

# The influence of the Consumer Protection Act 68 of 2008 on the warranty against latent defects, *voetstoots* clauses and liability for damages

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## OPSOMMING

### Die invloed van die Wet op Verbruikersbeskerming 68 van 2008<sup>1</sup> op die waarborg teen verborge gebreke, voetstootsklousules en aanspreeklikheid vir skade

Die bespreking fokus op die invloed van die Wet op Verbruikersbeskerming 68 van 2008 op die gemeenregtelike waarborg teen verborge gebreke en die gemeenregtelike remedies tot die koper se beskikking waar die waarborg nie nagekom word nie. Die verbruiker se regte op veilige, goeie gehalte goedere ingevolge artikel 55 sowel as die versweë waarborg van gehalte ingevolge artikel 56 word kritis bespreek. Die voortbestaan van voetstootsklousules ingevolge die Wet word bespreek asook die posisie waar eiendomsagente betrokke is by die verkoop van onroerende eiendom en die posisie ten opsigte van tweedehandse goedere. Ten laaste word die aanspreeklikheid vir skade deur goedere veroorsaak soos beoog in artikel 61 van die Wet bespreek.

## 1 Introduction

The Consumer Protection Act<sup>2</sup> (CPA) brought about significant changes to the commercial arena. It provides eight core fundamental consumer rights to consumers and also has a significant impact on the manner in which parties do business. More particularly it impacts on contracts of sale. The focus of this discussion will be on the effect of the CPA on the common law warranty against latent defects given by the seller as well as the effect of the CPA on the exclusion of the seller's warranty in terms of a *voetstoots* clause. The consumer's right to fair value, goods quality and safety (section 55) as well as the consumer's implied warranty of quality (section 56) is discussed critically. The situation where an estate agent is involved in a sale of immovable property as well as the sale of second-hand goods are also included in the discussion. A brief overview of the claim for damages caused by goods in terms of section 61 of the CPA is given as part of the remedies available to consumers for defective goods.

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1 'n Nie-amptelike vertaling van die *Consumer Protection Act 69 of 2008* is beskikbaar by [http://www.vra.co.za/index.php?option=com\\_content&view=category&layout=blog&id=3&Itemid=3](http://www.vra.co.za/index.php?option=com_content&view=category&layout=blog&id=3&Itemid=3) (red).

2 68 of 2008. Hereinafter referred to as "the CPA".

## 2 Legal Position Where the CPA is Not Applicable (Common Law Position)

### 2 1 Introduction

The common law position has been amended by the CPA but because of the scope of its application,<sup>3</sup> many sale agreements will fall outside the ambit of the CPA. In such instances the common law position prior the commencement of the CPA will remain. The warranty against latent defects may be given *ex lege* (as part of the *naturalia* of the contract of sale) or contractually (as part of the *incidentalalia*). The manner in which the warranty is given will also determine the remedies available to the purchaser should a latent defect be present in the thing sold (aeditilian remedies and the *actio empti*). The warranty may also be excluded by agreement and the *merx* is then sold "as is" or *voetstoots*. Much has been written about the common law warranty against latent defects, its application and development (from its inception in Roman law, its rediscovery in Roman-Dutch law and finally its application in modern South African law).<sup>4</sup> Of particular importance is the situation where the seller is also a merchant seller (dealer) or a manufacturer. As will be shown, the common law position has been amended where the CPA is applicable. With regard to liability the whole concept of strict liability is also introduced in terms of section 61 of the CPA and deserves discussion.

### 2 2 Meaning of Latent Defect

A latent defect constitutes an impairment of the usefulness of the thing sold and is not discoverable upon reasonable inspection by an ordinary person (not an expert).<sup>5</sup> The defect renders the *merx* unfit for the purpose for which it is bought or for which it is normally used and this must be determined objectively. In *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd*<sup>6</sup> a latent defect is defined as an abnormal quality or attribute which destroys or substantially impairs the utility or

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3 See paragraph 3 1 of this discussion.

4 Mostert, Joubert & Viljoen *Die Koopkontrak* (1972) 185-238; Kerr *The Law of Sale and Lease* (2004) 106-136, 205-219; Zimmerman *The Law of Obligations, Roman Foundations of the Civilian Tradition* (1990) 305-337; Zimmermann & Visser *Civil Law and Common Law in South Africa* (1996) 77-383; O' Donovan *MacKeurtan's Sale of Goods in South Africa* (1972) 238-265; Kahn *Principles of the Law of Sale and Lease* (2010) 26-40; Lötz "Verborgte gebreke, gevolgskade, handelaar, fabrikant en Siener van Rensburg" 2001 *De Jure* 219 219-246; Lötz "Die koopkontrak: 'n Historiese terugblik" (Deel 2) 1992 *De Jure* 143 148-155; Nagel *et al* *Commercial Law* 4 ed (2011) 223-224.

5 *MacKeurtans* 338-240; Nagel *et al* 223.

6 1977 3 SA 670 (A) 680. See also Mostert *et al* 185; *Dibley v Furter* 1951 4 SA 76 (C) 81; *Truman v Leonard* 1994 4 SA 371 (SE); *Van der Merwe v Meades* 1991 2 SA 1 (A); *De Vries v Wholesale Cars* 1986 3 SA 22 (O); *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd* 2002 2 SA 447 (AD) 48.

effectiveness of the *merx*. To establish the abovementioned, the court asked whether the defect was easily visible and reasonably discoverable by an ordinary purchaser and whether or not the purchaser was aware of the defect at the time of conclusion of the contract. The test is an objective one and is attached to the usefulness of the thing sold and not dependant on the specialist knowledge of the purchaser.<sup>7</sup> The defect must be material and substantial to qualify as a latent defect and affect the utility of the *merx*. The defect must have existed at time of conclusion of the contract and the purchaser must not have been aware of the defect at that time. The onus is on the purchaser to prove the latter. Although case law<sup>8</sup> have found a concealed servitude to be a latent defect it has been criticised with merit. Because a concealed servitude affects the use, enjoyment and disposal of the thing sold it is a form of eviction rather than a latent defect.<sup>9</sup> A patent defect will be noticed by a diligent person. The nature of the defect will determine whether it is latent or patent.<sup>10</sup> Although case law<sup>11</sup> have found a concealed servitude to be a latent defect it is has been criticised with merit.<sup>12</sup>

## 2 3 Warranty Against Latent Defects

The warranty against latent defects applies automatically by operation of law or *ex lege* and forms part of every contract of sale as a *naturalium*. Where the warranty is given *ex lege* the remedies available to the purchaser will be the aedilitian remedies (*actio quanti minoris* and the *actio redhibitoria*). It is also possible that a seller may give an express or tacit contractual warranty. This warranty may include the absence of bad or the presence of good qualities in the *merx*. Where the warranty is given contractually the remedy available to the purchaser is the *actio empti*. The purchaser is entitled to cancel the contract and claim damages in terms of the *actio empti*. In terms our common law the purchaser will always be able to use the aedilitian remedies even if a contractual remedy is present.<sup>13</sup> A claim for damages would however not be available to the purchaser in terms of the aedilitian actions.

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7 Nagel *et al* 223.

8 *Southern Life Assoc v Segall* 1925 OPD 11; *Overdale Estates (Pty) Ltd v Harvey Greenacre & Co Ltd* 1962 3 SA 767 (D); *Glaston House (Pty) Ltd v Inag (Pty) Ltd* 1977 2 SA 846 (A).

9 De Wet & Van Wyk *Die Suid-Afrikaanse Kontrakte en Handelsreg* (1978) 330.

10 *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1964 3 SA 561 (A) 677; *Waller v Pienaar* 2004 6 SA 303 (C) 308.

11 *Southern Life Assoc v Segall* 1925 OPD 11; *Overdale Estates (Pty) Ltd v Harvey Greenacre & Co Ltd* 1962 3 SA 767 (D); *Glaston House (Pty) Ltd v Inag (Pty) Ltd* 1977 2 SA 846 (A).

12 De Wet & Van Wyk 330.

13 Kerr 108 n 22 states that the case of *Hackett v G & G Radio & Refrigerator Corporation* 1949 3 SA 664 (A) would be authority for the proposition that during the course of history the *actio redhibitoria* absorbed some of the characteristics of the *actio empti*.

## 2 4 Aedilitian Remedies

The aedilitian actions or remedies will be available where there is a breach of warranty against latent defects and no express or tacit guarantee is present in terms of the contract, nor is the warranty expressly excluded. It can also be instituted where the seller fraudulently conceals the defect, guarantees the presence of good or absence of bad characteristics and were a *dictum et promissum*<sup>14</sup> was made.<sup>15</sup>

Liability under the aedilitian actions presupposes that the defect is not insignificant, that it is latent, that the purchaser is unaware of it and that the defect existed at time of conclusion of the contract.<sup>16</sup> Kerr declares that the motive for these actions is to assist buyers whenever they are cheated by sellers.<sup>17</sup> According to Kerr the extension of the aedilitian actions to cases in which the seller was unaware of the disease or defect is the main reason for the survival of the actions in modern times.<sup>18</sup>

The purpose of the *actio redhibitoria* is to put the parties in the position they were before conclusion of the contract by way of restitution. The onus is on the purchaser to prove that a reasonable person would not have bought the thing sold had he been aware of the latent defect. Kerr is of the opinion that the buyer does not have to prove that the disease or defect was apparent at the time of the sale; only that the thing sold had within it the beginnings of what is later seen to be a disease or defect.<sup>19</sup> This would seem to be consistent with the definition of a defect going to the root or nature of the particular *merx*. The test would be whether or not the latent defect is serious enough to render the *merx* unfit for the purpose for which it was bought.<sup>20</sup>

A *pro rata* reduction in the purchase price may be claimed with the *actio quanti minoris*. It may also be instituted more than once for every latent defect that existed at time of conclusion of the contract.<sup>21</sup> A purchaser may institute action for a reduction in the purchaser price either where the *dictum et promissum*<sup>22</sup> or the defect is not material or

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14 In *Phame (Pty) Ltd v Paizes* 1973 3 SA 397 (A) a *dictum et promissum* was defined as a declaration made during negotiations with regard to the quality of the *merx* that turns out to be false. Something more than mere praising of the thing sold.

15 Nagel *et al* 226-227.

16 Zimmermann & Visser 379-380.

17 Kerr 107. "It is however, to be understood that a seller, even though he was unaware of the existence of faults, liability for which is ordained by the aediles, must nevertheless be held liable. Nor is this unfair; for the seller was in a position to inform him on these matters, while to the buyer it makes no difference whether his deception is due to the seller's ignorance or to his guile."

18 Kerr 124.

19 Kerr 115.

20 *De Vries v Wholesale Cars (Pty) Ltd* 1986 2 SA 22 (O) 24. See also *Janse van Rensburg v Grieve Trust CC* 2000 1 SA 315 (C).

21 Nagel *et al* 226-227.

22 Kerr 135.

where the purchaser chooses to retain the property.<sup>23</sup> The *actio quanti minoris* allows the purchaser to claim a reduction in the purchase price while retaining the thing sold. The amount of the reduction is the difference between the purchase price and the value of the defective goods.<sup>24</sup> In the *Sarembock v Medical Leasing Services (Pty) Ltd & another*<sup>25</sup> the court held that the value of the property sold in its defective state is evidenced by its market value.<sup>26</sup> If there is no market for the property, other methods of determining its value will be considered like subtracting the costs of repair from the purchase price paid at time of conclusion of the contract.<sup>27</sup> The *actio quanti minoris* may also be instituted in the alternative to the *actio redhibitoria* provided it is based on different factual averments. The same applies to the institution of the *actio quanti minoris* in the alternative to the *actio empti*.<sup>28</sup>

The aedilitian actions or remedies are not available to the purchaser where the latent defect did not exist at time of conclusion of the contract, the defect was patent not latent, the sale was *voetstoots*, the latent defect was corrected, there was a waiver of the warranty or prescription occurred.<sup>29</sup> It would further not be applicable to goods bought at an auction or a sale by order of the court.<sup>30</sup> Where the whole contract of sale is subject to a suspensive condition, the aedilitian actions will only be available after the condition has been fulfilled.<sup>31</sup>

## 25 The *Actio Empti*

The purchaser may institute the *actio empti* where there is either an express or tacit warranty given in terms of the agreement. Other grounds<sup>32</sup> for institution include the warranty by the seller of the presence of good or the absence of bad characteristics in the thing sold; where the seller concealed the defect<sup>33</sup> and where the seller is a merchant seller or manufacturer. The *actio empti* may also be excluded by way of a *voetstoots* clause in an agreement. The purchaser may cancel the agreement and claim damages in terms of the *actio empti*. The claim for damages is based on breach of contract and the breach must be sufficiently serious to warrant cancellation.<sup>34</sup>

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23 Kahn 37.

24 Zimmermann & Visser 380.

25 1991 1 SA 344 (A).

26 215.

27 352. See also Kerr 129-130.

28 *Le Roux v Autovend (Pty) Ltd* 1981 4 SA (N) 890-894.

29 Nagel *et al* 228.

30 Kerr 135.

31 *Idem*.

32 For a summary of grounds for institution see Nagel *et al* 224-226.

33 In *Van der Merwe v Meades* 1991 2 SA 1 (A) 3 the court held that the purchaser had to prove that the seller was aware of the existence of a latent defect at time of conclusion of the contract and concealed it *dolo malo* (with the intention to defraud). The purchaser will in these instances be entitled to use the *actio empti* even if a *voetstoots* clause is present.

34 378.

## 2 6 *Voetstoots* Sales and Non-disclosure

Where the *voetstoots* clause is present the *merx* is sold and delivered as is. The word *voetstoots* is derived from the custom in terms of Roman-Dutch law to “*stoten*” or push the thing sold (for example a barrel of grain) with ones foot to indicate the delivery and sale of the property without coming with complaints later.<sup>35</sup> Kerr describes a *voetstoots* clause as a clause which stipulates that the seller is not to be held responsible for diseases or defects and goods are sold “as it stands” or “with all its faults”.<sup>36</sup> The effect of such a clause is that the seller does not take the risk of the presence of any diseases or defects, but is liable for misrepresentations of any kind.<sup>37</sup> Even if the word *voetstoots* is not expressly used in the clause which excludes liability, it is still referred to as such.<sup>38</sup> In general the parties exclude the aedilitian actions as well as the *actio empti* where a *voetstoots* clause is present.

Where contracting parties contradicted themselves (where for example a warranty was given by the seller that the thing sold is free from diseases but the contract also contains a *voetstoots* clause) the courts should not approach the question mechanically, but should ask which clause more reflects the true intentions of the parties.<sup>39</sup> In principle a *voetstoots* clause may be express or implied but the courts will not likely be persuaded that parties entered into an implied *voetstoots* clause.<sup>40</sup> Moreover there is a presumption against *voetstoots* sales.<sup>41</sup>

In the case of *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd & another*<sup>42</sup> the court held that where an indemnity clause excluded liability on an implied warranty of quality it may also exclude a warranty against latent defects. The court held that a warranty against latent defects was not dependent on contractual consensus but rather imposed by law and it would be inappropriate to talk about an implied warranty.<sup>43</sup>

The question may be asked whether a seller can “hide” behind a *voetstoots* clause where the seller concealed the latent defect. In *Orban v Stead*<sup>44</sup> the court confirmed the common law principle that there is no general duty on a seller to disclose. The court held that there are three situations when the silence of the seller will give rise to an action based

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35 *Nederlandse spreekwoorden, spreken en zegswijzen* (2009) 362. See also Otto “Verborgte gebreke, *voetstootsverkope*, die Consumer Protection Act en die National Credit Act” 2011 *THRHR* 525 525-545, 530.

36 Kerr 150.

37 *Ibid.*

38 *Ibid.*

39 Kerr 151.

40 *Ibid* 152.

41 *Schwarzer v John Roderick's Motors (Pty) Ltd* 1940 OPD 176 per Van den Heever J.

42 2002 6 SA 256 (C).

43 276-278.

44 1978 2 SA 713 (W) 717.

on non-disclosure, namely where there is concealment, where there is a designed concealment or where there is a simple non-disclosure.<sup>45</sup> There is however no duty on a seller to disclose where the seller does not know that the purchaser acted under an erroneous belief.<sup>46</sup> Where the seller intentionally concealed the defect he will be guilty of misrepresentation and the *actio empti* may be instituted.<sup>47</sup> This will also be the case where the purpose of the concealment was to mislead. The seller will not be protected by a *voetstoots* clause where he had knowledge of the latent defect at time of conclusion of the contract and fraudulently concealed it. This was confirmed in the case of *Truman v Leonard*<sup>48</sup> where the court held that where a contractual undertaking came about through fraud it is against public policy. A seller may only rely on a *voetstoots* clause where he was honest.<sup>49</sup> The court held that where there was a deliberate (fraudulent) concealment of latent defects by the seller which caused damage to the purchaser, the cause of action may be based on either the aedilitian actions or on delict on the grounds of fraudulent misrepresentation.<sup>50</sup>

In the case of *Waller v Pienaar*<sup>51</sup> the aedilitian actions were instituted because of a latent defect (the foundations of the property had not been compacted properly). The court referred to the "honesty requirement" as laid down in the *ABSA Bank Ltd v Fouche*<sup>52</sup> case and found that the defect was within the seller's exclusive knowledge and that the seller was aware of the fact that the purchaser did not know about the defect. The court held that intentional or negligent breach of the duty to disclose will automatically attract delictual liability based on public policy. The judgment is criticised by Lötz and Nagel<sup>53</sup>, firstly because the court found the defect to be latent. Lötz and Nagel refer to the definition of a latent defect as laid down in the *Holmdene Brickworks* case<sup>54</sup> and argue that the defect was patent rather than latent and that the purchaser was not discharged from his duty to do proper reasonable inspection of the property.<sup>55</sup> It is argued that the court ignored both the *caveat emptor* rule and the fact that there is no general duty to disclose on the seller. The latter was confirmed in the same case to which the court referred (*ABSA v Fouche*).<sup>56</sup> According to Lötz and Nagel the seller would only have a duty to disclose where such information does not fall within the scope of the purchaser; there is no possibility that the purchaser could obtain such knowledge on his own and the information within the exclusive

45 717-718.

46 719-720.

47 Nagel *et al* 225.

48 1994 4 SA 371 (C).

49 377.

50 378.

51 2004 6 SA 303 (C).

52 2003 1 SA 176 (SCA) 180-181.

53 "Waller v Pienaar 2004 6 SA 303 (K), Openbaringsplig van die Verkoper" 2005 *De Jure* 188 188-194.

54 1977 3 SA 670 (A) 680.

55 192-193.

56 193-194.

knowledge of the seller results in unequal bargaining positions.<sup>57</sup> In *Odendaal v Ferraris*<sup>58</sup> the court went as far as to determine that a failure to obtain statutory approval for a building was a latent defect and that a *voetstoets* clause would protect a seller in such a situation.

## 2 7 Merchant Sellers, Manufacturers and Grounds for Liability

Many judgments have been handed down regarding the issue of liability of merchant sellers and manufacturers for damages caused by latent defects.<sup>59</sup> Where a seller is also a merchant seller or dealer the seller will be liable for damages (including consequential damages)<sup>60</sup> in respect of latent defects in the *merx*. The merchant seller (dealer) had to profess in public to have been a dealer at time of conclusion of the contract and have expert knowledge and skill of the *merx* sold (the so-called Pothier rule). There have been conflicting viewpoints regarding the interpretation of the Pothier rule as well as the liability towards damages of the merchant seller.<sup>61</sup> Recent authority<sup>62</sup> is to the effect that the remedy of a purchaser against a merchant seller is a general contractual remedy based on the breach of a sale contract (the *actio empti*).

The manufacturer is liable for all damages (including consequential damages) and does not have to profess in public to have special knowledge with regard to the thing sold.<sup>63</sup> Negligence or ignorance of the defect is no defence against liability.<sup>64</sup> There are three cases of importance leading up to the promulgation of the CPA and will forthwith be discussed.

In *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd*,<sup>65</sup> the court referred to the manufacturer's liability as product liability and explained that a *nexus* between the manufacturer and consumer is not a requirement. A manufacturer who distributes a product commercially, which, in the course of its intended use, and as a result of the defect, caused damage to the consumer thereof, acts wrongly and thus unlawfully according to

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57 194.

58 2008 4 All SA 529 (A).

59 *Erasmus v Russell's Executers* 1904 TS 365; *Marais v Commercial General Agencies Ltd* 1922 TPD 440; *Young's Provision Stores (Pty) Ltd v Van Ryneveld* 1936 CPD 87; *Lockie v Wightman and Company* 1950 1 SA 361 (SR); *Odendaal v Bethlehem Romery Bpk* 1954 3 SA 370 (OPD); *Kroonstad Westelike Ko-Operatiewe Vereniging Bpk v Botha* 1964 3 SA 561 (A); *Langeberg Voedsel Bpk v Sarculum Boerdery* 1996 2 SA 565 (A).

60 Consequential damages or loss that flows from direct damages.

61 *Langeberg Voedsel Bpk v Sarculum Boerdery* 1996 2 SA 565 (A). See also *Zimmermann Obligations* 335.

62 *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd & another* 2003 2 ALL SA 167 (SCA); *Ciba-Geigy (Pty) Ltd v Lushof Farms* 2002 2 SA 447 (SCA).

63 *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 3 SA 670 (A) 680; *Langeberg Voedsel Bpk v Sarculum Boerdery* 1996 2 SA 565 (A); *Sentrachem Bpk v Prinsloo* 1997 2 SA 1 (A).

64 *D & H Piping Systems (Pty) Ltd v Trans Hex Group Ltd* 2006 3 SA 593 (SCA)

65 2002 2 SA 447 (SCA).

the legal convictions of the community.<sup>66</sup> The result was that both the merchant seller and the manufacturer were held to be jointly and severally liable. (The merchant seller's liability was based on a contractual warranty whereas the manufacturer's liability was based on delict).<sup>67</sup> Neethling and Potgieter<sup>68</sup> support the court's decision to move towards product liability for manufacturers and voice their hope that courts will apply the same in future judgments.<sup>69</sup> Lötz *et al*<sup>70</sup> question whether the Pothier rule is still juridically relevant and workable in a modern trade environment. It is argued that the true implication is that the rule transforms a general question of fact into an absolute legal principle.<sup>71</sup> An argument is made in favour of the foreseeability test in terms of our Law of Damages to determine consequential damages rather than applying the Pothier rule.<sup>72</sup>

Although the cause of action in the case of *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd*<sup>73</sup> was based on a claim for personal injury caused by a delict, the case is of importance with regard to product liability. The court held that there could be reasons for imposing strict liability on manufacturers but that it was not appropriate for the courts to address the issue. The court commented that the legislature was in a far better position to do so and for the court to attempt to alter the law judicially would raise more questions than it would answers.<sup>74</sup> (Prophetic words with regard to the CPA even though the CPA only came into operation seven years after the judgment). Van Eeden argues that despite the court's remarks to the effect that the *Aquilian* liability was really satisfactory, it provided only that the onus of proof was on the manufacturer and that an extended rule of *re ipsa loquitur*<sup>75</sup> was brought to include product liability.<sup>76</sup>

In the related case of *AB Ventures Ltd v Siemens Ltd*<sup>77</sup> the court confirmed the liability of manufacturers based on product liability.<sup>78</sup> The court held that there was a legal duty on the manufacturer to make sure that any product it manufactured and supplied complied with South African and international legislation which had as its aim ensuring that the product was fit for human consumption. Because of the manufacturers negligence in this regard, the court held it to be liable for

66 470.

67 475.

68 "Die Hoogste Hof van Appel laat die deur oop vir strikte vervaardigers-aanspreeklikheid" 2002 *TSAR* 582 – 586.

69 586.

70 Lötz *et al Specific Contracts in Court* (2009) 56-57.

71 *Ibid.*

72 *Ibid.*

73 2003 2 ALL SA 167 (SCA).

74 177-178.

75 The facts speak for themselves.

76 Van Eeden *A guide to the Consumer Protection Act* (2009) 66.

77 2011 4 SA 614 (SCA).

78 26.

consequential damages.<sup>79</sup> The *voetstoets* clause protecting a seller who is also a manufacturer from claims based on latent defects will be of no effect where the seller delivered goods other than those contracted for.<sup>80</sup>

### 3 Influence of the CPA on the Common Law Position

#### 3 1 Introduction

Section 2 Part H of the CPA<sup>81</sup> deals with the consumer's fundamental right to fair value, good quality and safety. As will be shown, the CPA has a fundamental influence on the common law warranty against latent defects. It is extremely important however to keep in mind that the CPA is not applicable to once-off transactions<sup>82</sup> or where the consumer is a juristic person<sup>83</sup> with an asset value or annual turnover, at the time of the transaction that equals or exceeds the threshold value as determined by the Minister of Trade and Industry.<sup>84</sup> The CPA will also not be applicable where goods and services are not supplied in the ordinary course of business. Where a home owner for example wants to sell his residential property or even vacation property and sells it once-off or not in the ordinary course of his business, the common law position discussed above will be applicable. (The same of course applies where the *merx* is movable property, for instance a motorcar). Typical examples where the CPA will apply to the sale of immovable property would be where the seller is a property developer and investors who buy, renovate and sell houses as a business. The CPA is also applicable where members of a home owners' association are involved.<sup>85</sup>

The position of merchant sellers and manufacturers deserves discussion. It is clear that goods and services are supplied in the ordinary course of their business. Where a merchant seller or manufacturer falls under the definition of the CPA and supplies goods and services in the ordinary course of business to a consumer (purchaser) for consideration, the CPA will apply. The CPA therefore regulates the marketing, relationships, transactions and agreements between producers,

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79 27.

80 22.

81 Ss 53 – 61 CPA.

82 S 5 CPA.

83 See s 1 CPA: definition of "juristic person" includes a body corporate, trust and partnership.

84 Ito GN 294 GG 34181 (01-04-2011) the threshold amount is R2 million.

85 S 5(6)(a) CPA provides that the CPA will be applicable where there is a supply of any goods or services in the ordinary course of business to any of its members by a club, trade union, association, society or other collective, whether corporate or unincorporated, of persons voluntarily associated and organised for a common purpose or purposes, whether for fair value consideration or otherwise, irrespective of whether there is a charge or economic contribution demanded or expected in order to become or remain a member of that entity.

suppliers, distributors, importers, retailers, service providers and intermediaries, on the one hand, and consumers on the other.<sup>86</sup>

Although Chapter 2 Part H of the CPA also deals with various other consumer rights related to the right to fair value, good quality and safety (ie the consumer's right to demand quality service, warranty on repaired goods, safety monitoring and recall etcetera) the focus of this discussion will be on the definition of a defect, the consumer's rights to safe, good quality goods, the implied warranty of quality and the liability for damages caused by goods.

### **3 2 Definition of “Defect” in Terms of the CPA**

Section 53 of the CPA provides certain definitions relevant to the right to fair value, good quality and safety (in other words applicable to the whole of Part H). “Defect” means a defect in goods, which is any material imperfection in the manufacture of goods or components that renders the goods less acceptable, including any characteristic of the goods or components that caused it to be less useful, practicable or safe, in circumstances that persons, generally, would be reasonably entitled to expect.<sup>87</sup> The definition in section 53 seems to be a confirmation of the definition given to “latent defects” in *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd*.<sup>88</sup> Perhaps the legislature should also have included the proviso in terms of section 55(5)(a) for greater certainty from the outset as part of the definition of “defect”.<sup>89</sup>

Van Eeden<sup>90</sup> is of the opinion that the definitions in terms of section 53 of the CPA and more specifically the definition of “defect” would require proof of the imperfection or characteristic, as well as proof of the state of the goods without the imperfection or characteristic. Proof also needs to be given about what people would reasonably be entitled to expect in the circumstances. In their comments on the Consumer Protection Bill,<sup>91</sup> Loubser and Reid<sup>92</sup> argue that the wording of what a consumer is “entitled” to expect is in contrast with actual consumer expectations and would lead back to a standard of reasonableness.<sup>93</sup> It is further argued that the consumer expectations test should be done away with in favour of a general standard of reasonableness assessed with hindsight.<sup>94</sup> Though Van Eeden acknowledges the merit of the

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86 See s 1 CPA for the appropriate definitions.

87 Ss 53(1)(a)(i), 53(1)(a)(ii) CPA.

88 1977 3 SA 670 (A).

89 In other words also including that it is irrelevant whether the defect is latent or patent.

90 245.

91 The wording of s 53 CPA remained unchanged in the final CPA.

92 “Liability for products in the Consumer Protection Bill 2006: A Comparative Critique” 2006 *Stell LR* 413 427. Take note that the writers comment on the Bill not the CPA. The arguments and interpretations are still relevant.

93 *Supra* 428.

94 *Ibid.*

argument of Loubser and Reid,<sup>95</sup> he argues that the wording is more closely related to language used in international instruments.<sup>96</sup> Van Eeden comments that the CPA has introduced a modified negligence liability regime.<sup>97</sup> At first glance the wording in section 53 (1)(a)(i) and (ii) “than persons generally would be reasonably entitled to expect” seems to entail the so called abortive legitimate expectations approach. It is however argued by Botha and Joubert to be excluded in the CPA.<sup>98</sup> One of the arguments against the legitimate expectations (consumer expectations) test is that it relates to design defects and that it is impossible for an ordinary consumer to define what he expects of such technical characteristics of a product.<sup>99</sup> This followed the line of criticism introduced by Loubser and Reid.<sup>100</sup> Jacobs, Stoop and Van Niekerk warns however that the exact extent of the test for defective goods or services will have to be determined based on the facts of each case when interpreted by our courts, taking all the relevant circumstances into account.<sup>101</sup>

### **3 3 Section 55: The Right to Safe, Good Quality Goods**

Section 55 of the CPA deals with a consumer’s right to safe, good quality goods and is not applicable to goods bought at an auction.<sup>102</sup> Section 55(2) stipulates that all goods must be reasonably suitable for the purposes for which they are generally intended, of good quality, in good working order and free of any (not only material) defects. The goods must 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.<sup>103</sup> The goods also need to be in compliance with any applicable standards set under the Standards Act,<sup>104</sup> or any other public regulation (keeping in mind that it is irrelevant whether the defect is latent or patent in terms of section 55(5) of the CPA). In addition, if a consumer has specifically informed a supplier of the particular purpose for which he or she wishes to use or acquire the goods and the supplier ordinarily offers to supply such goods, or acts

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95 Van Eeden 245.

96 Such as s 3 United Kingdom Consumer Protection Act 1987.

97 Which is broadly based on the European Union Product Liability Directive 85/374/EEC and the UK Consumer Protection Act 1987.

98 “Does the Consumer Protection Act 68 of 2008 provide for strict liability? – A comparative analysis.” 2011 *THRHR* 305 216.

99 *Ibid.*

100 2006 *Stell LR* 412 425.

101 Jacobs, Stoop & Van Niekerk “Fundamental consumer rights under the Consumer Protection Act 68 of 2008: A critical overview and analysis” 2010 *PER* 302 363.

102 S 55(1).

103 S 55(4) CPA which include; the manner in which the goods were marketed, packaged and displayed, the use of any trade description or mark, any instructions for, or warnings about the use of the goods, the range of things that might reasonably be anticipated to be done with the goods and the time when the goods were produced and supplied.

104 29 of 1993.

knowledgeable about the use of those goods, a consumer may forthright expect that such goods are reasonably suitable for the indicated purpose.<sup>105</sup> I am in agreement with Naudé that a consumer would not have to prove that the goods were unfit for the purpose at time of conclusion of the contract as is the case under the common law.<sup>106</sup>

In determining whether goods are in line with the requirements of sections 55(2) and 55(3) of the CPA, the use to which they would normally be put must be considered, which seems to be an indication that normal wear and tear may be taken into account. 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 goods.<sup>107</sup>

It is however a defence if a consumer was informed of the specific condition of the goods and he or she expressly accepted the goods on that basis or knowingly acted in a way compatible with accepting the goods in that condition.<sup>108</sup> When dealing with immovable property for example a description of the property in terms of section 55(6) would include the history (age or repairs affected) of the property and the current defects known to the seller. It could also include a general statement that the seller is not aware of any defects other than those disclosed, but that the property may or may not have additional defects (listing things like dampness or a leaky roof to the property's history and location). Lastly a statement that the property is offered for sale on the conditions described above could also be included in terms of section 55(6).

### 3 4 Section 56: The Implied Warranty of Quality

The above right to quality of goods has been safeguarded by an implied contractual warranty.<sup>109</sup> If the goods do not comply with the requirements and standards contemplated in section 55(2) of the CPA, a consumer may return the goods within six months to the supplier (without penalty) at the supplier's risk and expense. If the goods are returned, a supplier must, at the direction of the consumer, either repair or replace the defective goods, or refund the purchase price,<sup>110</sup> provided that if a supplier repairs any goods unsuccessfully he must, within three months of such failed repair, replace it or refund the purchase price.<sup>111</sup> It is uncertain whether this six month limitation has reference to the life span of the implied warranty (in which instance a *voetstoots* clause may

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105 S 55(3) CPA.

106 Naudé "The Consumer's Right of Safe, Good Quality Goods and the Implied Warranty of Quality Under Sections 55 and 56 of the Consumer Protection Act 68 of 2008" 2011 *SA Merc LJ* 336 339.

107 S 55(5)(a) CPA.

108 S 55(6) CPA.

109 S 56(1) CPA.

110 S 56(2) CPA.

111 S 56(3) CPA.

become operational after six months from conclusion of an agreement but it would seem unlikely), or execution of the remedies (in which scenario the implied warranty will exist indefinitely and the normal prescription rules regarding the institution of a claim will prevail). It is submitted that the latter approach is more acceptable and more in line with the purposes of the CPA.<sup>112</sup>

In terms of section 56(1) any transaction or agreement is subject to an implied warranty by the supplier to the effect that any supplied goods comply with the quality requirements and standards contemplated in section 55. However, this implied warranty is not applicable if the goods fail to meet the necessary standard because they were tampered with in some way after leaving the control of the supplier,<sup>113</sup> or if a consumer was informed of the specific condition of the goods and he or she expressly accepted the goods on that basis or knowingly acted in a way compatible with accepting the goods in that condition.<sup>114</sup> Furthermore, this implied warranty is in addition to any other implied (not tacit) warranty or condition imposed by the common law, the CPA itself, any public regulation or express contractual warranty or condition.<sup>115</sup>

### ***3 4 1 Remedies Available to the Consumer in Terms of Section 56***

Jacobs, Stoop and Van Niekerk argue that section 56 poses many interpretational problems and is one of the most controversial sections in the CPA.<sup>116</sup> It also has a potential extensive impact on the common law because even where a consumer examined goods and detected a defect prior to delivery but still accepted delivery, the consumer will still be entitled to rely on the remedies in terms of section 56 as a wider interpretation gives more protection to the consumer.<sup>117</sup>

The consumer has the choice of a refund, replacement or repair of the goods in terms of section 56. Jacobs, Stoop and Van Niekerk are of the opinion that the implied warranty under section 56(1) is more extensive than the implied warranties under the common law.<sup>118</sup> The writers also argue that the use of the word “or” between producer and importer means that the warranty is either given by the producer or the importer and cannot pertain to both simultaneously.<sup>119</sup>

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<sup>112</sup> Jacobs, Stoop & Van Niekerk 2010 *PER* 302 373.

<sup>113</sup> S 56(1) CPA.

<sup>114</sup> S 55(6) CPA.

<sup>115</sup> S 56(4) CPA.

<sup>116</sup> Jacobs, Stoop & Van Niekerk 2010 *PER* 302 373.

<sup>117</sup> *Ibid.*

<sup>118</sup> The common law warranties include the warranty against latent defects, the warranty of fitness for purpose, the warranty of reasonable merchantable quality and the warranty of the skill of art.

<sup>119</sup> Jacobs, Stoop & Van Niekerk 2010 *PER* 302 371. See also fn 479 where the writers confirm the extensive application of the CPA.

This remedy may pose a practical problem where the goods are immovable property and transfer thereof into the name of the consumer and registration of a bond over it has been affected. Though Jacobs, Stoop and Van Niekerk<sup>120</sup> are uncertain whether or not the implied warranty of quality would apply to immovable property, it is submitted that the warranty will always apply to goods<sup>121</sup> (including immovable property) supplied in the ordinary course of business to a consumer for consideration. The writers correctly state that the courts or the legislature would have to clarify the application of section 56 to immovable property.<sup>122</sup>

Because the consumer has a choice between replace, refund or repair it would be problematic where the consumer chooses a refund or a replacement of immovable property. Delivery of immovable property is on the date of registration thereof in the Deeds Office (also being the date when ownership is transferred).<sup>123</sup> South Africa follows an abstract system of ownership and it would be very time-consuming, inconvenient and costly to "deregister" the property or even refund the purchase price, especially where a bond is also registered. It is difficult to imagine a court making such an order and the costs related thereto would be excessive.

### **3 5 May a Consumer Institute Common Law Remedies where the CPA is Applicable?**

The question may be asked whether the common law remedies (*actio quanti minoris*, *actio redhibitoria* and *actio empti*) are still available to the consumer where the CPA is applicable or whether these actions have been substituted by legislative remedies. The answer is contained in sections 2(10) and 56(4) of the CPA. Section 2(10) provides that no provision of the CPA may be interpreted so as to preclude a consumer from any rights afforded in terms of the common law. Section 56(4) provides that the implied warranty of quality and the right to replace, refund or repair goods are *in addition*<sup>124</sup> to any implied warranty or condition imposed by the common law, the CPA or other public regulation<sup>125</sup> and any express warranty or condition stipulated by a retailer, producer, importer, distributor as the case may be.<sup>126</sup> It would seem therefore that the common law remedies will still be available to the consumer (purchaser). Practically speaking there would be no sense in instituting the *actio redhibitoria* because the defect would have to be of a material nature and relying on the implied warranty would be much less cumbersome. Nothing prevents a consumer from instituting the

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120 Jacobs, Stoop & Van Niekerk 2010 *PER* 302 375.

121 Definition of "goods" in s 1 CPA includes an interest in land.

122 *Ibid.*

123 Nagel *et al* 213. See also Schutte "The characteristics of an abstract system for the transfer of property in South African law as distinguished from a causal system" 2012(3) 120 120-151.

124 Own emphasis.

125 S 56(4)(a) CPA.

126 S 56(4)(b) CPA.

*actio quanti minoris* but it would be much simpler to rely on the implied warranty of quality in terms of section 56. Jacobs, Stoop and Van Niekerk argue that a consumer would only have the common law remedies at his disposal where the consumer discovers the defect or a breach of the implied warranty occurred six months or longer after delivery of the goods.<sup>127</sup> This is not a correct interpretation taking into account section 2(10) and 56(4).

It can be argued that “harm” as defined in the CPA<sup>128</sup> is not synonymous to damages in a contractual sense or damages that can be claimed in terms of the *actio empti*. The rationale for instituting the *actio empti* over and above section 56 would be the additional claim for damages. (If the damages claimed in terms of the *actio empti* also fall within “harm” as contemplated in section 61(5), this will be taken into account).

### 3 6 The Pothier Rule

Though the wording of section 55(3) of the CPA looks similar to that of the Pothier rule, it is not and should not be regarded as a confirmation thereof. Section 55(3) is not applicable to the supply of any or all goods but only relates to goods where the consumer *specifically*<sup>129</sup> informed the supplier of the *particular*<sup>130</sup> purpose for which the consumer wishes to acquire or use the goods. The supplier will therefore only be “measured” by the requirements contained in sections 55(3)(a) and (b) where goods were sold (supplied) for a particular purpose or use and where the purchaser (consumer) specifically informed the supplier thereof. The Pothier rule (as it has been applied in terms of our positive law) has two requirements, both of which must be present. The seller must be a merchant seller *and*<sup>131</sup> must have professed in public to have expert knowledge and skill. Section 55(3) does not call for both of these requirements to be present and clearly states that the supplier must either ordinarily offer to supply such goods<sup>132</sup> *or*<sup>133</sup> act in a manner consistent with being knowledgeable about the use of the goods. Before a consumer therefore has a right to expect that goods are reasonably suitable for the specific purpose that the consumer has indicated the following requirements need to be met: firstly the consumer must inform the supplier of the particular purpose or use and secondly the supplier must either ordinarily offer to supply such goods *or*<sup>134</sup> act in a manner consistent with being knowledgeable about the use of the goods.

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127 Jacobs, Stoop & Van Niekerk 2010 *PER* 302 373.

128 S 61(5) CPA.

129 Own emphasis.

130 *Ibid.*

131 *Ibid.*

132 Goods for a particular purpose or use.

133 Own emphasis.

134 *Ibid.*

### 3.7 Did *Voetstoots* Sales Survive the CPA?

#### 3.7.1 The Argument in Favour of Survival of the *Voetstoots* Clause

As mentioned earlier<sup>135</sup> the right of the consumer to receive goods that are suitable for the purpose for which they are generally intended, of good quality, in good working order and free of any defects<sup>136</sup> will not apply where the seller sells goods in a particular condition and the consumer has been expressly informed that the goods were offered in a specific condition and<sup>137</sup> has expressly agreed to accept the goods in that condition (or knowingly acted in a manner consistent with accepting the goods in that condition).<sup>138</sup>

It could be argued that section 55(6) allows suppliers to sell goods *voetstoots* provided that a consumer is informed of the particular condition of the goods and accepts or acts in a manner compatible with accepting the goods in that condition.<sup>139</sup> Morrissey and Coetzee<sup>140</sup> goes as far as to argue that a *voetstoots* clause (and inadvertently a *voetstoots* sale) also forms part of the surrounding circumstances of the supply of goods which must then be taken into account when determining whether the goods were useable and durable for a reasonable period of time.<sup>141</sup>

Sharrock argues that a supplier may contract out of the liability for the implied undertakings as to suitability and quality, but not those as to durability and compliance with statutory standards and an agreement on a "defects disclaimer" must be based on actual consensus.<sup>142</sup> The writer further argues that a "defects disclaimer" in terms of section 55(6) is an exemption clause and must also comply with the requirements of section 49 of the CPA.<sup>143</sup> Jacobs, Stoop and Van Niekerk is also of the opinion that a *voetstoots* clause will only apply where the provisions of section 55(6) are met.<sup>144</sup>

The CPA does not prohibit the seller from including clauses in consumer agreements that limit or exclude the seller's liability, or clauses where the purchaser's rights are waived or limited. Two sections in the

<sup>135</sup> See par 3.3 above.

<sup>136</sup> S 55(2)(a), (b) CPA.

<sup>137</sup> Own emphasis.

<sup>138</sup> S 55(6) CPA.

<sup>139</sup> Van Eeden 225; Meiring "Warranties and what they mean" 2011 *Without Prejudice* 14 14-15; Morrissey & Coetzee "Does this mean voetsek *voetstoots*?" 2010 *Without Prejudice* 12 12-13.

<sup>140</sup> Morrissey & Coetzee 2010 *Without Prejudice* 12 13.

<sup>141</sup> S 55(2)(c) CPA.

<sup>142</sup> Sharrock *Business Transaction Law* 8th ed (2011) 611.

<sup>143</sup> *Ibid.* S 49 CPA provides *inter alia* that any notice that purports to limit the suppliers liability must be drawn to the attention of the consumer in writing and in plain language, in a conspicuous manner at the earliest possible time and the consumer must be given an adequate opportunity to comprehend such a notice.

<sup>144</sup> Jacobs, Stoop & Van Niekerk 2010 *PER* 302 368.

CPA can be used to substantiate this argument. Section 4(4)(b) provides that any contract or document prepared or drafted by the supplier must be interpreted to the benefit of the consumer so that any restriction, limitation, exclusion or deprivation of a consumer's legal rights set out in such a document is limited to the extent that a reasonable person would ordinarily contemplate or expect.<sup>145</sup> Section 48(1)(c) provides that a supplier must not request a consumer to waive any of his rights, or waive the liability of a supplier, or assume any obligations *on terms*<sup>146</sup> that are unfair, unreasonable or unjust. The CPA therefore does not prohibit a *voetstoots* clause but simply provides that such a clause may not be on terms that are unfair, unreasonable or unjust and must be interpreted against the seller taking into account what a reasonable person would expect.

### ***3 7 2 The Argument Against Survival of the Voetstoots Clause (Preferred Viewpoint)***

Although there are provisions in the CPA that seem to support the survival of the *voetstoots* clause in terms of consumer sales,<sup>147</sup> there are also provisions that would support the exclusion thereof where the CPA is applicable. As mentioned earlier,<sup>148</sup> section 2(10) provides that no provision of the CPA (such as section 55(6)) may be interpreted so as to preclude a right that a consumer would have in terms of the common law (like the warrant against latent defects). Section 56(4) provides that the implied warranty of quality is in addition to any other warranty in terms of the common law. A fortification of the exclusion of *voetstoots* sales is also contained in section 51(1)(b)(i) which provides that a supplier must not make a transaction or agreement subject to any term or condition if it directly or indirectly purports to waive or deprive a consumer of a right in terms of the CPA. Such a transaction, agreement, provision, term or condition will be void.<sup>149</sup> Selling goods in terms of a general "umbrella" *voetstoots* clause is a clear waiver and deprivation of a consumer's right. Whether a *voetstoots* clause is worded as a condition or term or if it boils down to a waiver or deprivation, it will still be invalid. The fact that goods should not only be free of any defects but also useable and durable and comply with any publically regulated standard makes the reliance on a *voetstoots* clause even more difficult.

It seems therefore, that section 55(6) can be construed to have more than one meaning. Section 4(3) provides that in such an instance, the Tribunal<sup>150</sup> or court must prefer the meaning that best promotes the spirit and purposes of the CPA, and will best improve the realisation and

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<sup>145</sup> Having regard to the content of the document, the manner and form in which the document was prepared and presented; and the circumstances of the transaction or agreement in terms of s 4(4)(b)(i)-(iii) CPA.

<sup>146</sup> Own emphasis.

<sup>147</sup> See par 3 7 2 above.

<sup>148</sup> See par 3 5.

<sup>149</sup> S 51(3) CPA.

<sup>150</sup> National Consumer Tribunal.

enjoyment of consumer rights. Section 4(4)(a) further provides that any ambiguity that allows for more than one reasonable interpretation of a part of a document is resolved to the benefit of the consumer.

The argument by Morrissey and Coetzee<sup>151</sup> that a *voetstoots* sale may be included as part of the surrounding circumstances, is not thought through. A latent defect will, by its mere definition in terms of the CPA, render the goods less useful, practicable or safe in the circumstances. A *voetstoots* clause will fail the test of section 55(2)(c) not only because of the nature of a latent defect but also because of the common law definition of a latent defect and moreover because the CPA specifically provides that it is irrelevant whether the defect is latent or patent.<sup>152</sup>

The approach more in line with the purposes of the CPA argues that the effect of section 55(3) is that the use of a *voetstoots* clause is excluded and suppliers will generally have a duty to disclose all attributes of the *merx*. In this regard, the rule *caveat emptor*<sup>153</sup> seems to be abolished and there seems to be a general duty to disclose in terms of the CPA (even in the absence of fraud) and the test (to determine whether or not the seller has a duty to disclose) laid down in *Waller v Pienaar*<sup>154</sup> will no longer apply.

Nothing prevents a supplier (seller) however from selling goods in a particular condition.<sup>155</sup> (The sale of second-hand goods and goods sold by pawn brokers are good examples). This would mean describing the quality of the goods as well as the defects in detail and also proving that the consumer was informed and accepted goods on that basis. A clause that for example determines that the seller does not guarantee that the roof does not leak will no longer be enforceable.<sup>156</sup> A clause that however informs the consumer (purchaser) of a roof that leaks from time to time during heavy rains, will probably withstand the test of section 55(6).<sup>157</sup> The “loophole” for shrewd suppliers will most likely be to argue that even though the consumer did not expressly accept the goods in that particular condition they did act in a way compatible with accepting the goods.<sup>158</sup> The supplier still needs to keep a sales record of the transaction which must also include proof that the consumer was in fact informed and accepted the goods or acted in a way compatible with accepting the goods.<sup>159</sup>

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151 See par 3 7 1 above.

152 S 55(5) CPA.

153 Let the purchaser beware.

154 2004 6 SA 308 (C).

155 S 55(6) CPA.

156 Also referred to as an “umbrella” or “all inclusive *voetstoots* clause”.

157 Otto 2011 *THRHR* 525 539.

158 S 55(6)(b) CPA.

159 S 26 CPA.

### 3 8 Where an Estate Agent is Involved

Estate agents are regarded as intermediaries in terms of the CPA. An intermediary is defined as “a person who in the ordinary course of business and for remuneration or gain, engages in the business of representing another person with respect to the actual or potential supply of any goods or services; accepting possession of any goods or other property from a person for the purpose of offering the property for sale; or offering to sell to a consumer any goods or property that belongs to a third person”.<sup>160</sup> Section 1 of the CPA further provides that a person whose activities as an intermediary are regulated in terms of any other national legislation is not included in the definition of an intermediary. Though it can be argued that estate agents are already regulated by the Estate Agency Affairs Act<sup>161</sup> and the Estate Agents Board, estate agents are (and should be) included under the definition of intermediaries in terms of the CPA.

It is clear from the definition of “intermediary” that the CPA will apply to the Mandate Agreement between the seller and the estate agent. The CPA will also apply to the marketing practices<sup>162</sup> of the estate agent and should amount to responsible marketing.<sup>163</sup> The agent should be honest in his dealings<sup>164</sup> and have regard to the consumer’s fundamental rights of equality<sup>165</sup> and privacy<sup>166</sup> in terms of the CPA. Finally section 27 of the CPA and regulation 9 of the regulations made under the CPA require full disclosure of certain prescribed information.

The question that arises is whether the involvement of an estate agent in the sale of property where the sale is not in the seller’s ordinary course of business, will make any difference to the transaction and the inclusion of a *voetsstoets* clause. The involvement of an estate agent in the sale of immovable property gives rise to two transactions namely the mandate agreement, and the resultant sale agreement. The service the agent provides to its client (the seller) is the marketing and advertising of the property in the hope of procuring a willing and able purchaser for the property for which the estate agent will then receive consideration.<sup>167</sup> The estate agent receives no consideration for his services in advertising and marketing the property unless those services are successful and result in the production of a purchaser for the property. The agreement that results from the estate agents marketing efforts does not fall under the scope of the CPA. The contractual relationship that is the result of the

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160 Definition s 1 CPA.

161 112 of 1976.

162 Part E: The right to Fair and Responsible Marketing.

163 *Ibid.*

164 Part F: Right to Fair and Honest Dealing.

165 Part A: Right of Equality in Consumer Market.

166 Part B: Right to Privacy.

167 Snyman “National – News: The Consumer Protection Act 68 of 2008” <http://bit.ly/MneOp9> (visited 2012-03-08). See also Nagel *et al* 170-172.

agent's marketing efforts is a once-off transaction between the seller and the purchaser.<sup>168</sup>

Because of uncertainty with regards to whether or not property may still be sold *voetstoots* where an estate agent is involved in a once-off transaction, estate agents have begun to have sellers forfeit their right to sell their property *voetstoots* and are attaching a copy of a so-called "Property Condition Report" as a disclosure of the defects in the property and including a warranty by the seller to the effect that these are in fact the only defects in the property.<sup>169</sup> This approach by estate agents is unfair towards their clients.

There may however be reasons for estate agents taking such extreme causes of action. Section 4(1)(1) of the Estate Agents Code of Conduct provides that an estate agent who has a mandate to sell a property shall convey to a purchaser all facts concerning the property that are (or should reasonably in the circumstances be) within the agent's personal knowledge and which could be material to a prospective purchaser. Regulation 9(2)(m) of the regulations made under the CPA also provides that an estate agent must disclose any other<sup>170</sup> information which may be relevant and which the estate agent may reasonably be expected to be aware of.

I am in agreement with Davey that the estate agent should not take over the responsibility of disclosing any patent or latent defects which are known to the seller.<sup>171</sup> In order to avoid any arguments between the seller and the estate agent after conclusion of a sale with regards to what was and was not disclosed by the seller to the estate agent, it is suggested that it be recorded in the Mandate Agreement that the seller accepts and acknowledges that it is his (the seller's) duty and responsibility to disclose any latent defects that he is aware of as well as any issue regarding the property which may be of relevance to the purchaser.<sup>172</sup> It is further suggested that the purchaser should initial (and thereby acknowledge) a *voetstoots* clause in the agreement of sale.<sup>173</sup> Having thus clearly advised the seller of his obligations and the purchaser of his acknowledgements with regards to the condition of the property, the estate agent will have taken adequate care of both parties ensuring that they know exactly what their rights and obligations are.<sup>174</sup>

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168 Snyman *op cit.*

169 Davey IEASA National – News "Section 4.1.1 of the Code of Conduct + CPA = Questions about the appropriateness of the 'Voetstoots' clause = the 'birth' of the 'Property Condition Report' = CONFUSION" <http://bit.ly/RnMbV5> (visited 2012-03-08).

170 Aside from the other prescribed information in terms of Reg 9 as to the intermediaries' identification, relevant personal and professional details, consideration or commission.

171 Davey *op cit.*

172 *Ibid.*

173 *Ibid.*

174 *Ibid.*

Davey correctly warns that if an estate agent is going to take on the responsibility of disclosing defects, he will need to be adequately informed of the nature and extent of the defect.<sup>175</sup> Having taken on the responsibility of disclosing a defect from the seller and having passed on the information regarding the defect to the purchaser, arguments will arise regarding representations made as to the severity or extent of the defect at a later date.<sup>176</sup>

### 3 9 Second-hand Goods

Naudé correctly states that the interpretation and application of section 55(6) should be less stringent on suppliers of, for example, second-hand cars by the mere nature of the goods sold.<sup>177</sup> The writer does however advise dealers of immovable property or second-hand goods to recommend that the purchaser consult an independent expert to inspect the goods before the purchaser buys.<sup>178</sup> Naudé states that sellers would not easily get away with exclusion clauses (in terms of section 55(6)) in the case of new products.<sup>179</sup> It is clear that the wording of section 55 has a serious impact on sellers of second-hand goods, including pawn- or consignment stores. Though I agree with Morrissey and Coetzee<sup>180</sup> that a second-hand car dealer is seldom in a position to point out to a customer the exact wear and tear of every car part as well as every other defect, I do not agree that such dealerships will still be able to sell second-hand cars (or pre-owned cars as the popular term seems to be) *voetstoots*. Their argument is that a *voetstoots* sale could form part of the surrounding circumstances of the supply of the goods which must then be taken into account when determining whether the car was usable and durable for a reasonable period of time.<sup>181</sup> A *voetstoots* clause is a clear exclusion of the supplier's liability. It would therefore seem problematic to sell second-hand goods "as is" and a *voetstoots* clause would not be enforceable as part of the surrounding circumstances in the sale of the goods.

One possible exception to the above position deserves discussion. Second-hand car dealers also sell cars on behalf of owners rather than buying and reselling it themselves. The second-hand car dealership only acts as an agent in the selling of the car. In other words the dealership only provides space for the second-hand car on its selling floor and it is sold on behalf of the seller. Usually the seller would be a natural person and the sale would be a once-off transaction in which case the CPA will not apply. Even if the seller mandates the dealership to sell second-hand cars in the ordinary course of the seller's business, the dealership would still only act as an agent and section 55 may not be enforced against the

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175 *Ibid.*

176 *Ibid.*

177 Naudé 2011 *SA Merc LJ* 336 344.

178 *Ibid.*

179 *Ibid.*

180 Morrissey & Coetzee 2010 *Without Prejudice* 12.

181 *Ibid* 13.

dealership. It would seem that the position with regards to estate agents as discussed above<sup>182</sup> would apply. It is clear that these kinds of arrangements between a sellers and second-hand car dealers would regrettably increase in an attempt to avoid the repercussions of the CPA.

One might think that the Second-Hand Goods Act<sup>183</sup> sheds some light on the issue but the main purpose and aim of the Act is to prevent the trade in stolen goods and promote ethics in the trade of second-hand goods and therefore of no help.<sup>184</sup>

It is a realistic fact that the standard or condition of second-hand (or pawned goods) will differ from the condition of newly manufactured goods. It is worth mentioning that courts and the Tribunal<sup>185</sup> will probably refer to the interpretations that crystallised through case law. Kerr refers to *Addison v Harris*<sup>186</sup> where De Wet AJ states that the condition of new motorcars cannot be compared with the condition of second-hand cars. To say that a second-hand car is in good condition means that the car is in good condition *for what it is*<sup>187</sup> being an old, used car adding that temporary breakdowns are to be expected and might even be caused by ordinary wear and tear.<sup>188</sup> There can be no doubt that the fact that goods are supplied or sold second-hand will be part of the surrounding circumstances as described in section 55. (The situation however, still does not allow for a *voetstoots* sale). There can also be no doubt that the majority of second-hand car dealerships are exploiting consumers in this regard (using the condition of the car and wear and tear of the car as an excuse). I am of the opinion that the relevant industries might be more cautious when dealing with vulnerable consumers<sup>189</sup> as provided for in terms of the CPA. Authority given to the Minister of Trade and Industry to publish Industry Codes will also help to clarify the situation surrounding the sale of second-hand cars.<sup>190</sup>

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182 See par 3 8 above.

183 6 of 2009.

184 Preamble of the Second-Hand Goods Act 6 of 2009.

185 National Consumer Tribunal.

186 1945 NPD 444.

187 Italics in original.

188 Kerr 118-119.

189 S 3(1)(b) CPA: low-income, illiterate and vulnerable consumers to be protected in particular by the CPA.

190 S 82 CPA.

### 3 10 Liability for Damage Caused by Goods in Terms of Section 61 of the CPA

#### 3 10 1 Introduction

Section 61 of the CPA has been discussed by many authors.<sup>191</sup> The scope of section 61 within the current discussion is however limited to a broad general overview of the section, where suppliers are liable and damages claimable in terms of section 61 in light of the damage that may be caused by defective goods.

Section 61 provides that a producer, importer, distributor or retailer of any goods is liable for any harm, without proof of negligence on his part, caused as a consequence of supplying any unsafe goods, or a product failure of whatever nature, or inadequate instructions or warnings provided to a person (not only consumers) for the use of such goods.<sup>192</sup> For the purpose of section 61, 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 a consumer.<sup>193</sup>

Harm for which a person may be held liable includes the death, illness or injury to any natural person, any loss or physical damage to any property and any economic loss that results from the aforementioned.<sup>194</sup> If more than one person is liable, their liability is joint and several.<sup>195</sup> Liability in terms of this section cannot be circumvented by a contractual indemnity or waiver.<sup>196</sup> It is a defence if the above envisaged harm is wholly attributable to the compliance with any public regulation, or if the alleged unsafe product characteristic, failure, defect or hazard did not exist in the goods at the time it was supplied, or arose from complying with the instructions provided to the supplier, or if it is unreasonable to expect the distributor or retailer to have discovered the shortcomings in the goods, taking into account that person’s role in marketing the goods to consumers.<sup>197</sup>

The requirements established in terms of our positive law<sup>198</sup> for the liability of merchant sellers (liability on a contractual basis) and manufacturers (liability on a delictual basis) for latent defects remain

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<sup>191</sup> Van Eeden 242-249; Melville 98-100; Sharrock 279-299; Loubser & Reid 2006 *Stell LR* 413 413–452; Botha & Joubert 2011 *THRHR* 305 305-318; Otto 2011 *THRHR* 525 525-554; Jacobs, Stoop & Van Niekerk 2010 *PER* 302 363.

<sup>192</sup> S 61(1) CPA.

<sup>193</sup> S 61(2) CPA.

<sup>194</sup> S 61(5) CPA.

<sup>195</sup> S 61(3) CPA.

<sup>196</sup> S 51 CPA.

<sup>197</sup> S 61(4)(a)-(c) CPA.

<sup>198</sup> *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd* 2002 2 SA 447 (SCA) 451, 456.

intact where the CPA is not applicable. Ironically in cases such as *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd*<sup>199</sup> and *Consol Ltd T/A Consol Glass v Twee Jonge Gezellen (Pty) Ltd*<sup>200</sup> the CPA would not have made any difference to the requirements for liability. The reason being that the purchasers (consumers) in these cases were juristic persons with an annual turnover or asset value which exceeds the threshold value determined by the Minister of Trade and Industry<sup>201</sup> and therefore not protected by the CPA. It is submitted that the reason for the exclusion coincides with the preamble and purposes of the CPA being the protection of the vulnerable consumer.

Van Eeden is correct in stating that, in terms of our common law relating to product liability, it consisted of the law of delict subject to contractual variation.<sup>202</sup> The purchaser (in terms of our common law) has to prove that the manufacturer acted wrongfully and negligently, that the harm was caused by the manufacturer's negligence, and that there existed a causal *nexus* between the conduct of the manufacturer and the harm suffered by the consumer.<sup>203</sup> Whereas the common law requires proof of negligence, section 61 of the CPA states that a manufacturer will be liable for harm irrespective of whether such harm was caused as a result of negligence. Proving negligence on the part of a manufacturer has been notoriously difficult, very costly and time consuming. Litigation in this regard is likely to culminate in a judgment only after many years of litigation.<sup>204</sup> The average consumer usually does not have the financial means or time to go through with such a lengthy litigation process whereas the manufacturer (in contrast) can better afford litigation and will probably delay the outcome of such proceedings as long as possible.<sup>205</sup> Van Eeden argues that the *Aquilian* or fault liability system is not too far removed from the no-fault liability or strict liability system.<sup>206</sup> Van Eeden correctly agrees with Loubser and Reid that prior to the introduction of some form of strict liability in terms of the CPA, South African law was lagging behind developments internationally.<sup>207</sup> Van Eeden refers to the liability in terms of section 61 as "some form of 'modified strict liability'"<sup>208</sup> which is broadly based on the European model.<sup>209</sup> The model which the CPA introduces is however not an unqualified strict liability model but rather a model that attempts to strike a balance between fault and no-fault liability.<sup>210</sup>

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<sup>199</sup> 2002 2 SA 447 (SCA) 451, 456.

<sup>200</sup> 2002 6 SA 256 (C).

<sup>201</sup> S 5(2)(b) CPA read with s 6 CPA. The annual threshold is R2 million.

<sup>202</sup> Van Eeden 64-65.

<sup>203</sup> *Ibid.*

<sup>204</sup> Van Eeden 64.

<sup>205</sup> *Ibid.*

<sup>206</sup> Van Eeden 66.

<sup>207</sup> Van Eeden 242; Loubser & Reid 2006 *Stell LR* 413.

<sup>208</sup> *Ibid.*

<sup>209</sup> Van Eeden 246.

<sup>210</sup> *Ibid.*

According to Van Eeden,<sup>211</sup> fault-based and strict liability-based product liability regimes may impact in different ways on production costs and management culture relating to product safety and product defect issues. Product safety law has fallen largely into the domain of statutory intervention, establishing regulation to be administered by means of bureaucratic and criminal measures, whereas arrangement on distribution, scope and probability of liability has been the domain of the common law.<sup>212</sup> Though Van Eeden confirms the need for product liability (whether it be fault-based or strict liability-based) it is argued that the social and economic cost of an inappropriate product liability regime can be substantial.<sup>213</sup> I am in agreement with Van Eeden and Loubser and Reid<sup>214</sup> that the product liability regime under the common law fault rule is not strict enough and as a result both suppliers and manufacturers often escape their apposite share of the liability.<sup>215</sup> On the other hand Van Eeden cautions that producer liability should also not be so strict that it encourages excessive amounts of care and pushes prices up to an unreachable level for consumers.<sup>216</sup>

It is interesting to note that Loubser and Reid<sup>217</sup> are of the opinion that section 61 sets contractual rights between suppliers and consumers rather than create general rules for strict liability outside the contractual relationship. The opinion of Jacobs, Stoop and Van Niekerk<sup>218</sup> is supported, in which it is argued that section 61 does not require a contractual *nexus* between the supplier and the consumer. Section 61(3) confirms this argument by providing that suppliers are jointly and severally liable.

### **3 10 2 Sellers Liable in terms of Section 61 of the CPA**

Melville<sup>219</sup> states that section 61 of the CPA does not require fault on the part of a manufacturer or *supplier*<sup>220</sup> to be proven in a claim for damages. (It does, however seem that wrongfulness is still a requirement). It also extends the type of damages claimable beyond what is normally the case in common law.<sup>221</sup> It would seem that Melville regards a supplier to be included in the application of section 61 and also that the harm described in the section includes damages claimable under the common law. Van Eeden<sup>222</sup> is of the opinion that the CPA holds importers, distributors and *suppliers*<sup>223</sup> of goods strictly liable for

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211 Van Eeden 239.

212 *Ibid.*

213 Van Eeden 240.

214 Van Eeden 240.

215 Loubser & Reid 2006 *Stell LR* 413 416.

216 Van Eeden 241.

217 Loubser & Reid 2006 *Stell LR* 413 424.

218 Jacobs, Stoop & Van Niekerk 2010 *PER* 302 370.

219 Melville 26.

220 Own emphasis.

221 Melville 26.

222 Van Eeden 64.

223 Own emphasis.

damages<sup>224</sup> arising from the supply of any unsafe goods, product failure, defect or hazard. His interpretation of section 61(2)<sup>225</sup> is that a supplier of services must also be regarded as a supplier of those goods to the consumer. It would seem therefore that both Van Eeden and Melville regard suppliers of goods to be included rather than excluded from liability in terms of section 61. Van Eeden further substantiates this argument by referring to the provisions of section 51 and declares that a supplier would not be able to circumvent the modified product liability regime introduced by the CPA.<sup>226</sup>

Jacobs, Stoop and Van Niekerk<sup>227</sup> follow a different approach. It is argued that section 61(2) attempts to impose strict product liability on, for example, an electrician who installs a defective geyser or a surgeon who implants a defective pacemaker or a defective prosthetic. The purpose of section 61(2) according to these writers, is to protect customers against defective and inferior goods installed by suppliers, as they often do not have a choice from amongst goods and have to rely on the supplier's choices. However, it is argued that an amendment by the legislature may be necessary owing to the omission of the word "supplier" in section 61(1). Such an amendment is also needed where strict product liability as contemplated in section 61(2) may be imposed on service providers. It appears however that section 61(1) does not extend to service providers because it only refers to producers, importers, distributors and retailers. Alternatively, the legislature may have intended that service providers should be treated as retailers under section 61(1).<sup>228</sup> It is also noteworthy that the word supplier was included in the Consumer Protection Bill under the provisions pertaining to strict liability<sup>229</sup> but omitted in the final Act. In their comparative analysis Loubser and Reid refer to other jurisdictions all of which include suppliers of goods and services as liable in terms of strict liability.<sup>230</sup>

Botha and Joubert<sup>231</sup> refer to the defences against product liability contained in section 61(4) and more specifically section 61(4)(c).<sup>232</sup> It is argued that the wording of section 61(4)(c) provides some form of strict liability for manufacturers and importers but not for distributors and

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224 Van Eeden 64, 246, 249.

225 Section 51 CPA deals with prohibited transactions and agreements and provides that a supplier may not waive or deprive a consumer of rights in terms of the CPA (s 51(1)(b)(i)), avoid a supplier's obligation or duty in terms of the CPA (s 51(1)(b)(ii)) or set aside or override the effect of any provision of the CPA (s 51(b)(iii)).

226 Van Eeden 249.

227 Jacobs, Stoop & Van Niekerk 2010 *PER* 302 384.

228 *Ibid.*

229 S 71(1) CPA.

230 Loubser & Reid 2006 *Stell LR* 413 431-433.

231 Botha & Joubert 2011 *THRHR* 305 318. See also Jacobs, Stoop & Van Niekerk 2010 *PER* 302 388-389; Loubser & Reid 2006 *Stell LR* 413 451-452.

232 S 61(4)(c) CPA provides that liability of a particular product does not arise if 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.

retailers.<sup>233</sup> It is argued that distributors and retailers can escape liability by proving that “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 goods to consumers”.<sup>234</sup> They argue that the liability of distributors and retailers are still fault-based where reference is made to reasonableness.<sup>235</sup> What makes matters even more difficult is that a distributor of products is only liable under common law where there was a legal duty on him to inspect a product and he failed to do so. It is agreed that this defeats the purposes of the CPA and will result in ineffective redress for the most vulnerable consumers.<sup>236</sup>

Before retailers and distributors escape strict liability based on reasonableness, their marketing of the goods will also be taken into account.<sup>237</sup> Should “market” be used as verb it would include “to promote or supply any goods or services” and also include the sale of goods.<sup>238</sup> Cases such as *Kroonstad Westelike Boere-Ko-operatiewe Vereniging Bpk v Botha*<sup>239</sup> and *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd*<sup>240</sup> will be relevant when dealing with a supplier who is also an expert seller (merchant seller). Such a seller plays an important role in the marketing and supply of goods which have to be considered in terms of section 61(4)(c). It is submitted that a retailer or distributor will be strictly liable where he played a significant role in the marketing of the goods (which by the mere definition of retailer and distributor in terms of the CPA they seem to do) but it would seem that they would still need to comply with the Pothier rule and therefore “publicly professed to have attributes of skill and expert knowledge in relation to the kind of goods sold”.<sup>241</sup> The advantage of this is of course that consequential damages over and above the harm caused in terms of section 61(5) will be claimable.

### **3 10 3 Damages, Loss and Harm**

Van Eeden describes consequential damages as damages caused by the defective product, as distinguished from the cost of the defect itself.<sup>242</sup> Van Eeden makes a distinction between the provisions relating to the supply of unsafe goods in terms of section 61(1)(a) and (b) of the CPA. In

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233 Otto 2011 *THRHR* 525 542: The application of the interpretation rule *unius inclusio est alterius exclusio* will have the effect that the producer and importer (in contrast with the distributor and retailer) will still be liable even if it would be unreasonable to expect them to have discovered the defect.

234 S 61(4)(c) CPA.

235 Botha & Joubert 2011 *THRHR* 305 318.

236 *Ibid.*

237 S 61(4)(c) cpa.

238 See definition of “supply” s 1 CPA.

239 1964 3 SA 561 (A).

240 2002 2 SA 447 (SCA).

241 *Kroonstad Westelike Boere-Ko-operatiewe Vereniging Bpk v Botha* 1964 3 SA 561 (A) 571.

242 Van Eeden 238.

the former<sup>243</sup> the activity of supplying unsafe goods is required whereas supply is not a requirement for liability in the latter.<sup>244</sup> Loubser and Reid<sup>245</sup> state that the wording of the statute offers the owner significant additional opportunity for compensation over and above the contractual remedies already available when the product does not conform to the contract description.<sup>246</sup> Section 61 also opens up an important and potentially vast area of liability.<sup>247</sup>

Otto<sup>248</sup> argues correctly that if we were to look at the literal meaning given by the legislature in section 61(5), not all economic consequential damages will be claimable under section 61(5)(d) but only to the extent that such damage was caused by "harm" as set out in subsection (a) to (c).<sup>249</sup> In *Minister van Landbou-Tegniese Dienste v Scholtz*<sup>250</sup> damages were claimed on the grounds of a breach of a tacit warranty. A bull was bought for breeding purposes but was later found to be impotent. The plaintiff succeeded in a claim for damages which included the potential loss for the calves he would have had based on the tacit warranty.<sup>251</sup> Otto argues that although the damages claimed in the *Scholtz*-case was not based on a claim for consequential damages, it would theoretically be claimable on that basis. Unfortunately this type of consequential damage would not be claimable under the CPA unless "loss of any property" in section 61(5)(c) was given a far reaching meaning.<sup>252</sup> The purchaser may still be able to claim this type of consequential damage in terms of the breach of a tacit warranty even if liability under a tacit warranty is not mentioned in section 61(5).<sup>253</sup> It is submitted that Otto's argument that this is a gross oversight on the part of the legislature and should have been included, is correct.<sup>254</sup> One could also argue that even where the CPA is applicable consequential damages would be claimable because the goods were unfit for the purpose for which it was bought and (or) not of reasonable merchantable quality. Naudé points out that if "harm" as defined in terms of section 61(5) was caused by goods, there will be a claim for damages regardless of a section 55(6) clause.<sup>255</sup>

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243 S 61(1)(a) CPA.

244 Van Eeden 246.

245 Loubser & Reid 2006 *Stell LR* 413 439-440.

246 *Ibid.*

247 Loubser & Reid 2006 *Stell LR* 413 440: for example a small business might suffer loss of profits or loss of business reputation when a defective product was used in its undertaking and has caused an accident.

248 Otto 2011 *THRHR* 525 541.

249 In other words damages caused due to the death, injury or illness of any natural person or the loss or damage due to the movable or immovable property.

250 1971 3 SA 188 (A).

251 Otto 2011 *THRHR* 525 541-542.

252 *Ibid.*

253 *Ibid.*

254 Otto 2011 *THRHR* 525 541.

255 Naudé 2011 *SA Merc L* 336 345.

## 4 Conclusion

It is clear that the CPA is not the Armageddon many thought it to be. Many agreements of sale will fall outside the ambit of the CPA and in such situations the common law position will remain in tact. It would also seem that consumers who are purchasers will always have the common law remedies at their disposal over and above the legislative remedies provided for in terms of the CPA. This being said however, possible oversights, interpretational as well as practical problems need to be corrected to provide more certainty. Consumers and suppliers need to understand the practical application of Part H of the CPA. Not only the implied warranty of quality (section 55), the remedies available to the consumer in terms of section 56 but also the implications of section 55(6) on the supplier's liability. Though the liability of the supplier may be reduced in terms of section 55(6), a *voetstoets* clause will no longer hold water where the CPA is applicable. Industry Codes with regard to second-hand goods are of paramount importance. Such Codes might even provide a life-line to prevent these types of industries from going under. The liability in terms of section 61 has its own interpretational problems and the true effect of the section remains to be seen. It is hoped that the interpretation thereof by the courts will shed some light on the questions raised. Some of the uncertainties seem to be solved by applying the following rule of thumb: What is most beneficial to the consumer?