

# WHO IS LIABLE FOR THE LISTERIA OUTBREAK?

Category: Commercial Law

written by PPM Attorneys | March 13, 2018



## Who is Liable for the Listeria Outbreak?

A deadly outbreak of listeria, which has claimed up to 180 lives, has been narrowed down to the source. The Minister of Health Aaron Motsoaledi announced on Sunday that the recent outbreak of listeriosis has been traced to Enterprise's Polokwane Facility.

Chief Executive Officer at Tiger Brands, Lawrence MacDougall has subsequently suspended operations in both the Polokwane and Germiston Facility.

The legal question is who is liable for the Listeria Outbreak?

### Liability under the Consumer Protection Act 68 of 2008

Where there is no contractual relationship between the victim and the manufacturer or supplier of the goods. The manufacturer may be held liable for damages based on *Aquilian* liability, which is monetary loss sustained due to physical damage to a person or property. A plaintiff must prove that:

- there was a causal link between that conduct of the manufacturer and the resultant harm; and
- there is fault on the part of the manufacturer, usually in the form of negligence.

The Consumer Protection Act ("**CPA**"), however modifies the fault requirement in terms of product liability and product safety. According to section 61, the producer, importer, distributor or retailer of any goods (the 'supplier') is liable for the death of, injury to, or illness of a natural person, the loss of or physical damage to property, or for any economic loss resulting from such harm, irrespective of whether the harm resulted from any negligence on the part of the supplier. The CPA introduces a form "modified strict liability" for manufacturers or suppliers of goods.

A defence a supplier can raise is that if the allegedly unsafe product characteristic, failure, defect or hazard did not exist in the goods at the time they were supplied by that person to another person alleged to be liable, or was attributable to compliance with instructions by its supplier or any public regulation, or it would be 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.

Having regard to the above it seems highly likely that manufacturer of the products that caused the listeriosis illness will be liable in terms of the CPA.

### **Liability under the Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972**

The Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972 (“**FCDA**”) covers a number of foodstuff and related products. The legislation doesn’t specifically classify all pathogens associated with foodborne illnesses but regulation 692 of the FDA lists acceptable levels of organisms in quality standards, which must be complied with by manufacturers. This regulation provides specific microbiological standards relating certain acceptable levels of organisms. In cases where the regulation doesn’t list a specific pathogen Section 2 of the FCDA advances notion whereupon upon there is a failure by manufacturers to comply with quality standards. Its reads that any person shall be guilty of an offence under section 2 of the FCDA

*(b) if he sells, or manufactures or imports for sale, any foodstuff or cosmetic*

*(i) which is contaminated, impure or decayed, or is, or is in terms of any regulation deemed to be, harmful or injurious to human health; or*

*(ii) which contains or has been treated with a contaminated, impure or decayed substance or a substance which is, or is in terms of any regulation deemed to be, harmful or injurious to human health.*

Therefore, a manufacture that does not comply with Section 2 may be found to have caused harm whereupon a foodborne illness is identified.

Thus, food manufacturers and the entire supply chain must be aware that product liability may arise in terms of the CPA and in terms of Section 2 of FCDA. The harm caused may expose manufacturers to a criminal offence for selling or distributing food which is unfit for consumption or which has a foreign contaminate in the packaging. Thus, manufacturers and members of the supply chain should ensure compliance and quality standards are met in order not to cause harm to any person.

Consumers may have a claim against the manufacturer to damages if they suffered harm or injury from contracting listeriosis.