

Our ref: **201702-0011917**

04 April 2017

ASSESSMENT: COMPLAINT

The above matter, as well as the Complaint Form has reference.

Summary of complaint

The complainant ate the product with rat faeces in it. According to the complainant this affected her physically and emotionally.

The supplier only offered the complainant a R75 voucher and a hamper.

The complainant still has ill effects and does not want any products from the supplier as she lost faith in them.

The complainant wants compensation of R30 000.00.

Summary of supplier's response

According to the supplier they received an e-mail from the complainant regarding rat faeces in one of their products and arranged to collect the goods from the complainant. The supplier further advised that during their initial correspondence with the complainant, she made no mention of any ill effects from which she suffered.

The product was uplifted and sent to factory in Rosslyn, Pretoria, to be examined by the Quality Control department and an Environment Health Practitioner & Registered Pest Control Operator in the employ of the company's contracted pest control company. In addition, the factory manager caused a full and careful inspection to be done of the area around the machine where the product was packed for any openings or tracks that could indicate the possibility of rodents gaining access into the factory. Pest sightings logs were also reviewed to establish whether there were any present or previous reports logged. No entry points were identified in the inspection and no present or previous reports were noted.

In addition to the above, the overhead beams were inspected for soiling and the cleaning records checked against the master cleaning schedule. From the initial investigation done in the factory it could not be positively concluded that the contamination occurred during the production or packing processes. It could also not be concluded that the contamination took place on site.

On 30 January 2017 the supplier contacted the complainant to provide her with their feedback. Someone answered the phone on the complainant's behalf who advised that the complainant was obligated to consult a doctor as she has started to feel sick. The supplier requested that they send

through the doctor's report after which the person then gave the phone to the complainant to speak to the supplier, the complainant then advised that she thought that the vomiting and diarrhoea would go away and it did. She did not go to the doctor.

The company has also received a report from an Environmental Health Practitioner & Registered Pest Control Operator, kindly see attach report. They concluded that after careful examination they noticed a small round opening of approximately 1cm on the top right hand corner. This "small round opening" show indications of rodent activity and gnawing damage. Mice require approximately 0.5cm to enter via an opening and will gnaw their way into packaging.

They further concluded that it was unlikely that the hole (owing to the size thereof) would not have been noticed by visual inspection either at the factory, the warehouse or the shop and that this could not have been accidental contamination during the manufacturing, processing or storage, and that the gnawing damage and contamination most likely happened after sale, possibly in the consumer's home.

Based on their investigation the supplier concluded that the 150g packet of The product uplifted from the consumer was open and virtually empty. With the greatest respect to the consumer it is impossible under those circumstances to be absolutely sure of the source of the contamination. As mentioned above it is unlikely that the mouse/mice were in the packet for much more than 1 day or that the consumer could have missed the hole made by the mouse/mice when opening the packet and that would raise the question of why she then allegedly still ate the contents.

The company has received no other consumer complaints about this particular batch of the product. It is extremely unlikely as to be virtually impossible to believe that if there were rodent contamination in the factory or warehouse that only one packet of product would have been affected.

The company has conducted a full investigation at the factory and neither they nor their contract pest control company have found any trace of rodents in the factory.

Assessment

The law

The Consumer Protection Act 68 of 2008 (CPA)

Liability for damage caused by goods

- 61. (1)** *Except to the extent contemplated in subsection (4), the producer or importer, distributor or retailer of any goods is liable for any harm, as described in subsection (5), caused wholly or partly as a consequence of—*
- (a) supplying any unsafe goods;*
 - (b) a product failure, defect or hazard in any goods; or*
 - (c) inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any goods, irrespective of whether the harm resulted from any negligence on the part of the producer, importer, distributor or retailer, as the case may be.*
- (2)** *A supplier of services who, in conjunction with the performance of those services, applies, supplies, installs or provides access to any goods, must be regarded as a supplier*

of those goods to the consumer, for the purposes of this section.

(3) If, in a particular case, more than one person is liable in terms of this section, their liability is joint and several.

(4) Liability of a particular person in terms of this section does not arise if—

(a) the unsafe product characteristic, failure, defect or hazard that results in harm is wholly attributable to compliance with any public regulation;

(b) the alleged unsafe product characteristic, failure, defect or hazard—

(i) did not exist in the goods at the time it was supplied by that person to another person alleged to be liable; or

(ii) was wholly attributable to compliance by that person with instructions provided by the person who supplied the goods to that person, in which case subparagraph (i) does not apply;

(c) 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; or

(d) the claim for damages is brought more than three years after the—

(i) death or injury of a person contemplated in subsection (5)(a);

(ii) earliest time at which a person had knowledge of the material facts about an illness contemplated in subsection (5)(b); or

(iii) earliest time at which a person with an interest in any property had knowledge of the material facts about the loss or damage to that property contemplated in subsection (5)(c); or

(iv) the latest date on which a person suffered any economic loss contemplated in subsection (5)(d).

(5) Harm for which a person may be held liable in terms of this section includes—

(a) the death of, or injury to, any natural person;

(b) an illness of any natural person;

(c) any loss of, or physical damage to, any property, irrespective of whether it is movable or immovable; and

(d) any economic loss that results from harm contemplated in paragraph (a), (b) or (c).

(6) Nothing in this section limits the authority of a court to—

(a) assess whether any harm has been proven and adequately mitigated;

(b) determine the extent and monetary value of any damages, including economic loss; or

(c) apportion

Consideration of Law and Facts

We have considered all the evidence presented by both the complainant and the supplier and advise as follows:

- **Section 61 of the CPA**

Section 61 enable consumers to obtain redress from the producer, importer, distributor or retailer where they have been injured or have sustained property damage because of a safety defect in a product.

Section 61 further provides that producers, importers, distributors and retailers of goods will be liable for damage caused by these goods irrespective of whether negligence can be established.

This relieves consumer of the onerous burden of proving fault although the consumer must still prove that the product had a manufacture's defect¹ that made it unsafe and that there is a casual link between the harmful product and the damages suffered.

- A complainant must therefore show that the product had a manufacture's defect.
- A complainant must also prove the damages suffered

Manufacturer's defect

It is common cause that there were rat faeces in a packet of The product the complainant consumed. The question is whether the goods were contaminated at the time of supply to the complainant.

A supplier can only be held liable if the product defect existed at the time it was supplied to the consumer. Therefore, the supplier cannot be held accountable for contamination that happened after leaving the supplier's possession while in the control of the complainant.

In this matter the complainant believes that the product was purchased with the rat faeces in it, whereas the supplier concluded that the contamination did not happen during the manufacture process or while in storage before selling the item to the complainant. The supplier submitted a report from the Environmental Health Practitioner & Registered Pest Control Operator indicating that there is a small round opening of approximately 1cm on the top right hand corner of the product packaging. This "small round opening" show indications of rodent activity and gnawing damage. The supplier also did various inspections to determine if there were any reports of rodent infestation. All reports came back negative. The supplier therefore concluded that the contamination happened after leaving their control.

Although we take note that the complainant believes the product was purchased with the rat faeces in it, it must be noted that our assessments can only be based on the evidence furnished to us by both the complainant and the supplier.

From the evidence provided- no other same batch product complaints received, no rodent infestation detected at the place of manufacture or storage , product contains a hole which seems to have been caused by a rodent- our office can therefore only on a balance of probabilities conclude that the contamination did not happen while in the possession or control of the supplier.

Claim for damages

Even though we cannot conclude that the contamination happened while the product was under the control of the supplier we think it is still important to discuss the claim of R30 000.00 made by the complainant.

¹ Definition of 'defect' in terms of Section 53 of the CPA: 'defect' means-

- (i) Any material imperfection in the manufacture of the goods or components, or n performance of the service, that renders the goods or results of the service less acceptable than persons generally would be reasonable entitled to expect in the circumstances; or
- (ii) Any characteristic of the goods or components that renders the goods or components less useful, practicable or safe than persons generally would be reasonable entitled to expect in the circumstances;

In terms of Section 61 of the CPA consumers are able to claim damages suffered as a result of consuming unsafe goods.

Types of harm which a supplier can be held liable for:

- The death of, 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
- Any economic loss that results from any of the types of harm listed above.

It seems the complainant only at a later stage went to consult a doctor and provided us with a copy of the doctors note which diagnosed the complainant with *acute gastritis*.

The doctors note does not specify the cause of the illness.

In order to claim for damages one must show that there is a link between the defective product and the harm suffered.

Determining whether there is a link between the harm suffered and the defective product can place a heavy evidential burden on a consumer and may involve scrutiny of complex, highly technical evidence.

In order for the supplier to be held liable in terms of Section 61 a consumer must on a balance of probabilities prove causation.

There is no prove that the product caused the complainant's illness. Further to this the complainant has claimed R30 000.00 in compensation. Losses should be quantified at the amount which should be paid to the claimant to put it in the same position that it would have been but for the wrongful act. The complainant has not submitted any evidence that they suffered a loss of R30 000.00 due to the product she consumed.

There is no evidence which links the defective product with the complainant's illness. Further the complainant has not proved that they in fact suffered a loss of R30 000.00.

Conclusion

Based on the facts of this case, the information and evidence furnished to this office and on the principles of reasonableness and fairness, there is no reasonable prospect of this office making a recommendation in your favour.