What can businesses do to deal with public liability claims?

You own a business and you put a sign up saying, "Park at your own risk" - which effectively amounts to a 'contract'. Simply put, you are saying that anyone can enter your premises on that basis - if they don't want to then they shouldn't enter - and that you are not liable for any damages howsoever arising, whether due to your negligence or anything else. In reality though, the sign actually means nothing and offers a business no protection against public liability claims.

This can be contested in terms of Section 48 of the Consumer Protection Act (CPA) on the basis that ‘a supplier must not offer to supply, supply, or enter into an agreement to supply any goods or services on terms that are unfair, unreasonable or unjust (and here’s the kicker), they cannot require a consumer or any other person to waive any rights or assume any obligation on terms which are unfair, unreasonable or unjust.’

PJ Veldhuizen, managing director of Gillan & Veldhuizen, says that when dealing with consumers, what businesses need to do is to ensure a contractually sound relationship between them and the consumer which promotes the objectives of the Consumer Protection Act. This includes fair and reasonable treatment of consumers by suppliers when supplying goods and services.

There is a clear injunction in the legislation which requires a court or tribunal to interpret the provisions of the CPA purposively – by that, it means that a presiding officer, when attributing meaning to any part of the legislation, must do so in the light of the purpose which it seeks to achieve. “For example,” says Velhuizen, “any ambiguous provision in the act must be interpreted in favour of the consumer and although it may seem like an oversimplification of matters, the interests of consumers will generally win the day.”

When suppliers are wishing to consider the fairness of any provisions on which they seek to rely, they should consider who their consumers are, especially in relation to those consumers who could be considered vulnerable as result of poverty, illiteracy, age or any other vulnerability.

PJ Veldhuizen

At store level, suppliers need to ensure that their staff are adequately briefed on how to deal with the public, are aware of the CPA, and know to whom they should refer any complaints.

If you work with clients or customers in public spaces, have visitors to your premises, or manufacture products, suppliers are encouraged not to simply rely on so-called exclusionary clauses or signs which may have assisted them prior to the CPA and should now adequately insure themselves against claims.

While claims made against you may be opportunistic and ultimately unsuccessful, the costs of defending even spurious claims can be debilitating and these defence costs should also be insured against all public liability claims.

Veldhuizen adds that whilst it is often a David and Goliath game, there are many lawyers who are prepared to take on matters on contingency basis, i.e. a no-win-no-fee in circumstances where consumers have been injured and significant damages incurred. Veldhuizen, therefore, advises that when confronted by a public liability claim, one should always consider appointing a mediator to assess whether there is scope for alternative dispute resolution.

Without necessarily admitting liability, the purpose of mediation is to explore whether it is not simply an apology that somebody wants – furthermore, mediation will see you as being a responsible and worthy supplier, and will ultimately save the business money and preserve its reputation.