LIABILITY FOR DEFECTIVE PRODUCTS UNDER THE CONSUMER PROTECTION ACT

Prior to the Consumer Protection Act 68 of 2008 (‘the CPA’) coming into operation, consumers seeking redress for harm caused by defective products had to prove that the producer of the products was at fault in some way. In this regard, one of the most significant changes that the CPA introduced to South African consumer law is in the context of product liability: consumers no longer carry the heavy evidentiary burden to prove negligence on the part of the supplier from which the defective product was acquired.

Section 61 of the CPA provides that the producer, importer, distributor and retailer of a particular product (‘the supply chain’) are each liable for any harm caused (wholly or partly) by a product that is:

- unsafe;
- had a product failure, defect or hazard; or
- not adequately labelled so as to give proper instructions or warnings pertaining to any hazard that may arise from or be associated with the use of the product,

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

Furthermore, if in a particular case more than one party in the supply chain of the product is liable, their liability is joint and several. Consequently, a consumer who suffers harm from a defective product can bring a claim against any person in the supply chain, irrespective of whether they have contracted with that party and even where they are unable to establish negligence. The consumer, however, will still have to prove the existence of a defect, unsafe characteristic or hazard in the product and will have to prove that this was the cause of the harm suffered. Suppliers, manufacturers and distributors may not contract out of this strict liability towards consumers.

Harm for which a person in the supply chain may be held liable, includes the death of or illness or injury to a natural person, as well as loss of or physical damage to property.

For example: A buys a gas heater from a local hardware store (the supplier) and on the first opportunity he uses it, there is an explosion due to a defect in the mechanisms built into the heater. The explosion ruined the heater itself, cracked the glass coffee table that stood nearby and A sustained burn wounds.

A will be able to institute a claim for damages under section 61 of the CPA against the business from which he bought the heater, or the distributor of the heater or the importer thereof. A will not need to prove that there was negligence on the side of any of the persons/entities in the supply chain, but he must prove that there was a defect in the heater and that the defect caused the harm.
It must be noted that this so-called ‘strict liability’ is not unlimited: a particular supplier, such as the supplier of the gas heater in the above example, who supplied an unsafe product, may escape liability if he/she/it can show that, amongst other things:

(i) the product defect or hazard is wholly attributable to compliance with a public regulation;
(ii) where it is unreasonable to expect the distributor or supplier to have discovered the defect having regard to the role they play in the supply chain;
(iii) where the defect did not exist in the product when it was supplied by that party to another liable party; or,
(iv) where it is wholly attributable to compliance with instructions provided by the product supplier.

It is important to note that section 61 applies where there is a supply to any person/entity of any goods within the borders of South Africa, irrespective of whether the transaction is otherwise exempt from the provisions of the CPA. Therefore, all consumers of goods and services (regardless of the size of the consumer’s annual turnover or the fact that the consumer may be a corporate entity)* who suffer harm as a result of the supply of an unsafe, defective or hazardous product and/or the lack of warnings and instructions in respect thereof, will be entitled to claim damages in terms of section 61 from anyone in the supply chain.

* (Although entities with an asset value or annual turnover exceeding R 2 million are not protected as consumers under the CPA, as an exception, section 61 does offer relief to such entities)