

# Liability for Damage Caused by Loadshedding: A Consideration of Whether Collective Action for Redress by Consumers in South Africa is Possible

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## Abstract

The *Consumer Protection Act* 68 of 2008 (CPA) seeks to advance the social and economic welfare of consumers in South Africa by protecting vulnerable consumers, amongst other things. Loadshedding, which is characterised by a chronic shortage in the supply of electricity, was introduced into South African society in 2007 as a mechanism to distribute the demand for electricity. Its purpose is to relieve the stress on the national power grid when the demand is high to prevent a national blackout. One of the impacts of the power surge when electricity is restored to the power grid is damage to consumer property such as electrical appliances. In section 61 the CPA makes provision for consumers to institute an action for liability flowing from damage caused by "goods". This paper argues that section 61 may be a good legal basis for collective redress by consumers in South Africa against power suppliers such as Eskom and the local municipalities.

## Keywords

Consumer protection law; section 61 of the *Consumer Protection Act* 68 of 2008; strict liability; loadshedding; class action.

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## 1 Introduction

The *Consumer Protection Act* 68 of 2008 (CPA) was introduced to advance the social and economic welfare of consumers in South Africa. It seeks to do this through protecting vulnerable consumers, amongst other things.<sup>1</sup> Socio-economic rights were emphasised in post-apartheid South Africa with the ushering in of the new constitutional democracy.<sup>2</sup> As a result, the provision of basic services by government to all persons, including the majority of the South African population that was previously deprived from using a service like electricity, meant that there was an increased demand for electricity.<sup>3</sup> Coupled with South Africa's role as an exporter of electricity in the continent, there was a significant increase in demand, while supply could not meet these requirements.<sup>4</sup> Loadshedding was introduced into South African society in 2007 and refers to a reduction in the electrical load through disconnecting consumers from the power grid at certain intervals.<sup>5</sup> It is a strategy designed to lessen the load on the power supply system.<sup>6</sup> Loadshedding is characterised by a "chronic shortage" in the supply of electricity that is attributed to a long period of improper planning and a lack of investment in the national power grid by the state.<sup>7</sup>

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<sup>1</sup> Section 3(1)(b) of the *Consumer Protection Act* 68 of 2008 (CPA) reads as follows: "(1) The purposes of this Act are to promote and advance the social and economic welfare of consumers in South Africa by- ...

(b) reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by consumers-

(i) who are low-income persons or persons comprising low-income communities;  
(ii) who live in remote, isolated or low-density population areas or communities;  
(iii) who are minors, seniors or other similarly vulnerable consumers; or  
(iv) whose ability to read and comprehend any advertisement, agreement, mark, instruction, label, warning, notice or other visual representation is limited by reason of low literacy, vision impairment or limited fluency in the language in which the representation is produced, published or presented."

<sup>2</sup> See ss 22-27 of the *Constitution of the Republic of South Africa*, 1996 (the Constitution).

<sup>3</sup> Lenoke *Impact of Load Shedding on the Economic Growth* 1; Masinga and Madzivhandilla 2023 *AJGD* 185-186.

<sup>4</sup> See Lenoke *Impact of Load Shedding on the Economic Growth* 1.

<sup>5</sup> See Hlongwane and Daw 2023b *IJEEP* 355; Hlongwane and Daw 2023a *IJEEP* 28; Dube and Moyo 2021 *PELJ* 12.

<sup>6</sup> Masibi *Impact of Loadshedding on ICT Enterprises* 1; Lawson 2022 *SAJE* 469.

<sup>7</sup> Nkosi and Dikgang 2018 *Journal of Commodity Markets* 37; Goldberg *Economic Impact of Load Shedding* 1; Walsh "Estimating the Economic Cost of Loadshedding" 1; Toto 2022 *EEEP* 52-53; and Inglesi-Lotz 2023 *SAJS* 3.

Loadshedding in South Africa occurs through regular planned electricity outages that are caused by shutting down segments of the electricity grid with the ultimate intention of preventing the risk of a national blackout.<sup>8</sup> It has been divided into stages. The higher stages usually signify higher megawatts being shed and more areas experiencing loadshedding during that period.<sup>9</sup> The implementation of a stage is dependent on what the strain on the grid is at a given time.<sup>10</sup> In addition to the impact that loadshedding has on consumers on the ground, loadshedding has had a significant impact on economic loss in the South African economy as a whole.<sup>11</sup>

Although the looming electricity crisis was identified in the late 1990s, the South African government did not take decisive steps to address the matter.<sup>12</sup> Unfortunately, the introduction of loadshedding is not without consequences. One of the major impacts of the power surge during the restoration of electricity after a period of loadshedding is damage to goods such as electrical appliances. Accordingly, this paper explores whether section 61 of the CPA, which makes provision for consumers to institute an action for liability for damage caused by “goods”, could be a viable and effective avenue for redress against the national power utility and related suppliers. Secondly, the paper assesses whether such action could be instituted by way of the collective action of consumers.

## 2 Liability for damages caused to goods under the CPA

Section 61 of the CPA introduced a strict liability framework into South African consumer protection law.<sup>13</sup> In essence, the section provides that persons involved in the supply chain, as producers, retailers, importers or distributors, may be held liable by consumers – regardless of whether fault in the form of negligence is established.<sup>14</sup> This provision is quite important in the overall scheme of the CPA, as the CPA states that even if a

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<sup>8</sup> Toto 2022 *EEEP* 53; Masinga and Madzivhandilla 2023 *AJGD* 186; Nkosi and Dikgang 2018 *Journal of Commodity Markets* 37; Hlongwane and Daw 2023a *IJEEP* 28; and Walsh "Estimating the Economic Cost of Loadshedding" 1. See also *United Democratic Movement v Eskom Holdings SOC Ltd* (005779/2023) [2023] ZAGPPHC 280 (5 May 2023) para 1.

<sup>9</sup> Lawson 2022 *SAJE* 479. See also Eskom date unknown <https://www.eskom.co.za/wp-content/uploads/2021/03/UnderstandingLStages.pdf>.

<sup>10</sup> Lawson 2022 *SAJE* 480.

<sup>11</sup> Goldberg *Economic Impact of Load Shedding* 4; Walsh "Estimating the Economic Cost of Loadshedding" 1, 16. Also see Du Venage 2020 <https://www.e-mj.com/news/this-month-in-coal/south-africa-comes-to-standstill-with-eskoms-loadshedding/>.

<sup>12</sup> Goldberg *Economic Impact of Load Shedding* 2; Masibi *Impact of Loadshedding on ICT Enterprises* 1.

<sup>13</sup> Laubscher and Reid "Section 61" 61-2.

<sup>14</sup> The latter provision addresses safety monitoring and recalls and does not fall within the scope of this paper. Section 5(5) of the CPA. Also see Laubscher and Reid "Section 61" 61-2.

transaction is exempt from its provisions, such a transaction will still be subject to section 61 and section 60 of the CPA.<sup>15</sup>

*Eskom Holdings Limited v Halstead-Cleak*<sup>16</sup> was a matter where a cyclist sought to hold Eskom Holdings SOC Limited (Eskom) liable for a personal injury in the form of electrical burns that he sustained when he was exposed to live low-hanging power lines over a footpath where he was cycling.<sup>17</sup> The Supreme Court of Appeal (SCA) held that there must be a "consumer-supplier" relationship in order for section 61 of the CPA to apply.<sup>18</sup> In particular, the SCA highlighted that the cyclist: (a) had not entered into a transaction with Eskom as a supplier or producer of electricity in the ordinary course of Eskom's business; and (b) was not at the time of his injury a user, recipient or beneficiary of the electricity.<sup>19</sup> It is therefore important to establish that a person is indeed a *consumer* who has entered into a *transaction* with the *supplier* in order to establish liability under section 61. A brief discussion of the definitions of these key terms follows.

## 2.1 Key definitions

In order to establish the existence of a "consumer-supplier" relationship, it ought to be understood how a supplier and consumer are defined respectively under the CPA. In this regard a "supplier" is defined as someone who markets goods or services.<sup>20</sup> "Market" has a wide meaning in the context of the CPA and refers to the promoting or supplying of goods or services.<sup>21</sup>

The CPA's definition of a "consumer" is wide and extends *inter alia* to someone:

- (i) to whom goods or services are marketed;
- (ii) who has entered into a transaction with a supplier; and
- (iii) who uses the goods and services, regardless of whether the person was a party to the transaction,

in the *ordinary course of business*.<sup>22</sup>

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<sup>15</sup> Section 5(5) of the CPA. Laubscher and Reid "Section 61" 61-4A. Also see *Griessel v Montsanto South Africa (Pty) Ltd* 2020 JDR 0082 (GP) para 17.

<sup>16</sup> *Eskom Holdings Limited v Halstead-Cleak* 2017 1 SA 333 (SCA) (hereafter the *Eskom Holdings Limited* case).

<sup>17</sup> *Eskom Holdings Limited* case para 2.

<sup>18</sup> *Eskom Holdings Limited* case paras 24-25.

<sup>19</sup> *Eskom Holdings Limited* case para 22. Also see Laubscher and Reid "Section 61" 61-4.

<sup>20</sup> Section 1 of the CPA.

<sup>21</sup> Section 1 of the CPA.

<sup>22</sup> Section 1 of the CPA. Own emphasis.

One of the key terms included in paras (ii) and (iii) of the definition of a consumer is "transaction", which is defined in the CPA as follows:

- (a) in respect of a person acting in the ordinary course of business-
  - (i) an agreement between or among that person and one or more other persons for the supply or potential supply of any goods or services in exchange for consideration; or
  - (ii) the supply by that person of any goods to or at the direction of a consumer for consideration; or
  - (iii) the performance by or at the direction of that person of any services for or at the direction of a consumer for consideration; or
- (b) an interaction contemplated in section 5(6), irrespective of whether it falls within paragraph (a).<sup>23</sup>

The phrase "ordinary course of business" is a critical component in considering whether a person is a consumer as defined in the CPA. It is used when defining both "consumer" and "transaction". It is accordingly important, as part of establishing the existence of a "consumer-supplier" relationship, to have a proper understanding of this phrase, which is not defined in the CPA. However, the Tribunal in *Doyle v Killeen*<sup>24</sup> set out the following factors that ought to be considered when determining whether the transaction has indeed occurred in the ordinary course of business:

- Whether the person has a registered business
- The nature of the business that the person engages in
- The nature of the goods normally sold by the person
- The frequency with which the goods are sold by the person
- Whether the person advertises or markets his goods on a frequent or ongoing basis.<sup>25</sup>

Considering the nature of the electricity-supply business in South Africa, it is self-evident that the abovementioned factors are present when electricity is supplied to persons in South Africa for use in their households. As a result, such persons would qualify as consumers as defined in the CPA.

Another important aspect to be considered is the dual nature of the definition of consumer. A consumer can be either a natural person or a juristic person

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<sup>23</sup> Section 1 of the CPA.

<sup>24</sup> *Doyle v Killeen* (NCT/12984/2014/75(1)(b)CPA) [2014] ZANCT 43 (25 September 2014).

<sup>25</sup> *Doyle v Killeen* (NCT/12984/2014/75(1)(b)CPA) [2014] ZANCT 43 (25 September 2014) para 59.

with an annual turnover or asset value of less than R2 million.<sup>26</sup> Therefore, small businesses that fall within this threshold also benefit from the protections of the CPA. This is important considering the negative impact that loadshedding has on businesses, as discussed further below.<sup>27</sup>

From the above discussion of these key definitions, it is evident that there is indeed a consumer-supplier relationship when electricity is supplied to consumers for use in their homes or businesses.<sup>28</sup> This is distinguishable from the facts in the *Eskom Holdings Limited* case, where the cyclist came across the live wire when cycling and not necessarily using the electricity as a consumer. Accordingly, section 61 of the CPA becomes a potential remedy that is available to the consumer.<sup>29</sup> A closer analysis of section 61 is necessary to establish what it caters for and whether it could be a viable remedy for damage that is caused by loadshedding.

## **2.2 Section 61 of the CPA as a basis for liability**

Section 61 of the CPA provides that:

the *producer or importer, distributor or retailer of any goods* is liable for any *harm...* caused wholly or partly as a consequence of—

- (a) Supplying any *unsafe goods*;
- (b) *A product failure, defect or hazard* in the 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.<sup>30</sup>

Under this provision, the court may still: (i) assess whether harm has indeed been proven and mitigated; (ii) determine the total extent of the monetary value in so far as damages are concerned; or (iii) specifically apportion liability to persons who are jointly and severally liable under the section.<sup>31</sup>

From a reading of section 61(1) of the CPA, there are four important elements to establishing liability.<sup>32</sup> First, the designation of the supplier must be established, i.e. that the supplier concerned is a producer, importer distributor or retailer. Secondly, the supplier must be providing *goods* to the consumer. Thirdly, the goods must carry a characteristic of being unsafe,

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<sup>26</sup> Section 1 of the CPA. GN 294 in GG 34181 of 1 April 2011.

<sup>27</sup> See para 2.2.4.1 below.

<sup>28</sup> *Eskom Holdings Limited* case.

<sup>29</sup> Also see s 5(1)(a) of the CPA.

<sup>30</sup> Section 61(1) of the CPA. Own emphases.

<sup>31</sup> Section 61(6) of the CPA. Also see s 61(2) of the CPA regarding joint and several liability.

<sup>32</sup> See *Eskom Holdings Limited* case paras 19, 21.

defective or hazardous. Alternatively, the supplier must have failed to set out adequate instructions or warnings to the consumer. Finally, the problematic characteristic of the goods must have caused harm to the consumer. Naturally, this means that there must be a causal link between the harm and the problematic characteristic of the goods. Each of these elements is addressed in term.

### 2.2.1 Designation of the electricity suppliers in South Africa

The suppliers responsible for the provision of electricity in South Africa are mainly Eskom, a state-owned company, and the local municipalities. Eskom generates, transmits and distributes electricity across the country.<sup>33</sup> In most instances Eskom supplies electricity to consumers through supply agreements that it concludes with entities such as local municipalities.<sup>34</sup>

The CPA defines a "producer" as a person who *inter alia* generates or creates goods in South Africa with the intention of making such goods available for supply in the ordinary course of business.<sup>35</sup> A "distributor" in relation to goods is defined as a person who is supplied with goods by the producer or importer or even another distributor, and subsequently supplies those goods to another distributor or to a retailer, in the ordinary course of such a person's business.<sup>36</sup> Lastly, a "retailer" is defined as a person who supplies goods to the consumer in the ordinary course of business.<sup>37</sup> The potential designation of Eskom or the local municipalities as importers is irrelevant for the purposes of this discussion, as electricity is generated locally by Eskom. It is submitted that Eskom therefore fits into the designations of producer, distributor and retailer as it is responsible for the generation, transmission and distribution of electricity to consumers in South Africa.<sup>38</sup> Municipalities also fit into the definition of retailers in so far as they are involved in the direct supply of electricity to the consumers.<sup>39</sup>

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<sup>33</sup> *United Democratic Movement v Eskom Holdings SOC Ltd* (005779/2023) [2023] ZAGPPHC 280 (5 May 2023) para 80.

<sup>34</sup> See Dube and Moyo 2021 *PELJ* 6.

<sup>35</sup> Section 1 of the CPA, definition of "producer". Also see Van Eeden and Barnard *Consumer Protection Law* 393.

<sup>36</sup> Section 1 of the CPA, definition of "distributor".

<sup>37</sup> Section 1 of the CPA, definition of "retailer".

<sup>38</sup> Also see *United Democratic Movement v Eskom Holdings SOC Ltd* (005779/2023) [2023] ZAGPPHC 280 (5 May 2023) para 10.

<sup>39</sup> Also see *Afriforum v Minister of Trade and Industry* 2013 4 SA 63 (GNP) paras 52, 55.

### 2.2.2 *Is electricity a "good"?*

The CPA specifically defines "goods" to include "gas, water and electricity".<sup>40</sup> Therefore, electricity constitutes a good as contemplated in the CPA broadly and section 61(1) as set out above.

### 2.2.3 *An assessment of the characteristic of the good*

For purposes of section 61(1) of the CPA, it is critical to establish that the good was unsafe, hazardous, defective, failed or was provided by the supplier without adequate warnings or instructions. Importantly, it is not necessary to establish that all of these characteristics are present. Instead, at least one of these characteristics should be present to establish liability under section 61(1) of the CPA.

As a point of departure, the various characteristics that make a good a potential subject of section 61 of the CPA are defined in section 53 of the CPA. This section sets out the definitions that apply to Part H: Right to fair value, good quality and safety. This is the Part under which section 61 of the CPA also falls. The only characteristics that are explored as potential grounds for liability under section 61 of the CPA in this paper are defectiveness, hazard, unsafe and failure as they are most relevant in the context of loadshedding. The definitions will first be laid out for context and this will be followed by the application of the relevant components of the defined characteristics when considering the viability of the collective action below.<sup>41</sup>

#### 2.2.3.1 Defect

A "defect" is defined as:

- (i) any material imperfection in the manufacture of the goods or components, or in performance of the services, that renders the goods or results of the service less acceptable than persons generally would be reasonably entitled to expect in the circumstances; or
- (ii) any characteristic of the goods or components that renders the goods or components less useful, practicable or safe than persons generally would be reasonably entitled to expect in the circumstances.<sup>42</sup>

The test for whether a good is defective requires consideration of the nature of the goods that consumers would be entitled to expect without the imperfection.<sup>43</sup> In other words, it becomes necessary to apply the "consumer expectations test" or the "legitimate expectations test" – which embodies an element of reasonableness.<sup>44</sup> This means that when applying

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<sup>40</sup> Section 1 of the CPA, definition of "electricity".

<sup>41</sup> See para 3 below.

<sup>42</sup> Section 53(1)(a) of the CPA.

<sup>43</sup> Van Eeden and Barnard *Consumer Protection Law* 391.

<sup>44</sup> Laubscher and Reid "Section 53" 53-7.



this test the courts would need to assess what comprises a reasonable expectation by analysing certain factors such as

the standard intended for the goods; the possible prevention of the harmful effect; the benefit, utility and cost of the goods; the manner in which, and purposes for which, the goods have been marketed; the use of any get-up or mark in relation to the goods; warnings with respect to doing or refraining from doing anything with or in relation to the goods; what might reasonably be expected to be done with or in relation to the goods; and the time when the goods were manufactured or supplied.<sup>45</sup>

The consumer expectations test has, however, been subject to some criticism in the South African context due to the difficulty of establishing a uniform standard of what a person may reasonably be entitled to expect.<sup>46</sup> This would vary drastically considering the diverse socio-economic status of the population in South Africa.<sup>47</sup>

The most relevant component of the definition of defect as set out above is para (ii). Its application in the specific context of loadshedding is discussed in further detail below.<sup>48</sup>

### 2.2.3.2 Hazard

A "hazard" is defined as:

a characteristic that—

- (i) Has been identified as, or declared to be, a hazard in terms of any other law; or
- (ii) Presents a significant risk of personal injury to any person, or damage to property, when the goods are utilized.<sup>49</sup>

The most relevant component of this definition is para (ii), which refers *inter alia* to a significant risk of damage to property being caused by the utilisation of the goods. Laubscher and Reid<sup>50</sup> submit that this requires that the court apply a value judgment to determine whether the risk is indeed "significant". The authors suggest that this assessment ought to be conducted in the context of the factors that are suggested for consideration under the consumer expectation test, as quoted above.<sup>51</sup> The application of para (ii) in the context of loadshedding is discussed in further detail below.<sup>52</sup>

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<sup>45</sup> Laubscher and Reid "Section 53" 53-12.

<sup>46</sup> Barnard 2021 *IJCLP* 32.

<sup>47</sup> Barnard 2021 *IJCLP* 32.

<sup>48</sup> See para 3.1.1 below.

<sup>49</sup> Section 53(1)(c) of the CPA.

<sup>50</sup> Laubscher and Reid "Section 53" 53-12.

<sup>51</sup> Laubscher and Reid "Section 53" 53-12.

<sup>52</sup> See para 3.1.2 below.

### 2.2.3.3 Unsafe

The term "unsafe" is defined as relating to goods presenting "an extreme risk of personal injury or property damage to a consumer or to other persons" as a result of a certain "characteristic, failure, defect or hazard".<sup>53</sup> Thus, for goods to be considered as "unsafe", such goods must present an extreme risk of damage *inter alia* to a consumer's property.<sup>54</sup> This appears to be a higher standard than a significant risk. In ordinary parlance, while extreme refers to "presenting in the utmost degree some particular characteristic",<sup>55</sup> significant refers to something that is "unlikely to have occurred by chance alone".<sup>56</sup> The definition of "unsafe" requires the consideration of certain overlapping characteristics, such as whether there is a failure, defect or hazard as defined.<sup>57</sup> Laubscher and Reid<sup>58</sup> rightfully argue that the overlapping nature of this definition may have the effect that a consumer seeking to claim would rely on the lowest of the vague and general standards when making a claim. It is submitted that this definition would not be applicable to a potential claim by consumers in the context of loadshedding. This is owing to the fact that the higher threshold in respect of the risk does not present itself in the loadshedding context. This is explored in further detail below.<sup>59</sup>

### 2.2.3.4 Failure

Finally, in terms of section 53(1)(b) of the CPA, a "failure" refers to the "inability of the goods to perform in the intended manner or to the intended effect". It is understood that the intended effect is a matter of how the producer or manufacturer of the goods in question intended that the goods should perform.<sup>60</sup> The possible application of this characteristic in the context of loadshedding is discussed in further detail below.<sup>61</sup>

## 2.2.4 Harm

The final element that ought to be considered when applying section 61, is whether harm was caused by the characteristic of the good in question. In this regard section 61(5) of the CPA provides that harm, for the purposes of this provision, is inclusive of: (i) death, injury or illness in respect of a natural

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<sup>53</sup> Section 53(1)(c) of the CPA.

<sup>54</sup> Section 53(1)(d) of the CPA.

<sup>55</sup> Oxford English Dictionary 2024 Extreme [https://www.oed.com/dictionary/extreme\\_adj?tab=meaning\\_and\\_use#4880256](https://www.oed.com/dictionary/extreme_adj?tab=meaning_and_use#4880256).

<sup>56</sup> Oxford English Dictionary 2024 [https://www.oed.com/dictionary/significant\\_adj?tab=factsheet#22826154](https://www.oed.com/dictionary/significant_adj?tab=factsheet#22826154).

<sup>57</sup> Laubscher and Reid "Section 53" 53-14.

<sup>58</sup> Laubscher and Reid "Section 53" 53-14.

<sup>59</sup> See para 3.1.4 below.

<sup>60</sup> Laubscher and Reid "Section 53" 53-10.

<sup>61</sup> See para 3.1.3 below.

person; (ii) loss or damage to the property of a consumer; and (iii) any economic loss in respect of (i) and (ii).

Two forms of harm are envisaged under section 61 of the CPA, namely physical harm and economic harm.<sup>62</sup> It goes without saying that the physical and economic harm are interlinked, i.e. the physical harm gives rise to the economic harm. Therefore, the discussion on harm in the context of this paper will focus on two aspects of physical harm, with the relevant linkage to the resultant economic harm. The first is damage to property as a result of the power surges caused by loadshedding;<sup>63</sup> and the second is the potential for damage to property and death or personal injury flowing from fires caused by electrical fires that result from power surges or from alternative sources of energy that consumers are forced to use during loadshedding. In each case it is important that a causal link be established between the loadshedding and the harm that it ultimately causes.<sup>64</sup> Each of these types of harm is discussed in turn.

#### 2.2.4.1 Damage to consumer property following power surges

It is undisputable that loadshedding has a detrimental impact on the capacity of community members to generate an income, as well as access to education and healthcare.<sup>65</sup> As highlighted by Masinga and Madzivhandilla,<sup>66</sup> the disconnection and reconnection of electricity during loadshedding causes damage to electrical appliances that were turned on before loadshedding commenced. Harm, therefore, takes place in the form of damage to consumer property. Key amongst the items that are often subject to damage are refrigerators, which are used to preserve food by keeping it at a suitably cool temperature. 38% of the people in South Africa have had to acquire new refrigerators due to the damage caused to their appliances by loadshedding.<sup>67</sup> A related consequence of loadshedding is that 93% of South Africans have been forced to dispose of food that had been spoilt in their refrigerators.<sup>68</sup> It goes without saying that spoiled food carries a health risk as it can be dangerous to consumers.<sup>69</sup> It cannot be ignored that many South Africans are financially vulnerable and living below

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<sup>62</sup> Van Eeden and Barnard *Consumer Protection Law* 394.

<sup>63</sup> Power surges have also been acknowledged by Eskom in a power surges fact sheet that encourages consumers to buy power surge protectors to avoid damage to their appliances – see Eskom 2020 <https://www.eskom.co.za/eas/wp-content/uploads/2021/05/SURGEPROTECTIONFACTSHEETFINAL.pdf>.

<sup>64</sup> Laubscher and Reid "Section 61" 61-5.

<sup>65</sup> Inglesi-Lotz 2023 SAJS 2; *United Democratic Movement v Eskom Holdings SOC Ltd* (005779/2023) [2023] ZAGPPHC 280 (5 May 2023) para 38.

<sup>66</sup> Masinga and Madzivhandilla 2023 AJGD 187.

<sup>67</sup> Masinga and Madzivhandilla 2023 AJGD 187.

<sup>68</sup> Masinga and Madzivhandilla 2023 AJGD 187. Also see Inglesi-Lotz 2023 SAJS 3.

<sup>69</sup> Masinga and Madzivhandilla 2023 AJGD 187.

the poverty line and cannot afford three nutritious meals a day.<sup>70</sup> It is unfortunately these vulnerable consumers who find themselves needing to throw away the spoiled food, as they do not have access to alternative energy sources that can be used to power their home appliances.<sup>71</sup>

Consumers who may find themselves living above the poverty line may still not be able to afford alternative backup energy to power their refrigerators. Therefore, they might find themselves having to opt for unhealthy food alternatives.<sup>72</sup> That said, the damage caused by loadshedding is not restricted to refrigerators, but extends to other electrical appliances such as LED lights, televisions, geysers, stoves and intercoms.<sup>73</sup> Again, the impact is more pronounced in low-income households that cannot afford to replace these appliances or to insure them.<sup>74</sup> Thus the impact of loadshedding is most severely felt by the vulnerable consumer that the CPA seeks to protect.<sup>75</sup>

Unfortunately, the harm caused by loadshedding is not restricted to natural persons, but extends to juristic persons that operate as businesses. Businesses also experience damage to critical equipment as devices are turned on and off from time to time.<sup>76</sup> This cost is borne by the businesses and thus has a further detrimental effect on the businesses' turnover, particularly that of small businesses that fall within the scope of the CPA's protection.<sup>77</sup>

In both instances, where natural and juristic persons as consumers are concerned, the related economic harm would include the cost of hiring a substitute, replacing or repairing the damaged goods.<sup>78</sup> It could even be argued that there might be scope to include the indirect costs associated with spoiled food from damaged fridges, for example. When it comes to the operation of a business, the economic loss may also extend to loss of profits due to the damage to the property that is used for the business.<sup>79</sup> In all these instances, the causal link must be clearly established.

Eskom's power surge protection fact sheet acknowledges the damage that can be caused by the loadshedding power surges, alongside lightning and

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<sup>70</sup> Masinga and Madzivhandilla 2023 *AJGD* 188.

<sup>71</sup> Masinga and Madzivhandilla 2023 *AJGD* 189.

<sup>72</sup> Masinga and Madzivhandilla 2023 *AJGD* 188.

<sup>73</sup> Masinga and Madzivhandilla 2023 *AJGD* 188, 189.

<sup>74</sup> Inglesi-Lotz 2023 *SAJS* 3.

<sup>75</sup> Masinga and Madzivhandilla 2023 *AJGD* 189; s 3(1)(b) of the CPA.

<sup>76</sup> Masibi *Impact of Loadshedding on ICT Enterprises 2*; Schoeman and Saunders "Impact of Power Outages on Small Businesses" 332.

<sup>77</sup> Masibi *Impact of Loadshedding on ICT Enterprises 2*.

<sup>78</sup> Laubscher and Reid "Section 61" 61-25.

<sup>79</sup> Laubscher and Reid "Section 61" 61-26.

power interruptions caused by network faults.<sup>80</sup> The fact sheet encourages consumers to procure surge protectors in order to protect their devices from the said power surges.<sup>81</sup> However, it is submitted that it is unreasonable to place this obligation on consumers, most of whom comprise of the vulnerable low-income majority in South Arica. To avoid potential litigation for damage caused by loadshedding, it would be prudent for Eskom or the relevant local municipalities to take the relevant preventative measures, whether that is through the installation of surge protectors into the grid or any other steps that are sound, taking into account engineering considerations and consumer safety.

#### 2.2.4.2 Damage to property or personal injury from fires

Further to direct damage to property following electricity surges, research has also been conducted that indicates that there had been an increase in the probability of residential fires following power outages.<sup>82</sup> This is not only as a result of electrical fires following power surges, but also due to the use of alternative means of generating energy during power outages, such as wood, paraffin, gas etc.<sup>83</sup> Fires of this nature result in damage to property as well as physical injury.<sup>84</sup> Once again, the effect is more severely felt by the poor, particularly those residing in informal housing.<sup>85</sup> The related economic harm would include the cost of repairing damaged physical property caused by the fires or associated medical costs from the physical injury sustained. However, it cannot be denied that the element of causation, which must still be proven in terms of section 61(1) of the CPA, would be very difficult for consumers to establish. Therefore, pursuing an action under section 61 of the CPA for harm of this nature might be a challenge.

### 2.3 *Do the exclusions apply?*

There are certain limitations to the application of section 61 of the CPA. First, it will not apply in instances where the product characteristic or failure can be attributed to compliance with any public regulation.<sup>86</sup> Secondly, section 61 will not be applicable in instances where the unsafe characteristic or failure in the product was not present at the time that the goods were supplied, or the characteristic can be attributed to compliance with

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<sup>80</sup> See Eskom 2020 <https://www.eskom.co.za/eas/wp-content/uploads/2021/05/SURGEPROTECTIONFACTSHEETFINAL.pdf>.

<sup>81</sup> Eskom 2020 <https://www.eskom.co.za/eas/wp-content/uploads/2021/05/SURGEPROTECTIONFACTSHEETFINAL.pdf>.

<sup>82</sup> Lawson 2022 SAJE 482, 483.

<sup>83</sup> Lawson 2022 SAJE 482.

<sup>84</sup> Lawson 2022 SAJE 471.

<sup>85</sup> Lawson 2022 SAJE 478.

<sup>86</sup> Section 61(4)(a) of the CPA.

instructions provided.<sup>87</sup> Thirdly, section 61 will not be applicable in instances where it is unreasonable to expect that the distributor or retailer would have discovered the defect or hazard concerned, bearing in mind the role of that person in promoting and supplying the goods to the consumer.<sup>88</sup> Finally, if the claim is brought three years after the death or illness for which compensation is claimed, or after the date when the person possessed knowledge about the material facts about the cause of loss or damage to property, or the latest date on which economic loss was suffered as a result of the defect or characteristics, then the claim would have prescribed and section 61 cannot assist a consumer in this situation.<sup>89</sup>

It is submitted that none of these exceptions to the application of section 61 would be applicable when relying on section 61 as a basis for collective litigation for damage caused by loadshedding. The possible application of the first exception will be discussed, however, given that it is the most relevant in this context. In this regard a national state of disaster was declared in respect of the electricity crisis by the Minister of Co-operative Governance on 9 February 2023.<sup>90</sup> Regulations to give effect to this declaration were released on 27 February 2023. The purpose of these public regulations were to: (i) assist and provide a level of relief to the public; (ii) protect property; (iii) avert the disruption of electricity; and (iv) address the damaging nature and effects of loadshedding *inter alia* through multiple mechanisms including the minimisation of the loadshedding impact on various aspects of society.<sup>91</sup> However, nothing in the regulations sought to exempt the suppliers of electricity from the application of section 61 of the CPA. Given that the focus of these regulations was on mitigating the results of loadshedding, it cannot be said that loadshedding during this period was as a result of compliance with public regulation. In other words, the damage caused by loadshedding cannot be attributed to these regulations. The regulations were in any event in effect for an exceptionally short period as they were revoked approximately two months later, on 5 April 2023, when the national state of disaster was terminated. Therefore, the regulations are no longer applicable to the loadshedding dispensation in South Africa.<sup>92</sup>

### 3 The viability of collective action

At the outset it is worthwhile to consider whether Eskom and the local municipalities may be absolved from potential liability due to the fact that loadshedding is currently implemented to avoid a total collapse of the

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<sup>87</sup> Section 61(4)(b) of the CPA.

<sup>88</sup> Section 61(4)(c) of the CPA.

<sup>89</sup> Section 61(4)(d) of the CPA.

<sup>90</sup> GN 3020 in GG 48009 of 9 February 2023.

<sup>91</sup> Regulation 2 in GN R3089 in GG 48145 of 27 February 2023.

<sup>92</sup> GN R3265 in GG 48400 of 5 April 2023.

national grid. Accordingly, does necessity apply as a defence in this context? In terms of the common law of delict “necessity” refers to lawful conduct that is intended to prevent harm through the infliction of harm on an innocent person.<sup>93</sup> In this context it could refer to the indirect infliction of harm on consumers through loadshedding to avoid the risk of the grid’s collapsing completely. An act committed as a result of necessity is considered to be justified and makes conduct lawful which might otherwise have been unlawful.<sup>94</sup> Considering that section 61 of the CPA establishes a statutory strict liability regime, it is argued that the common law principles of delict will not be applicable as there is a distinction between the enforcement of a statutory right and a common law right.<sup>95</sup> In terms of section 61, lawfulness is not considered in the same sense that it is delictually. Instead, it is required under section 61 only that the supplier supply goods that are “defective, unsafe, hazardous” or goods that have a failure in order to place reliance on section 61. Therefore, it is submitted that the common law principle of necessity will not absolve Eskom and the local municipalities from potential liability under section 61 of the CPA, Accordingly, this application of necessity is not considered further.

In order to establish the viability of a collective action on the basis of section 61 of the CPA for liability in respect of damage caused by loadshedding, it is critical to establish certain facts. In the discussion above it has already been established that in so far as the relationship between Eskom, the municipalities and the consumers receiving and using electricity is concerned, there is indeed a consumer-supplier relationship.<sup>96</sup> Secondly, it has been established that while Eskom falls within the designation of a producer, distributor and retailer, municipalities that supply electricity would, at the very least, be retailers.<sup>97</sup> Therefore the designation of the supplier that is prescribed under section 61 has been met. Thirdly, electricity clearly falls within the scope of goods as defined in the CPA.<sup>98</sup> Fourthly, the type of harm caused by loadshedding has been established.<sup>99</sup>

What remains is to determine the connection between the characteristic of the electricity and the harm that is suffered by consumers. Thereafter, an assessment of the viability of collective redress ought to be explored.

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<sup>93</sup> Midgley and Van der Walt *Principles of Delict* para 112.

<sup>94</sup> Midgley and Van der Walt *Principles of Delict* para 112.

<sup>95</sup> *Daniël Johannes Erasmus t/a First Engineering & Stainless v Euro Steel Services (EC)* (unreported) case number 1139/2018 of 2022 para 12; *Motus Corporation (Pty) Ltd t/a Zambezi Multi Franchise v Wentzel* 2021 3 All SA 98 (SCA) para 26; *Chirwa v Transnet Limited* 2008 4 SA 367 (CC).

<sup>96</sup> See para 2.1 above.

<sup>97</sup> See para 2.2.1 above.

<sup>98</sup> See para 2.2.2 above.

<sup>99</sup> See para 2.2.4 above.

### 3.1 *Characteristic: Defective, unsafe, hazardous, failure?*

At the outset it is important to reiterate that the wording of section 61(1) of the CPA does not require that every possible characteristic be present in order to establish liability under section 61. As such, the presence of multiple grounds or characteristics is not necessary, but it does make the basis for collective redress stronger. In *Eskom Holdings Limited v Halstead-Cleak*<sup>100</sup> the court considered section 61(1)(b) of the CPA, which provides that there should be a product failure, defect or hazard in the good concerned. In its analysis of the provision the SCA remarked obiter that:

In any event it cannot be found that the harm the respondent suffered was as a result of the electricity *itself* failing, or that the electricity had a defect. Failing in this context would be if the electricity were unable to perform in the intended manner. This was not the case. The electricity, in the context of the case did not suffer from a *material imperfection in the manufacture of the goods*. Likewise, the electricity did not have a *characteristic that rendered it less useful or safe* than a person would generally expect in the circumstances. The same applies to the electricity not possessing a characteristic that presented a *significant risk* of injury to any person when the goods are utilised.<sup>101</sup>

Therefore, a narrow approach was adopted by the court in so far as interpreting what constitutes a defect, failure or hazard in the context of electricity. The SCA in *Halstead-Cleak* restricted its analysis to the functionality of the electrical current itself. However, Laubscher and Reid<sup>102</sup> argue with merit for a wider consideration of whether electricity is defective, hazardous or unsafe. The authors submit that the interpretation—

should not be restrictively understood to refer only to electrically charged particles (current), but must be understood in a wider sense, to include the manner in which the current is conducted *and made accessible*. It is suggested that electricity as a species of 'goods' in the commercial sense comprises both the current and the means whereby the current is conducted and made accessible by the producer, importer, distributor or retailer. If this occurs *irregularly and inappropriately*, as in the case of a live and unprotected power line overhanging a footpath and exposing persons to harm, the electricity (in the wider sense referred to above) is arguably 'less useful, practicable or safe than persons generally would be reasonably entitled to expect', therefore presenting a 'defect' in terms of s 53(1)(a)(ii).<sup>103</sup>

It is submitted that this wider definition that highlights not only how the electricity is conducted but also how it is made accessible is preferable and more accurate. This wide meaning is therefore the interpretation that is adopted in the discussion that follows, in order to assess whether electricity that is subject to loadshedding meets the characteristics as set out in

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<sup>100</sup> *Eskom Holdings Limited case*.

<sup>101</sup> *Eskom Holdings Limited case* para 24. Own emphasis.

<sup>102</sup> Laubscher and Reid "Section 53" 53-14.

<sup>103</sup> Laubscher and Reid "Section 53" 53-4. Own emphasis.



section 61(1) of the CPA, namely being defective, hazardous, unsafe or having failed.

### 3.1.1 *Defectiveness*

As mentioned above,<sup>104</sup> the second component of the definition of "defect" is most relevant in the context of this discussion, namely the possession of—

any characteristic of the goods or components that renders the goods or components less useful, practicable or safe than persons generally would be reasonably entitled to expect in the circumstances.<sup>105</sup>

In the context of the consumer expectations test that is underpinned by reasonableness, it can reasonably be expected by consumers that the provision of electricity, i.e. the way it is made accessible, should be useful, safe and not cause damage to their property. However, the implementation of loadshedding does not meet this standard for two reasons. First, the duty to supply electricity to consumers should be interpreted as a supply of electricity on an uninterrupted basis, subject to expected instances of routine maintenances or instances of *vis major* such as fires or cable theft.<sup>106</sup> However, the interruption to the supply of electricity that is caused by loadshedding makes the supply less useful in that it cannot be used as intended during such outages. Secondly, the intermittent manner in which electricity is made accessible in South Africa renders it less safe because the power surges that occur when electricity is re-introduced into the grid after loadshedding cause damage to consumer property and can, in some instances, even result in personal injury.<sup>107</sup> Accordingly, loadshedding, makes defective the manner in which electricity is made accessible.

### 3.1.2 *Hazardous*

As mentioned above,<sup>108</sup> para (ii) of the definition of "hazardous" would be most relevant in the context of loadshedding, i.e. that when the electricity is used, it presents a *significant risk* of "injury to any person, or *damage to property*".<sup>109</sup> In the context of the provision of electricity, much research has been conducted that has indicated that power surges that arise when electricity is re-introduced into the grid do indeed cause significant risk of damage to the property of consumers.<sup>110</sup> This therefore results in the

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<sup>104</sup> See para 2.2.3.1 above.

<sup>105</sup> Section 53(1)(a) of the CPA.

<sup>106</sup> Dube and Moyo 2021 *PELJ* 7.

<sup>107</sup> See Masinga and Madzivhandilla 2023 *AJGD* 187. See para 0 above.

<sup>108</sup> See para 2.2.3.2 above.

<sup>109</sup> Own emphasis. Section 53(1)(c) of the CPA.

<sup>110</sup> See para 2.2.4.1 above.

manner in which electricity is provided being hazardous, given that its use can result in harm to individuals or damage to their property.

### *3.1.3 Product failure*

The question arises whether loadshedding can be considered to be a failure when it is as a result of a planned outage to avoid a total collapse. What is critical to this enquiry is whether the electricity is performing in the intended manner. As mentioned above, this test requires a consideration of how the producer or manufacturer intended for the goods to perform.<sup>111</sup> Loadshedding is intended to mitigate the risk of a total blackout; however, this does not change the fact that this is not how electricity is intended to perform by Eskom or the local municipalities. Accordingly, it is argued that when electricity is connected and disconnected during loadshedding, there is a clear failure in that the electricity is unable "to perform in the intended manner" due to its being provided inconsistently as a result of loadshedding. This makes the manner in which electricity is made accessible a product failure as envisaged in section 61(1) of the CPA. To the extent that this argument does not hold, electricity remains hazardous and defective, as has been submitted above.

### *3.1.4 Unsafe*

It is submitted that the manner in which electricity is made accessible would not necessarily fall under the category of being "unsafe" as envisaged in the CPA. As discussed above, for a product to be unsafe it must pose an *extreme risk inter alia* of damage to property.<sup>112</sup> While it is a high possibility that damage to property could ensue due to loadshedding, the defect, failure or hazard does not necessarily present an extreme risk. Therefore, this is not a ground that may be relied upon for the purposes of pursuing an action under section 61.

## **3.2 A consumer class action**

Section 4 of the CPA gives effect to the realisation of consumer rights. Under this provision certain persons are given the permission to approach the court, the National Consumer Commission or the National Consumer Tribunal alleging that either: (i) their rights under the CPA have been "infringed, impaired or threatened"; or (ii) prohibited conduct has occurred or is in the process of occurring.<sup>113</sup> These persons include persons that are acting as part of or in the interests of a class of persons who have been similarly affected by the infringement of rights or prohibited conduct.<sup>114</sup>

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<sup>111</sup> Laubscher and Reid "Section 53" 53-10.

<sup>112</sup> Own emphasis. Section 53(1)(d) of the CPA.

<sup>113</sup> Section 4(1) of the CPA.

<sup>114</sup> Section 4(1) of the CPA.

Class actions are often used as a vehicle for redress in instances where individual claims are not significant enough to pursue and where the class members are poor or the class itself is large.<sup>115</sup> Undoubtedly, it might be costly and tedious for households or small businesses to institute action on an individual basis against Eskom or the municipalities for damage caused by loadshedding.<sup>116</sup> However, the recognition of class actions under section 4 of the CPA means that collective redress might be a viable means of seeking redress for the harm caused by loadshedding. This provision also echoes section 38(c) of the Constitution, which makes provision for collective redress through class actions for the purposes of enforcing the Bill of Rights.<sup>117</sup>

Van Eeden and Barnard suggest that sections 4(1) and 69 do not govern section 61 of the Act; and, save for the liability arrangement in the provision itself, section 61 is governed by the common law.<sup>118</sup> To take this point further, the authors submit that section 61 of the CPA neither alleges an infringement of a consumer right, nor the occurrence of prohibited conduct as envisaged in section 4 of the CPA.<sup>119</sup> In so far as an infringement of a consumer right is concerned, the argument is that section 61(1)(a)-(c) of the CPA merely states the circumstances under which the supplier will be liable for harm suffered by a person without proof of negligence.<sup>120</sup> Concerning the prohibited conduct, the argument is that the circumstances specified in section 61(1) do not amount to conduct that is in contravention of the CPA.<sup>121</sup> Therefore, the essence of the authors' submission is that the standing provisions in section 4 cannot be relied upon when enforcing section 61 of the CPA; and further that the hierarchical requirements set out in section 69 of the CPA will not be applicable. The implication of this approach is that a class action within the framework of the provisions of the CPA would not be feasible.

While the authors' stance in so far as section 69 is concerned is sound, their position in relation to section 4 presents a significant challenge to the realisation of rights by consumers. The main issue that arises is that our common law does not recognise class actions.<sup>122</sup> In fact, class actions were

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<sup>115</sup> Broodryk 2019 *Stell LR* 7; *Children's Resource Centre Trust v Pioneer Food (Pty) Ltd* 2013 2 SA 213 (SCA) para 10.

<sup>116</sup> De Stadler and Eiselen "Section 4" 4-6. Also see Jacobs, Stoop and Van Niekerk 2010 *PELJ* 306.

<sup>117</sup> De Stadler and Eiselen "Section 4" 4-3. Also see Jacobs, Stoop and Van Niekerk 2010 *PELJ* 306.

<sup>118</sup> Van Eeden and Barnard *Consumer Protection Law* 387.

<sup>119</sup> Van Eeden and Barnard *Consumer Protection Law* 388-389.

<sup>120</sup> Van Eeden and Barnard *Consumer Protection Law* 388.

<sup>121</sup> Van Eeden and Barnard *Consumer Protection Law* 389.

<sup>122</sup> *Firststrand Bank Limited v Chaucer Publications (Pty) Limited* 2008 2 SA 592 (C) para 20 (hereafter the *Chaucer Publications* case).

foreign to South African common law and, instead, a very cautious approach to standing was adopted by the courts prior to the constitutional dispensation.<sup>123</sup> This changed with the introduction of section 38 of the Constitution, in terms of which section 38(c) of the Constitution, like section 4(1)(c) of the CPA, recognises class actions.<sup>124</sup> Of course, section 61 of the CPA does not directly enforce a constitutional right. However, it has been argued that the provision of electricity is a constitutionally protected right.<sup>125</sup> In this regard Dube and Moyo argue that the right to electricity is implied in the constitutional imperative to fulfil socio-economic rights to housing, healthcare, dignity, education, access to information, freedom of expression and freedom to practise one's occupation or profession, to name but a few.<sup>126</sup> In *United Democratic Movement v Eskom Holdings SOC Ltd* the high court even went to the extent of declaring the practice of loadshedding as being unconstitutional in so far as it infringes on the rights to education, security and healthcare.<sup>127</sup> The framing of the provision of electricity as a constitutionally protected right is important for two reasons, namely: (i) it elevates the need for consumers to experience an uninterrupted supply of electricity; and (ii) it establishes a foundation for a constitutionally-based class action. While this is certainly a possibility, the exploration of a class action in terms of section 38(c) of the Constitution falls outside the scope of this paper, which seeks to assess how the CPA, through its strict liability provision, could be a basis for a class action by consumers in South Africa.

Despite the view expressed above by Van Eeden and Barnard regarding the application of section 4(1) when enforcing section 61 of the CPA, it is submitted that there is scope for a wider interpretation of section 61 of the CPA. In *Natal Joint Municipal Pension Fund v Endumeni Municipality*<sup>128</sup> the court held that:

Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is

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<sup>123</sup> *Chaucer Publications* case para 22.

<sup>124</sup> *Chaucer Publications* case para 23. Also see Barnard 2021 *IJCLP* 34.

<sup>125</sup> See Dube and Moyo 2021 *PELJ* 9-12, 17.

<sup>126</sup> See Dube and Moyo 2021 *PELJ* 9-10. Also see *Daniels v Scribante* 2017 4 SA 341 (CC) paras 209-210.

<sup>127</sup> *United Democratic Movement v Eskom Holdings SOC Ltd* (005779/2023) [2023] ZAGPPHC 280 (5 May 2023) para 38; *Wilrus Trading CC v Dey Street Properties (Pty) Ltd* (1750/2021) [2021] ZAGPPHC 42 (9 February 2021) para 24.

<sup>128</sup> *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 (SCA) para 18.

possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation.

In the light of the above dictum, section 61 must be interpreted *inter alia* in the context in which it appears and in alignment with the purpose to which it is directed. In this regard section 61 of the CPA falls under Part H of the CPA, which makes provision for the right to fair value, good quality and safety. The Part starts off by providing the definitions that apply to the whole part, including of the key terms used in section 61, namely, defect, failure, hazard and unsafe.<sup>129</sup> Furthermore, a key provision that falls under Part H and relates to section 61 is section 55 of the CPA, which provides for the consumer's right to safe and good quality goods. In terms of section 55, consumers have the right to receive goods that are *inter alia* free from defects.<sup>130</sup> Section 56 of the CPA also makes provision for the implied warranty of quality, which has the effect that the supplier warrants that the goods are not *inter alia* defective.<sup>131</sup> Therefore, it is submitted that section 61 of the CPA gives practical effect to the right to fair value, good quality and safety, by providing for liability in cases where consumers have been exposed to goods that are defective or unsafe, or have failed. This is particularly important in the context of the purpose of the CPA, which is to protect vulnerable consumers, given that it has been established that it is often the most vulnerable consumers that suffer significant harm.<sup>132</sup> Accordingly section 4(1) of the CPA can and should be relied on in the enforcement of section 61 since the provision, contextually considered, enforces a consumer right and also seeks to prevent or deter a prohibited practice from occurring.

The CPA does not allow consumers to approach the National Consumer Tribunal, along with the National Consumer Commission, for damages that flow from a product liability claim.<sup>133</sup> In this regard the National Consumer Tribunal does not have the power to make an order for damages due to its limited statutory jurisdiction.<sup>134</sup> It can only confirm a consent order that

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<sup>129</sup> Section 53 of the CPA.

<sup>130</sup> Section 55(2)(b) of CPA.

<sup>131</sup> Section 56(1) and (2) of the CPA.

<sup>132</sup> See para 2.2.4.1-2.2.4.2 above.

<sup>133</sup> Van Eeden and Barnard *Consumer Protection Law* 388.

<sup>134</sup> See ss 150 and 151 of the *National Credit Act* 34 of 2005 and ss 112 and 114 of the CPA. Also see Van Eeden and Barnard *Consumer Protection Law* 459, where the authors submit that: "notwithstanding the provisions of section 4(2)(b)(ii)(bb) of the CPA, the orders that the NCT has the power to grant are confirmed to those orders

includes an order for damages.<sup>135</sup> Similarly, the other bodies envisaged under section 69 of the CPA are also creatures of statute that do not have the power to award damages. It would thus not be necessary for the consumer to first approach those forums prior to approaching the civil courts.<sup>136</sup> The content of section 61 also makes reference only to the court and to no other enforcement body.<sup>137</sup> Accordingly, it would be best for a consumer to bring such an application directly before the civil courts. The powers of the court in the context of collective redress under the CPA are also affirmed by section 76(1)(c) of the CPA, which allows a court to award damages against a supplier in respect of a class of affected consumers.

The wording of the section is broader in that a "matter" is not restricted to the enforcement of rights or the prevention of prohibited conduct, but can be any matter that is brought before the court in terms of the CPA. This provision further supports the enforceability of section 61, and damages that are provided for therein within the provisions of the Act.

The CPA does not prescribe a procedure for bringing forward a class action.<sup>138</sup> A call has correctly been made for greater certainty in so far as procedural guidance for the institution of class actions is concerned.<sup>139</sup> Barnard submits with merit in this regard that the lack of procedural guidance through legislation is indeed preventing class actions from being successfully implemented.<sup>140</sup> Clarity from the legislature in this regard would be beneficial to consumers wishing to make use of the class action provisions under the CPA. Nonetheless, the high court has considered class

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specified in sections 112 (administrative fines) and 11 (interim relief) of the CPA, and in sections 150 and 151 of the NCA."

<sup>135</sup> Section 74(1) of the CPA.

<sup>136</sup> Also see Laubscher and Reid "Section 61" 61-32, where the authors submit with merit: "86. Product liability claims under s 61 are essentially for the recovery of damages. It is significant that s 61 is the only section in the CPA which regulates liability for damages. The section creates a liability for damages, but it does not create a special CPA remedy for recovery of damages. The Commission, Tribunal, an ombuds, a consumer court, and dispute resolution agents referred to in s 69, read with s 70, are creatures of statute and must execute their functions within the parameters imposed by the CPA. For reasons set out below these institutions appear not to have jurisdiction to award damages under s 61 and therefore not to constitute 'other remedies available [to claimants under s 61] in terms of national legislation', as referred to in s 69(d), before approaching a court."

"87. The Consumer Commission is not empowered to award damages. The Commission in any event no longer investigates individual consumer complaints but only endemic harmful business practices. This indicates that the legislature did not intend that a product liability claim under s 61 should first be referred to the Consumer Commission, before the plaintiff(s) may institute action in a civil court." (Footnotes omitted).

<sup>137</sup> See s 61(6) of the CPA.

<sup>138</sup> De Stadler and Eiselen "Section 4" 4-4; Barnard 2021 *IJCLP* 35.

<sup>139</sup> Barnard 2021 *IJCLP* 35.

<sup>140</sup> Barnard 2021 *IJCLP* 35.

actions in various instances, including the constitutional law context. In this regard the preliminary procedural steps to pursuing a class action are that: (i) the applicant must seek leave from the High Court to pursue the action on a representative basis; (ii) a common interest needs to be established before the action proceeds; and (iii) the representative of the class action must be required to provide affected parties with sufficient notice in order for them to opt in or opt out.<sup>141</sup>

Further to the above, class actions must be certified. In this regard the following requirements were laid down in *Children's Resource Centre Trust v Pioneer Food (Pty) Ltd*,<sup>142</sup> for certification:

- the existence of a class identifiable by objective criteria;
- a cause of action raising a triable issue;
- that the right to relief depends upon the determination of issues of fact, or law, or both, common to all members of the class;
- that the relief sought, or damages claimed, flow from the cause of action and are ascertainable and capable of determination;
- that where the claim is for damages there is an appropriate procedure for allocating the damages to the members of the class;
- that the proposed representative is suitable to be permitted to conduct the action and represent the class;
- whether given the composition of the class and the nature of the proposed action a class action is the most appropriate means of determining the claims of class members.

However, as was confirmed by the court in *Mukaddam v Pioneer Foods*,<sup>143</sup> these are not inflexible requirements. Rather they are factors that can be taken into account by the court in order to determine whether it is indeed in the interests of justice to certify the matter.<sup>144</sup> It is submitted that, in the absence of CPA-specific guidelines on the institution of class actions, the above jurisprudence on the certification of class action proceedings would be equally applicable in the context of collective action against Eskom and the local municipalities for damage to consumer goods that is caused by loadshedding.

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<sup>141</sup> *Chaucer Publications* case para 26. Also see De Stadler and Eiselen "Section 4" 4-4.

<sup>142</sup> *Children's Resource Centre Trust v Pioneer Food (Pty) Ltd* 2013 2 SA 213 (SCA) para 26.

<sup>143</sup> *Mukaddam v Pioneer Foods* 2013 5 SA 89 (CC) para 37.

<sup>144</sup> *Mukaddam v Pioneer Foods* 2013 5 SA 89 (CC) para 35-37; De Stadler and Eiselen "Section 4" 4-5.

## 4 Concluding remarks

This paper has sought to determine whether collective redress for damage that is caused to consumer goods by loadshedding is due and possible. In the light of the comprehensive discussion, it is argued that collective action by persons in South Africa against Eskom and the local municipalities for liability for damage to goods that is caused by loadshedding is indeed feasible. This is particularly so in the light of the fact that those who suffer the most from loadshedding and its effects are the vulnerable consumers that the CPA seeks to protect. If an action of this nature were to be successful, all members of the class, namely consumers who have experienced damage to property or their persons because of loadshedding, would benefit from the order of the court, or a settlement agreement if the parties to the litigation agree on a settlement instead. Either way, a class action would benefit all affected consumers, and particularly the vulnerable consumers who do not have the financial means (i) to mitigate or prevent the harm caused by loadshedding or institute action against a supplier; or (ii) to repair the damages that have been caused by loadshedding from their personal pockets.

A collective action of this nature might also encourage the suppliers of electricity in South Africa to take steps to ensure that the provision of electricity, even if it is still subject to loadshedding, is made safer and less hazardous. This could be through the use or incorporation of surge protectors or any other engineering mechanisms that would mitigate the harm that consumers are ordinarily exposed to.

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### List of Abbreviations

AJGD	African Journal of Governance and Development
CPA	Consumer Protection Act 68 of 2008
EEEP	Economics of Energy & Environmental Policy
IJEEP	International Journal of Energy and Economics and Policy
IJCLP	International Journal on Consumer Law and Practice
PELJ	Potchefstroom Electronic Law Journal
SAJE	South African Journal of Economics
SAJS	South African Journal of Science
SCA	Supreme Court of Appeal
Stell LR	Stellenbosch Law Review