becomes more evident. As alluded to in paragraph 3 above, the definitions of "defect", "failure", "hazard" and "unsafe" must also be applied in the interpretation of the provisions of section 61. Notably the definition of "defect in section 53(1)(a) and (b) refers to the expectations of "persons" and not the expectations of "consumers". Even more pertinent is the fact that the definition of "unsafe" which is generally the characteristic in a product that leads to a product liability claim, refers to the risk of personal injury or property damage "to the consumer *or other persons*". Arguably, this definition supports a view that the legislature intended a broader reach for the product liability provisions in section 61 which would avail them also to innocent bystanders.

When one views the provisions of section 61 through the prism of the Constitution[124] it could further be argued that limiting the strict product liability provisions in section 61 to "consumers" as defined in the CPA also offends the right of persons to be treated equally in terms of section 9 of the Constitution. Why should users, recipients and beneficiaries of defective goods who are not in privity of contract with a supplier receive the broad protection of section 61 while it is not extended to an innocent bystander who also is not in privity of contract with the supplier? Why should the first group be allowed to claim free from the impediment of having to prove negligence and be able to have a broadened possibility of redress given that the whole supply chain bears liability under the CPA whereas the latter group is foreclosed from relying on section 61 and its "strict" liability redress? It further clearly infringes on the right of access to justice in terms of section 34 of the Constitution of innocent bystanders who will not be able to obtain redress under the common law as they will have difficulty proving negligence by the manufacturer. Such persons are prejudiced as they cannot rely on the absence of fault by, or the broad liability imposed on, the supply chain by section 61.

Loubser and Reid also consider the implications of the *Eskom* case for product liability under the CPA and remark that it is possible that the references in section 61(5)(a) and (b) to "any natural person" were meant to indicate that harm in the form of death or injury can only be suffered by a natural person, thereby distinguishing a consumer who is a natural person from a consumer who is a juristic person, explaining why the property damage in section 61(5) is not linked to natural persons. They further state that

> "[i]t follows from this argument that a section 61-claimant can be any person, natural or juristic, *who fits the description of 'consumer'*,[125] either as a person to whom the defective goods were marketed or who received the defective good pursuant to a transaction with the supplier, as referred to in paras (a) and (b) of the

124 Constitution of the Republic of South Africa, 1996.
125 Authors' emphasis.

> definition of 'consumer', or as a user, recipient or beneficiary of those particular goods, as referred to in para (c) of the definition".[126]

However, they also pick up on the anomaly that section 61, read with section 53 that deals with the definition of "defect", "failure", "hazard and "unsafe" does not unambiguously exclude bystanders injured by goods as potential claimants, such as a person injured when touching an open and live electricity cable.[127] They further point out that section 61(1)(c) and 61(2) refer to the "consumer" as opposed to section 61(5)(a) and (b) that refer to the death or illness of "any natural person".[128] The writers further agree that section 5(1)(d) read with section 5(5), which extends the application of the CPA to exempt transactions, arguably highlights the intention of the legislature to provide general redress for persons harmed by defective goods "even if they did not receive the goods pursuant to a 'transaction' or as a 'consumer' within the meaning of para (b) of the definition of 'consumer'".[129] They therefore argue that this ambiguity in section 61 warrants a purposive interpretation. Pointing out that the Supreme Court of Appeal in the *Eskom* case emphasised that the purpose of the CPA is to protect consumers, they remark that it is arguable that bystanders injured by goods fall within the category of "vulnerable consumers" to be protected against harm caused by defective goods. Accordingly they ask:

> "Are we to assume, for example, that there can be no claim under s 61 on behalf of an infant injured by defective goods bought by its parents, on the basis that such an infant cannot be party to a consumer transaction and in many cases would not, on a strict interpretation, qualify as the user, recipient or beneficiary of the goods?"[130]

Loubser and Reid are thus also of the view that it is not clear that the legislature intended this result and they therefore suggest that the courts should in cases of injury suffered by bystanders adopt a wide and purposive interpretation of the concepts "recipient" and "beneficiary" as contained in the definition of "consumer" in order to accommodate claims by or on behalf of such bystanders.[131]

Kriek,[132] however, takes a different view. She is of opinion that in light of the consumer protectionist policy underlying the CPA, the ambiguity created by the wording of section 61 requires that section 61 should be interpreted as "being available to all persons falling within paragraph (c) of the definition of 'consumer' . . . in other words, including users of goods".[133] Referring to the *Eskom* case, she notes that it is unclear when a person would qualify as "using" goods.[134] She, however, points to the fact that no reference was made to bystanders in the draft definition of "consumer" in the Consumer Protection Bill and remarks that if it was the legislature's intention to provide bystanders with the protection afforded by section 61, it is arguable that the definition of

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126 Loubser and Reid in Naudé and Eiselen *Commentary on the Consumer Protection Act* (2014ff) 61-4.
127 *Idem* 61-4A.
128 *Ibid.*
129 *Ibid.*
130 *Ibid.*
131 *Ibid.*
132 *The scope of liability for product defects under the South African Consumer Protection Act 68 of 2008 and common law – A comparative analysis* (LLD US 2017).
133 *Idem* 318–319.
134 *Idem* 312–319.

consumer would have expressly included bystanders.[135] She nevertheless submits that in the interest of legal certainty, it would have been preferable for the legislature to have consistently referred in section 61 to either "consumers" or "persons" harmed by goods and to specifically state whether bystanders harmed by defective goods are protected by section 61.[136]

7 CONCLUSION

The *Eskom* case is an unfortunate example of a genuine attempt by the legislature to create a very expansive consumer protection framework and in undertaking this gargantuan task, not paying appropriate attention to exactly how wide the concept of "consumer" should be defined to cater for all the types of liability that the Act seeks to provide for. Even the calls for a "purposive interpretation" to the product liability provisions in section 61 appear at first glance to be thwarted by the fact that the purposes of the Act all amount to the desire for greater protection of "consumers" as defined in the Act. For an Act that espouses the use of plain language as set out in section 22 thereof, the CPA dismally fails to follow its own admonishments as is clear from the inadvertent and inconsistent use of the concepts "consumer" and "person" in sections 53 and 61. It is clear that on face value the definition of "consumer" in section 1 of the CPA is not worded wide enough to appropriately accommodate the reach of the product liability provisions in section 61 with regard to the whole range of persons who may be regarded as plaintiffs in product liability matters. It is also clear that shoddy draftmanship and an arbitrary oscillation between the concepts "consumer" and "person" in section 61 has led to confusion about whether section 61 is to the avail of persons generally, thus including innocent bystanders, who wish to institute a product liability claim *ex delicto* for harm occasioned by a defective product. This problem has now been exacerbated by the decision of the Supreme Court of Appeal in the *Eskom* case. The Department of Trade and Industry is currently busy with a review of the CPA[137] and it is submitted that, rather than to wait for the Supreme Court of Appeal to revisit its opinion on who qualifies as plaintiffs under section 61 at some certain stage, the DTI review is an opportune moment to augment part (c) of the definition of "consumer" to specifically also include "innocent bystanders for purposes of liability under section 61".

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135 *Idem* 324.

136 *Ibid.*

137 See "The briefing to the Select Committee on Trade and International Relations on the 2018/19 Strategic and Annual Performance Plans of The National Consumer Commission (NCC) 06 June 2018" presented by Ms Thezi Mabuza, acting commissioner (available at https://bit.ly/2T9z93Z, accessed on 7 March 2019).