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Food Law Landscape in South Africa

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Landscape Outline

- No single regulatory authority
- Vertical and Horizontal fragmentation
- Department of Health – enforcement at local level
- Department of Agriculture (DAFF) - Inspectorate
- DTI – includes CPA (NCC/NCT), ITAC, and NRCS
- SARS – customs and excise – product definitions
- Self Regulation – CGCSA etc



Issues

- Non-compliant imports, Emerging producers
- Public pressure e.g. Horse DNA, GMO's etc
- Enforcement, or lack thereof
- History of non-compliance by industry
- Out of step with foreign requirements TBT
- Product Liability under CPA
- Excise and VAT and product definitions



The Food Laws and the CPA

- Agricultural Products Standards Act 119 of 1993
“The purpose of the Agricultural Product Standards Act 119 of 1990 is to provide for control over the sale and export of certain agricultural **products**, control over the sale of certain imported agricultural products; and control over other related products; and for matters connected therewith”



APS (continued)

- Product is defined in the Act as:-
 - (a) **any commodity of** vegetable or animal origin, or produced from a substance of vegetable or animal origin, and which consists wholly or partially of such substance; and
 - (b) **any other commodity** which in general appearance, presentation and intended use corresponds to a commodity referred to in paragraph (a);



APS (cont)

The APS Act thus governs agricultural commodities and related products.

- Grapes, wheat, eggs, poultry, juice, ice creams and sorbets, and dairy products are examples of agricultural products.
- An agricultural product may still be classified as an agricultural product after it has been manipulated by drying, milling, baking or extraction etc.



APS (cont)

- What do the regulations provide for?
 - What additives may be used
 - What process may be used – currently being strengthened
 - Where products may be produced or stored
 - What may and may not be stated on the labels, outer packaging, in advertising etc
 - **Font sizes and other labelling issues as well!**



APS (cont)

- **Section 6:** ‘No person shall use any name, word, expression, **in any manner**, either by itself or in conjunction with any other verbal, written, printed, illustrated or visual material, **in connection with** the sale of a product in a manner that conveys or creates or is likely to convey or create a false or misleading impression as to the nature, substance, quality or other properties,, of that product.’
- **“cream cake”** – prosecuted and found guilty but prosecution muddled APS and FCD Act!



Foods Laws and the CPA

- **Consumer Protection Act 68 of 2008**
- “goods” includes—
- (a) anything marketed for **human consumption**;
- (b) any tangible object not otherwise contemplated in paragraph (a), including any medium on which anything is or may be written or encoded;.....”



CPA (cont)

- “**service**” includes, but is not limited to—
- (a) any work or undertaking performed by one person for the direct or indirect benefit of another;
-
- (e) the provision of—
- (i) any accommodation or **sustenance;**”



CPA (cont)

- **“trade description”** means—
- (a) any description, statement or other direct or indirect indication..
- (i) the number, quantity, measure, weight or gauge of any goods;
- (ii) the name of the producer or producer of any goods;
- (iii) the ingredients of which any goods consist.....;
- (iv) the place or country of origin of any goods;
- (v) the mode of manufacturing or producing any goods; or
- (b) any figure, work or mark, other than a trade mark, that, according to the custom of the trade, is commonly understood to be an indication of any matter contemplated in paragraph (a);



CPA (cont)

- “**unconscionable**”, when used with reference to any conduct, means—
- *(a)*.....
- *(b)* otherwise unethical or improper to a degree that would shock the conscience of a reasonable person;”
- **PROHIBITED CONDUCT!**
 - **DECEIVING THE POORLY LITERATE ETC**



CPA (cont)

- Dealt with in detail later but, in short:
- Requires plain language to be used to inform consumers of the fact required for a decision
- Prohibits deception and misrepresentation in marketing, advertising and **labelling**
- Requires clear understandable instructions and warnings and provides recourse if not so!
- Includes GMO labelling requirement!



CPA Regulations

- Proposed Regulation on labelling of meat and processed meat products in light of Horse and other exotic meats scandal
- GMO Labelling regulations and pending amendment thereto
- Recall Guidelines (ultra vires?)



Food Laws and the CPA

- **Foodstuffs Cosmetics and Disinfectants Act 54 of 1972**
- “**foodstuff**” means any article or substance (except a medicine as defined in the Medicines and Related Substances Act, 1965 (Act No. 101 of 1965)) ordinarily eaten or drunk by a person or purporting to be suitable, or manufactured or sold, for human consumption, and includes any part or ingredient of any such article or substance, or any substance used or intended or destined to be used as a part or ingredient of any such article or substance;
- **Overlap with APS Act? Overlap with CPA?**



FCD (cont)

- **“label”** means any brand or mark or any written, pictorial or other descriptive matter appearing on or attached to or packed with any foodstuff, cosmetic or disinfectant or its package, and referring to such foodstuff, cosmetic or disinfectant; and, when used as a verb, means to brand or mark or to attach or to provide in any other manner with, any written, pictorial or other descriptive matter;



FCD (cont)

- “ ...any person shall be guilty of an **offence**—
- (a) if he sells, or manufactures or imports for sale, any foodstuff, cosmetic or disinfectant—.....”
 - Composition of matter e.g. preservative, pesticide, additive not permitted or excess amount
 - Contaminated microbially or chemically
 - **False description on label, advertising etc or sale thereof**



SARS

- **VAT**

- Certain products Zero rated based on definitions e.g. Maas without food colouring – once added then 14%

- **Excise**

- Schedules to Act define products by composition or process e.g. liquor products etc and rates differ!
- Definitions OFTEN different from food and liquor laws



ITAC

- **Duties**

- Definitions critical
- Amount of duties levied/applied for differs by product definition or production process e.g. roasted chicory
- Current SAPA application for duties on Poultry may turn on definitions and brining issues



NRCS

- **SANS 285**
 - Letter sizes
 - Prescribed pack sizes
- **SANS 458**
 - Weights and measures issues
- **Others**
 - Tinned fish and meat
 - Frozen fish etc



Food Law Landscape

- Agricultural Products Standards Act
 - Primarily regulates products standards
 - Also regulates packaging and labelling
- Consumer Protection Act
 - Labelling – trade description and honest labelling
 - **GM ingredients !!**
 - BIGGEST FINES and liability
- NRCS – SANS289, SANS 485 etc - known as “weights and measures”
e.g. E-mark
- SARS – VAT and Excise on goods based on SARS definitions
- ITAC – duties and tariffs based on trade issues



Importance of the CPA

- Main objective of CPA is to protect consumers against exploitation, poor quality, defective, unsafe goods and services and hold suppliers responsible AND **provide consumers with simple redress**
- Main objective of Act 36, 54, 119, etc are compositional standards and safety and labelling, which incidentally also protects consumers but there is **no redress for consumers, only fines for transgressors (small fines?)**



CPA Consumer Rights

- **Information in Plain and Understandable Language**
 - Plain language is required on packaging and inserts
 - Ordinary person of the class of intended consumer with average literacy skills, but no special skills as a consumer, must understand its significance and importance
 - Layout, use of vocabulary, use of images, etc all considered
 - Especially important for **allergen warnings, storage instructions, cooking instructions, health warnings**



Liability for Harm to Consumers

- CPA creates a “no fault” liability by importers, manufacturers, wholesalers, and retailers
- Liability for hazardous or defective products
- Liability for insufficient instructions or harm caused due to failure to warn of harm that may occur – **PLAIN LANGUAGE**



CPA – Trade Descriptions

- Section 24 – Trade Description and GM ingredients
- Applies together with R146, APS, SANS, Meat Safety Act etc, and issues not covered by one of those to the same extent as the CPA will need to comply with the CPA
- Meat and processed meats – draft regulation
- GM ingredients labelling
 - Prescribed goods will have to carry a notice in the prescribed manner in accordance with relevant public regulations if they contain GMO's – **5% threshold?**
 - **All approved GM crops covered! What about products thereof? Animals fed with these crops?**
 - R25 under the FCD Act may not be the standard applied and it appears that DTI has a stricter regime in mind as “the consumer has the right to know so he can make a choice”.



CPA – Trade Descriptions

- Consumer's right to honest labelling and marketing
 - Exaggeration, puffing, innuendo – **CAMS v Functional Foods!**
 - Benefits or characteristics that are not actually found in the product or provably achieved through the use of the product
 - Quality, quantity, ingredients etc
- Consumer's right to safe, good quality goods
 - Right to return incorrectly labelled goods for a refund!
- **Strict liability where inadequate instructions or warnings** -warnings on coffee that it is hot
- **IMPERATIVE TO LABEL CORRECTLY, WARN OF ALLERGENS AND OTHER RISKS**



“Food Fraud” - CPA

Liability for Mislabelling

- Product line changeover – **Species adulteration!**
- Packaging change over – **Allergens/Species**
- Missing ingredient - **soy injection in meat/poultry**



Regulatory Authorities

- NRCS and Consumer Commission fall under the DTI (not just food)
 - CPA mechanisms for handling non-conformance
- Agricultural Products Standards Act, Meat Safety Act, and Liquor Products Act and Regulations fall under DAFF – enforced Nationally
- Food labelling, packaged water, infant food, soft drinks - DoH
 - enforced by EHP's at local authority level
- SARS!!!!!!



Inter - departmental Co-Operation

- No mechanism for resolving conflicts between various regulations under different authorities
- No FDA type arrangements **No single labelling regulatory authorityBUT**
- **Co-operative Governance Act? Ministers to Consult.....**
- **Joint Parliamentary Portfolio Committee – Food Control Umbrella!**



Enforcement

- **R146 – FCD Act provides for criminal prosecution**
- Presumptions in FCD Act make it much easier to prosecute offenders as many technical defences don't exist!
 - 6 months for first offence or equivalent fine
 - 12 months for second offence or equivalent fine
 - 24 months for third offence or equivalent fine
 - Forfeiture of goods in contravention of R146
 - Recent prosecution is KZN of retailer over cream cakes
- **APS Act provides for criminal prosecution**
- Recent Search Warrants issued and simultaneous raids on various retailers to seize non-compliant product and prosecute offenders



Enforcement

Consumer Protection Act

- CGSO – Ombudsman for Consumer Goods (soon accredited?)
- NCC investigation – NCT hearing
- Greater of R 1 000 000 or 10% of turnover
- Possible 12 months imprisonment instead of administrative fine

NRCS

- Non compliance with SANS289 or SANS 458 can lead to prosecution and eventual fine or even forfeiture of product
- NRCS is very pro-active in finding non-compliances
- Recently order immediate removal from sale of olive oil where number sizes were 5.5 mm instead of 6 mm!



Enforcement

SARS

- Al Capone was brought down by the IRS!
- Very powerful and inequitable laws
- Pay first, query later
- Can go back 10 years
- Onus is on accused - no other law like it



RECALL – Which Law?

Undeclared Allergens Recall in USA

- **FOR IMMEDIATE RELEASE** - September 19, 2013 - Wegmans is recalling 4,327 units of Wegmans brand APPLE CINNAMON Mini Muffins, Net Wt. 14 oz., because the product contains **undeclared soy**. People who have an allergy to soy run the risk of serious or life-threatening allergic reaction if they consume this product.
- Single biggest cause of recalls are undeclared ingredients!



RECALL – CPA Domain

NCC ordered Recall

- Cost is no object to the NCC – Consumer safety is prime
- Substantial time has passed and supplier not done the right thing

Voluntary Recall

- Prevent or limit harm quickly e.g. egg not on label
- Reduce number of claims for harm caused
- Limit extent of prosecution by NCC and the fine imposed
- Reduce reputational harm



RECALL!

Recall Guidelines published by National Consumer Commission in GG 35434 of 13 June 2012

- Section 60 of CPA makes provision for procedures for both voluntary and compulsory recalls
- Cannot simply withdraw a mislabelled product quietly!
- Must officially notify the Commission in prescribed manner, publicise the recall, and in general conduct the recall transparently
- Obligation to take recalls seriously and failure to follow processes could lead to prosecution
- **Ultra Vires?**



Currently under Scrutiny

- GM Foodstuffs!
- Brine in IQF Chicken and misleading labelling
- DNA of exotic species in processed meat products “Is there horse in my wors?” not declared on labels, now “equine trimmings” on one retailer label
- Cream cakes and confectionary and the use of imitation cream products instead of “real dairy cream”
- Sell by dates/best before dates -expiry of foodstuffs
- Imported ingredients not disclosed on ingredients lists or misleading disclosure “Product of RSA or Zambia or China”
- Correct classes on fruit and vegetables - all potatoes cannot be “FIRST GRADE”



The Future

Consumer activism is exploding with NGO's funding organisations such as ACB to force issues such as GM Labelling

Parliament and inter-departmentary committee looking at unified food safety law or csar overarching all laws!

Consumers are Voters!



Questions?

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