

SOUTH AFRICA / JUDGMENT

Buckle Packaging (Pty) Ltd v National Consumer Commission (NCT/227511/2022/101(1)) [2023] ZANCT 4 (23 January 2023) [2023] ZANCT 4

COURT

National Consumer Tribunal

BEFORE

A Potwana, M Peenze, C Sassman

CASE / FILE NUMBER

NCT/227511/2022/101(1)

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IN THE NATIONAL CONSUMER TRIBUNAL SITUATED IN CENTURION

Case Number: NCT/227511/2022/101(1)

In the matter between:

BUCKLE PACKAGING (PTY) LTD

APPLICANT

and

NATIONAL CONSUMER COMMISSION

RESPONDENT

Coram:

Dr A Potwana

- Presiding Tribunal member

Dr M Peenze

- Tribunal member

Adv C Sassman - Tribunal member

CONSENT ORDER RULING

THE PARTIES

1. The Applicant is Buckle Packaging (Pty) Ltd, a private company with limited liability, duly incorporated and registered in terms of the company laws of the Republic of South Africa, with its principal place of business at Shop [...], H[...], City Deep, Gauteng. The Applicant was represented by Adv CT Vetter instructed by Hendrik Hugo of Edward Nathan Sonnenbergs Inc.
2. The Respondent is the National Consumer Commission (Commission), an organ of the state within the Republic of South Africa's public administration but as an institution outside the public service, with its physical address at [...] D[...] L[...] Road, Groenkloof, Pretoria.[1] The Commission was represented by Mr L Biyana, a Senior Legal Advisor in the Commission's employ.

APPLICATION TYPE AND JURISDICTION

3. The original application in this matter was brought in terms of section 101(1) of the Consumer Protection Act 68 of 2008 (CPA).

In terms of the provisions of this section, the Tribunal has jurisdiction to review compliance notices.

4. The Tribunal's jurisdiction to adjudicate the parties' application to have their settlement agreement confirmed as a consent order is derived from section 150(d) of the National Credit Act 34 of 2005 (NCA) read with Rule 20(1) of the Tribunal Rules.²

BACKGROUND

5. On 12 April 2022, the Commission issued a compliance notice in terms of section 100(1) of the CPA. In the issued compliance notice, the Commission stated that on or about 14 February 2022, the Applicant imported a consignment of 931 cartons of sewing yarns (goods) that did not comply with the CPA into the Republic of South Africa. The Commission alleged that the goods did not conform to the South African national standards for fibre content as required in terms of the provisions of Government Notice No. 2410 of 2000 published in the Government Gazette of 30 June 2000 because they did not contain a trade description indicating the fibre content or composition. Consequently, the Commission charged that the Applicant contravened section 24(5) read with Regulation 6(1)(b) of the CPA and instructed the Applicant to remove the goods to their country of origin or from the African continent at its own cost. Alternatively, the Applicant should have the goods destroyed at an accredited destruction facility. The Commission further required the Applicant to refrain from importing goods into the Republic of South Africa in contravention of section 24(5)(a) read with Regulation 6(1)(a) and section 24(5)(b) read with Regulation 6(1)(b) of the CPA.

6. On 9 May 2022, the Applicant filed an application to review the compliance notice issued by the Commission and sought an order in the following terms:
- 6.1. “Reviewing, setting aside, and cancelling the compliance notice;
- 6.2. Alternatively:
- 6.2.1. an order for the amendment of the compliance notice to allow for the embargoed release of the goods to enable complaint labelling
to be applied to the goods;
- 6.2.2. an order that Buckle Packaging be permitted to apply for the conditional release of the goods from customs supported by any order
that the Tribunal may make;
- 6.2.3. that the Commissioner of Customs and Excise be authorised to release the goods to the Applicant on the following condition and any
other condition that he/she deems appropriate:
- (a) within 60 days of the order, that the Applicant affix a label which according to the Tribunal is compliant; and
- (b) within 20 business days of having been notified by the Applicant that compliant labels have been affixed, the Respondent must inspect the goods and if satisfied authorise the final release of the goods to the Applicant.
- 6.3. That the Respondent be ordered to pay the costs of this application; and/or 6.4. Further and/or alternative relief.”
7. The Applicant’s grounds of review are mapped out in the affidavit of its director, Anthony Mason (Mason). He averred that the detained goods are card boxes containing “spun polyester bag closing thread” that is wound into cones. This thread is used to close bags in which various goods are packed for sale to the wholesale or retail trade. It is sold to the wholesale market and specific customers that require the thread to seal their bags for retail. The cones are not sold as individual items but remain in the boxes when they are sold. A label is only affixed to the outside of each box. He submitted that the Commission was wrong to conclude that the Applicant did not comply with Regulation 6(1)(b) because the South African national standards for fibre content and care labelling do not apply.
8. The Applicant contended that the fibre content standard did not apply to the thread for, among others, the following reasons:
- 8.1. The thread is not textile or a textile product.
- 8.2. The thread is not fabric.

8.3. The thread does not consist of fibre or fibre content and does not fall into any of the classes of the national standards for fibre content that the Commission alleges the Applicant did not comply with.

8.4. A consumer does not need any warning or information regarding the thread.

9. Concerning the care labelling standard, the Applicant contended that the same does not apply to the thread for, among others, the following reasons:

9.1. The thread is not a “textile piece-good”, “textile article”, or clothing”.

9.2. A consumer does not need any warning or information regarding the thread since it is sold to the wholesale market for purposes of a sealing bag of goods which is then sold to a consumer.

9.3. Considered in context and bearing in mind its purpose, the standard does not apply to the thread.

10. The Applicant further contended that the goods are not sewing yarns as described in the compliance notice and as claimed by the Commission. The

Commission’s decision to issue a compliance notice is liable to be reviewed and set aside because:

10.1. It was influenced by an error of fact.

10.2. Irrelevant considerations were not taken into account, and the decision was taken because irrelevant considerations were taken into account within the meaning of section 6(2)(e)(iii) of PAJA.

10.3. It was not rationally connected to the purpose for which it was taken within the meaning of section 6(2)(f)(ii) of PAJA.

10.4. It was unreasonable within the meaning of section 6(2)(h) of PAJA.

10.5. It was unconstitutional and unlawful within the meaning of section 6(2)(i) of PAJA.

10.6. It was materially influenced by an error of law within the meaning of section 6(2)(d) of PAJA.

10.7. It was contrary to law, irrational, unreasonable, and the Commission misconstrued the nature of its powers and violated the principle of legality.

11. Mason further submitted that the Applicant is currently suffering significant financial prejudice in demurrage and storage costs of the goods, totalling R136 500.00 excluding VAT as of March 2022. Including transportation, the goods were purchased for an amount of R1 516 618.16 and have cost the Applicant additional freight forwarding costs in the amount of R294 484.14 (inclusive of customs

VAT, agency fees, cargo duties and documents) to date. The goods have a commercial value of R2 173 325.00. If they are destroyed or returned, the Applicant will lose R2 173 325.00.

12. The Commission filed the answering affidavit of its Acting Commissioner, Ms Thezi Mabuza (Mabuza). She contended that the imported goods are “High tenacity yarn of polyesters, whether or not textured”, and their tariff code is 5402.20(5). They have been used in the manufacture of textiles, carpets and tarpaulin. The term “textiles” includes fibres, yarns, fabrics, and other related items. The goods are textiles, as listed in Chapter 54 of the Harmonized Tariff.

In Dictionary. Com, the definition of textile includes “a material, as a fibre or yarn, used in or suitable for weaving”.

Amongst others, In the Merriam-Webster dictionary, textile is defined as “fibre, filament, or yarn used in making cloth”. The yarn becomes a textile even before weaving. The Applicant’s argument is based on the intended use of the goods. The description

of the yarn in the compliance notice as a sewing thread does not affect the validity of the compliance notice.

13. The Applicant filed a replying affidavit. Amongst other submissions, the Applicant submitted that the decision that was taken to issue the detention notice and the compliance notice is contrary to the recommendation made by the Respondent’s own inspector. The decisions are arbitrary and capricious. The compliance notice should be set aside on this basis alone. Further, the Applicant challenged. Mabuza’s qualifications and expertise in the use of high-tenacity yarns. It submitted it would seek the relevant

paragraphs of Mabuza’s affidavit be struck off. It contended that yarn is not a textile.

THE LAW

14. Section 150(d) of the NCA states-

“In addition to its powers in terms of this Act, the Tribunal may make an appropriate order in relation to prohibited conduct or required conduct in terms of this Act, or the Consumer Protection Act, 2008, including confirming a consent agreement in terms of this Act or the Consumer Protection Act, 2008 as an order of the Tribunal.”

15. Section 24(5) of the CPA states-

“The producer or importer of any goods that have been prescribed under subsection (4) must apply a trade description to those goods disclosing-

- (a) The country of origin of the goods; and
- (b) Any other prescribed information.”

16. Regulation 6(1)(a) and (b) of the CPA Regulations states-

“In order to assist consumers in making informed decisions or choices, for purposes of subsections (4) and (5) of section 24 of the Act and subject to regulation (2), the importation into or the sale in the Republic of the goods specified in Annexure ‘D’,

irrespective of whether such goods were manufactured or adapted in the Republic or elsewhere, is prohibited unless-

- (a) a trade description, meeting the requirements of section 22 of the Act, is applied to such goods in a conspicuous and easily legible

manner stating clearly-

- (i) the country of origin in which they were manufactured, produced or adapted.
- (ii) in the event of a textile manufacturer, importer or seller operating in the Republic using imported greige fabric to produce dyed, printed or finished fabric in the Republic, that such fabric has been dyed, printed or finished in South Africa from imported fabric; and
- (iii) that a locally manufactured product using imported material must state “Made in South Africa from imported materials”;
- (b) such goods conform to the South African national standards for fibre content and care labelling in accordance with the provisions of Government Notice No. 2410 of 2000, published in the Gazette of 30 June 2000.”

HEARING AND SETTLEMENT

17. On the day of the hearing, 23 January 2023, the Tribunal asked the parties’ legal representatives if they would like to discuss a settlement. After a short adjournment, the parties informed the panel that they had reached an agreement. Subsequently, they electronically presented a draft consent order via the Registrar’s office. After considering the draft consent order, the panel requested the parties’ legal representatives to present a signed settlement agreement instead in terms of Rule 20 of the Tribunal Rules, which states-

“(1) The Tribunal may confirm a resolution or agreement as a consent order[2]-

- (a) on application by the facilitator of that resolution or agreement; and (b) without hearing any evidence.
- (2) Upon receipt of an application for a consent order, the Tribunal may:
 - (a) make its ruling on the application based on the documents filed alone, without hearing any evidence;
 - (b) require further submissions or documents from the parties before adjudicating on the application, in which case the directions of the Tribunal will be communicated to the parties by the Registrar; or

- (c) require that a hearing date be scheduled for the application, in which case the Registrar will proceed in terms of rule 18(1).
- (3) If the Tribunal refuses to make the consent order applied for, or requires any changes that a party is unwilling to accept, the Registrar must serve on each party to the agreement or resolution-
 - (a) a notice that the application has been refused;
 - (b) a copy of the agreement or resolution in its original form, in respect of which the application was refused; and
 - (c) a copy of the Tribunal's reasons for the refusal."

18. The pertinent terms of the settlement agreement are that the parties agree, inter alia, that:

18.1. The Commission will send the letter attached to the settlement agreement and marked "A" to the Border Police: City Deep by latest 17:00 on Tuesday, 24 January 2023.

18.2. The labels to be attached to the cartons that are the subject matter of this application should state their country of origin, the fibre content and composition of the goods, and that the care labelling is "not applicable".

18.3. A representative of the Commission will monitor the attachment of the labels on 3 February 2023 at 9:00 am, whereafter the goods will be immediately released from detention.

ANALYSIS OF THE EVIDENCE AND CONCLUSION

19. On a balance of probabilities, the Tribunal is satisfied that the settlement agreement entered into by the Applicant and the Respondent may be confirmed as a consent order in terms of section 150(d) of the NCA.

20. Accordingly, the Tribunal orders that:

20.1. the settlement agreement between the Applicant and the Respondent annexed hereto and marked "Annexure A to Buckle Packaging (Pty) Ltd v National Consumer Commission, NCT Case Number: NCT/227511/2022/101(1)" is hereby confirmed as a consent order in terms of section 150(d) of the NCA; and

20.2. no order is made as to costs.

Thus, done and dated 23 January 2023.

Dr A Potwana Presiding Tribunal Member

Adv C Sassman (Tribunal Member) and Dr M Peenze (Tribunal Member) concur.

[1] The Commission was established in terms of section 85 of the Consumer Protection Act 68 of 2008. 2 Regulations for Matters Relating to the Functions of the Tribunal and Rules for the Conduct of Matters before the National Consumer

Tribunal, 2007.

[2] Underline inserted for clarity.

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