WERKSMANS ATTORNEYS

COMPETITION

Tainted treats, spoiled foods and potential dangers…are there any legal safeguards for consumers?

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In recent weeks gone by, there have been numerous food poisoning cases reported[1] resulting in serious health issues and, in some cases, even death of children. We, as consumers, often take it for granted that the goods we eat are safe to consume (and not expired!).

However, what happens when this is not the case? What if the foods we eat are not safe for human consumption? Or what if expired goods fell through the cracks, into our trolley and, ultimately, on our table? Is there any form of protection that we have as consumers? Are there any consequences for the producer or supplier of the goods?

There is an existing legal framework to protect consumers and to hold manufacturers, retailers or suppliers of the goods accountable. This existing framework is found in and emanates from the Consumer Protection Act 68 of 2008 ("**CPA**"), Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972 ("**FCDA**") and our common law.

The CPA

The purpose of the CPA is to, amongst others, protect consumers from hazards to their well-being and safety[2] which would include protecting consumers from poisonous or harmful food.

Section 55 of the CPA posits that every consumer has a right to safe, good-quality goods (including food)[3] and a right to receive food products that are generally suitable and fit for the purpose intended.[4] What this means is that, in essence, food must be safe for human consumption and manufacturers, suppliers or retailers are responsible for ensuring this and, in so doing, giving effect to this right.

However, when food is not safe for human consumption, but nevertheless sold, section 61 of the CPA is instructive and provides that –

- consumers are able to sue suppliers and manufacturers of food for damages or injuries suffered by them as a result of using or consuming the goods, irrespective of whether or not there was any negligence on the part of the supplier or manufacturer;[5] and
- if more than one party is potentially liable, the consumer can sue any one of them, as their liability is joint and several. In essence, this means that if the consumer sues one party and receives payment, that party can then sue the others for a contribution towards the payment.[6]

The harm in question may arise from a product failure, defect or hazard or inadequate instructions or warnings regarding any hazard arising from or associated with the use of any goods. The type of harm for which a person may be held liable includes –[7]

- the death of, or injury to, any natural person;
- an illness of any natural person;
- any loss of, or physical damage to, any property, irrespective of whether it is movable or immovable; and
- any economic loss that results from any of the types of harm listed above.

In terms of section 112 of the CPA, the National Consumer Tribunal ("**Tribunal**") may impose an administrative fine in respect of a contravention of the provisions of the CPA which can either be a prohibited (not to do) or required (to do) conduct.[8] An administrative fine may not exceed the greater of –[9]

- 10% of the wrongdoer's annual turnover during the preceding financial year; or
- R1 million.

Of note is that a failure to comply with section 55 of the CPA – which requires food to be safe and suitable for use – does not appear to be recognised as an *offence* in terms of the CPA and, consequently, is not liable to imprisonment. Imprisonment, as a form of punishment in terms of the CPA, can only be levied when a person is convicted of an *offence* in terms of the CPA.

The lack of imprisonment as a penalty can be interpreted as somewhat insufficient from an enforcement perspective. We say this because, in extreme cases, such as when poisonous food causes death, wrongdoers may only be liable financially rather than face possible imprisonment. Given, for example, the irreversible state of death, it is arguable that a fine might be insufficient considering the gravity and extent of harm caused.

The FCDA

The FCDA came into effect in the early 70s and is one of the earlier pieces of legislation designed to regulate, amongst others, "foodstuffs" which section 1 defines as –

"*any article or substance…ordinarily eaten or drunk by a person or purporting to be suitable, or manufactured or sold, for human consumption…*"

Section 2 of the FCDA provides that any person shall be guilty of an offence if he sells, manufactures or imports for sale, any foodstuff which is contaminated, impure or decayed, or is, in terms of any regulation deemed to be harmful or injurious to human health.[10]

There have been many regulations published pursuant to the FCDA relating to food safety requirements (for different types of food) for human consumption. These regulations are aimed at, amongst others, ensuring that food products meet certain safety and quality standards.

In terms of section 18 of the FCDA, any person convicted of an offence – including a contravention of section 2 as discussed above – under the FCDA is liable to a fine or imprisonment (or both). The length of imprisonment depends on whether it is a first, second, third or subsequent conviction and ranges from six to twenty-four months.

The Common law

Under the common law, a supplier can be held civilly liable for damages arising from food poisoning. In *Muzik v Canzone-del-Mare*,***[11]*** –

- a customer of a restaurant ordered a meal (seafood) and, after eating the meal, experienced symptoms of food poisoning which led to his hospitalisation and further medical treatment; and
- the customer sued the restaurant for damages for, amongst others, the loss of enjoyment of life including not being able to work, read, play the piano or go for walks.

The court held that Muzik was entitled to compensation in the amount of R400 for the temporary loss of enjoyment of life. To this end, it was held that –

> *Plaintiff's discomfort due to his peculiar symptoms as well as the loss of his amenities in not being able to go for walks, play the piano and read and go to work was of short duration and I think that a fair award would be a sum of R400.*

Conclusion

Food safety concerns are on the rise and the CPA, FCDA and, to a lesser extent, common law are crucial for ensuring that food does not pose a health risk to consumers. Most recently –

- President Cyril Ramaphosa ("**President**") announced that a proclamation to regulate spaza shops has been approved and will be spearheaded by the Department of Co-operative Governance and Traditional Affairs to address the growing scourge of food-borne illnesses and deaths across the country;[12] and
- the Gauteng Department of Education has issued a directive for the immediate suspension of food sales on school premises, in response to a surge in foodborne illnesses affecting pupils across the province.[13] The (i) Limpopo and (ii) Free State Department of Education have respectively followed suit also issuing temporary bans on food sales in and near schools amid rising food poisoning cases.[14]

While a fine may be appropriate in certain circumstances, the recent number of cases involving the hospitalisation and in some instances death of children make a fine seem like a slap in the wrist for the wrongdoers. It would seem, as several communities (affected by the food poisoning cases currently under investigation) have suggested thus far, that closures of the implicated spaza shops / retailers is a no brainer. In addition –

- the CPA makes clear provision for imprisonment for specific offences, but none of which relate to the sale of poisonous food – one cannot think of a better time to criminally prosecute and order imprisonment than now in circumstances where children have lost their lives; and
- although the FCDA makes provision for imprisonment as a penalty, it limits such imprisonment to a maximum period of twenty-four months – a relatively minimal duration especially if poisonous food products lead to severe health concerns or even death. It is therefore also arguable that in circumstances where death results, a longer period of imprisonment would be proportionate to the offence and therefore warranted.

Although it is not clear where the current food poisoning investigations will go or what the President's proclamation will look like, it would seem that a lot more (in the form of intervention) will be required from the Commission together with the National Prosecuting Authority. Communities and schools also have a role to play in helping to identify the retailers or spaza shops that may be selling goods or products that are not safe for human consumption. Communities must alert the authorities promptly, and avoid taking the law into their own hands.

> *"Integrity is doing the right thing even when no one is watching." — C.S. Lewis*

Contact us: Please feel free to contact us should you require any advice concerning the CPA or FCDA including assistance with compliance, policy drafting, training and legal representation in the event of litigation.

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[1] See, for example –

- the news report titled "Food poisoning: 16 Tembisa school children rushed to hospital after eating achaar" available here, accessed on 24 October 2024;
- the news report titled "ATM asks Public Protector to probe food poisoning outbreaks linked to expired goods" available here, accessed on 24 October 2024;
- the news report titled "Families await 'official cause of deaths' of their six kids despite cops saying it's insecticide", available here, accessed on 24 October 2024.

[2] See the preamble of the CPA.

[3] See the definition of "goods" in section 1 of the CPA which includes "*anything marketed for human consumption;*".

[4] See section 55(2)(a) of the CPA.

[5] See section 61(1) and (5) of the CPA.

[6] See section 61(3) of the CPA.

[7] See section 61(5) of the CPA.

[8] Section 1 of the CPA defines "prohibited conduct" as an act or omission in contravention of the CPA. No definition of "required conduct" is provided in the CPA, but CPA literature provides that required conduct refers to conduct as required by a specific provision of the CPA. See the Commentary on the Consumer Protection Act Revision Service 10, 2024 at 112-2.

[9] The Tribunal, when determining an appropriate fine, is required to consider a number of factors including, amongst others, the nature, duration, gravity and extent of the contravention, any loss or damage suffered as a result of the contravention, profit derived from the contravention and the degree to which the respondent has co-operated with the National Consumer Commission ("**Commission**") and Tribunal.

[10] See section 2 of the FCDA. Also see the advisory note of the Consumer Goods and Services Ombud available here, accessed on 24 October 2024.

[11] 1980 (3) SA 470 (CPD).

[12] See the EWN news article here, accessed on 11 November 2024.

[13] See the Citizen news report here, accessed on 11 November 2024.

[14] See the IOL news reports here and here, accessed on 12 November 2024.

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