

SOUTH AFRICA / JUDGMENT

Coertze and Another v Young (NCT/7142/2012/73(3)&75(1)(b)&(2) CPA) [2013] ZANCT 25 (13 September 2013)

[2013] ZANCT 25

COURT

National Consumer Tribunal

BEFORE

D Terblanche, P Beck, X May

CASE / FILE NUMBER

NCT/7142/2012/73(3)&75(1)(b)&(2) CPA

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case number: NCT/7142/2012/73(3)&75(1)(b)&(2) CPA

DATE:13/09/2013

In the matter between:

GERHARD ROELOF COERTZE.....FIRST APPLICANT

MADELEIN BURGERSECOND APPLICANT

and

ROCELIA YOUNG.....RESPONDENT

Coram:

Ms D Terblanche – Presiding member

Ms P Beck – Member

Mr X May – Member

Date of Hearing: 4 September 2013

Judgment and Reasons

APPLICANT

1. The First Applicant in this matter is Gerhard Roelof Coertze (“the First Applicant”), a major male residing in Elarduspark, Pretoria.
2. The Second Applicant is Madelein Burger (“the Second Applicant”), a major female residing in Elarduspark, Pretoria.

RESPONDENT

3. The Respondent is Rocelia Young, a major female, residing in Waterkloof (hereinafter referred to as “the Respondent”).

APPLICATION TYPE

4. This is a two-fold application –

In terms of section 75(1)(b) and section 75(2) of the Consumer Protection Act 68 of 2008 (hereinafter referred to as “the CPA”), for leave to refer a matter non-referred by the National Consumer Commission (hereinafter referred to as the “NCC”) directly to the National Consumer Tribunal (hereinafter the Tribunal); and

For an order granting a remedy arising out of alleged conduct in terms of the CPA.

THE HEARING

5. This matter was heard on 4 September 2013 at the seat of the National Consumer Tribunal.
6. The matter was heard on a default basis as the Respondent did not file an Answering Affidavit as provided for in Rule 13 of the Rules of the Tribunal¹. The Applicants accordingly applied for default judgment as contemplated in Rule 25(2) of the Rules of the Tribunal.
7. The Applicants withdrew the Section 75(2) application at the hearing as they have brought it to the Tribunal in error.

RELIEF SOUGHT

8. The Applicants seek an order from the Tribunal –

To grant the Applicants leave to refer the matter directly to the Tribunal; and

Directing the Respondent to refund the Applicants an amount of R17 000-00, together with interest.

BACKGROUND

9. According to the first Applicant, the Applicants entered into an agreement with the Respondent, in terms of which the Respondent undertook to perform certain services.
10. The services agreed upon by the Respondent entailed the following:

Research of alternative cleaning products;

Preparation of 4 prototypes or examples;

Comprehensive weekly feedback on the progress of the development;

Suggestions on a name, logo and brand for this product;

Marketing strategy;

Basic business plan;

Minimum end product production of 2000 units of the product, together with a cost estimate for branding a portion of these products for a renowned hotel group; and

Assistance with compiling, implementing and adhering to statutory obligations.

11. The parties agreed upon the services above and the Applicants, during May 2011, paid an amount of R20 000-00 to the Respondent for the agreed upon services.
12. By August 2011, the relationship between the parties have soured to such an extent that they agreed that they cannot continue with their business relationship and consequently severed the relationship.
13. Respondent allegedly agreed to refund the Applicants an amount of R17 000-00 by way of various undertakings and a subsequent settlement agreement ensued between the parties. This happened allegedly during 20 September 2011.
14. On 28 September 2011 the Applicants lodged a complaint with the National Consumer Commission (hereinafter referred to as the "NCC") as a result of Respondent's failure to pay the amount of R17 000,00 agreed upon.
15. A settlement agreement was reached between the Applicants and the Respondent on 17 May 2012, with the assistance of a Conciliator at the NCC. The settlement agreement stipulates that the Respondent will refund the Applicants an amount of R17 000-00, the amount to be paid into the bank account of the First Respondent on 31 July 2012.
16. On 3 December 2012, the NCC issued a notice of non-referral under reference number NCC/09/11/COETZE/11372 on the basis that the relief sought (by Applicants) does not allege any facts which, if true, would constitute grounds for a remedy under the CPA.

ISSUES TO BE DECIDED

17. The Tribunal has to decide whether the Applicants have made out a case for the Tribunal to –

Grant the Applicants leave to refer the matter directly to the Tribunal; and

Whether a basis exists upon which the Tribunal may grant the remedy sought by the Applicants.

LEAVE TO REFER TO THE TRIBUNAL

18. The Tribunal firstly considered on what basis it should consider the application for leave to refer directly namely whether on the basis of a review of the NCC's decision not to refer, or as an application ab initio.
19. With regard to this determination the Tribunal obtains its guidance from section 75(1) of the CPA. The relevant section provides as follows:

"75(1) If the Commission

issues

a notice of non-referral in response to a complaint, other than on the grounds contemplated in section 1162, the complainant concerned may refer the matter (own emphasis added) directly to —

- (a) ... ; or
 - (b) the Tribunal, with leave of the Tribunal (own emphasis added)."
20. On the plain reading of the wording of section 75(1) of the CPA, the issue is the referring of a matter to be adjudicated and not the reviewing of a decision of the NCC.

In the view of the Tribunal the word 'matter' emphasised above is not reflective of a direction to treat the application as a review application. Specifically, it is in the Applicant's discretion to refer the 'matter', not the NCC's 'decision', to the Tribunal for leave from the Tribunal to refer it directly to the Tribunal.

21. Next the Tribunal considered the basis upon which it may grant leave to refer. The Tribunal found guidance in a previous decision of this Tribunal³, in which the panel quoted from the decision of *Westinghouse Brake and Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd*⁴, and applied the rationale underpinning the approach taken in that matter.
22. The Tribunal held the following:

*"11.4 When determining whether the Applicant should be granted leave to refer the matter to the Tribunal, the Tribunal considered the requirements for the granting of "leave". A similar application can be found in the High Court practice, where an applicant applies for leave to appeal a judgment. It was held in *Westinghouse Brake and Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd*⁵ that "in applications for leave to appeal properly brought before the appropriate court in terms of the old sec 20, read with sec 21 as it then was, the only relevant criteria were whether the applicant had reasonable prospects of success on appeal and whether or not the case was of substantial importance to the applicant or to both him and the respondent"⁶ This was so irrespective of whether the appeal lay to the full court or to the Appellate Division.*

11.5 The Tribunal will therefore, when considering whether to grant the Applicant leave to refer or not, use the same test as applied in the High Court for applications for "leave" and will therefore consider:

11.5.1 The Applicant's reasonable prospects of success with the referral;

11.5.2 Whether the matter is of substantial importance to the Applicant or Respondents."

23. In the light of the above, the Tribunal is of the view that the basis upon which leave should be granted has to be measured against the -

Reasonable prospects of success; and

Substantial importance of the matter.

24. With regard to the reasonable prospects of success, this matter was brought to the Tribunal on the basis of a default judgment application. The application was served on the Respondent as required by the Rules of the Tribunal. This is apparent from the record that the Tribunal considered.

25. The Respondent did not answer to the application. In terms of Rule 13(5) of the Rules of Tribunal, the submissions made by the Applicant are accordingly deemed admitted.

26. From the record and the Applicants' oral submissions made at the hearing, it is clear that -

The parties entered into an agreement in terms of which the Respondent undertook to provide certain services to the Applicants during the course of 2011; and

The Respondent did not provide the services as agreed upon.

27. The Respondent is accordingly in contravention on the CPA, more specifically sections 54(1) and 19(2)(a)(i) of the CPA:

Section 54(1) of the CPA stipulates that when a supplier undertakes to perform any services for or on behalf of a consumer, the consumer has a right to the timely performance and completion of those services, and timely notice of any unavoidable delay in the performance of the services⁷ and to the performance of the services in a manner and quality that persons are generally entitled to expect.⁸

Section 19(2)(a)(i) stipulates that a supplier is responsible to perform the services on the agreed date and at the agreed time, if any, or otherwise within a reasonable time after concluding the transaction or agreement, unless otherwise expressly provided or anticipated in an agreement.

28. In the matter currently before the Tribunal, it is evident that -

The agreement as envisaged supra qualifies as an agreement⁹ in terms of the CPA.

The Respondent undertook to supply a service to the Applicants, as provided for in the CPA.

The performance of the services was not provided in a manner and of a quality that the Applicants were entitled to expect.

29. Section 69(1)(a) of the CPA provides that a consumer, as contemplated in section 4(1) of the CPA, may seek to enforce any right in terms of the CPA or in terms of an agreement, by referring the matter directly to the Tribunal, if such a direct referral is permitted by the CPA in the case of the particular dispute.
30. It is therefore evident to the Tribunal that not only have the Applicants set out a basis for a remedy under the CPA and that they have reasonable prospects of success in the matter at hand.
31. The Tribunal are therefore of the view that the Applicants' application for leave to refer the matter, must succeed in the circumstances.

THE REMEDY SOUGHT BY THE APPLICANTS

32. The basis upon which the Tribunal may grant a remedy must be apparent from a contravention of the CPA. From the above, the Applicants have clearly set out a basis for a remedy under the CPA.
33. The Applicants are accordingly entitled to either have the defect in the quality of the services performed or goods supplied remedied or be refunded a reasonable portion of the price paid for the services performed, having regard to the extent of the failure in terms of section 54(2) of the CPA.
34. Section 54(2) of the CPA provides that if a supplier fails to perform a service to the standards contemplated in subsection (1), the consumer may require the supplier to either—
“(a) remedy any defect in the quality of the services performed or goods supplied; or
(b) refund to the consumer a reasonable portion of the price paid for the services performed and goods supplied, having regard to the extent of the failure.”
35. Section 150(i) of the National Credit Act, 34 of 2005 (“the NCA”), read with section 75(4)(b) of the CPA, empower the Tribunal to make any appropriate order required to give effect to a right, as contemplated in the CPA.
36. With regard to the remedy the Applicants seek, this Tribunal is not empowered to issue an order for interest sought. Section 150(h) of the NCA empowers the NCT to issue and order for refund and interests. The only provision in the Tribunal's empowering legislation, allowing it to issue an order for interest is in terms of section 150(h) quoted above. This is not an instance where to imposition of an order in terms of section 150(h) is appropriate.
37. A ‘refund’ is defined¹⁰ as returning money to somebody, usually because he or she paid too much or did not receive what was paid for, and “pay back
(money), typically to a customer who is not satisfied with goods or services bought.

38. It was considered by the Tribunal whether the legislator, in Section 54(2)(b) of the Act, deliberately refers to a refund to the consumer a reasonable portion of the price paid for the services performed, and nothing in addition.
39. It is submitted that the Tribunal may in terms of Section 75(4)(b) of the Act make any applicable order contemplated in the CPA or in section 150 or 151 of the NCA. It is further submitted that in terms of Section 150(i) of the NCA the Tribunal may make any other appropriate order required to give effect to a right, as contemplated in the Act.
40. The Tribunal further considered that, in accordance with Section 19(2)(a)(i) of the CPA, it is an implied condition of every transaction that the supplier is responsible to perform the services on the agreed date and at the agreed time, if any, or otherwise within a reasonable time after concluding the transaction or agreement, unless otherwise expressly provided or anticipated in an agreement.
41. Section 54(1) of the CPA stipulates that when a supplier undertakes to perform any services for or on behalf of a consumer, the consumer has a right to the timely performance and completion of those services, and timely notice of any unavoidable delay in the performance of the services¹¹ and to the performance of the services in a manner and quality that persons are generally entitled to expect.¹²
42. Subsection (2) provides that if a supplier fails to perform a service to the standards contemplated in subsection (1), the consumer may require the supplier to either—
remedy any defect in the quality of the services performed or goods supplied; or
refund to the consumer a reasonable portion of the price paid for the services performed and goods supplied, having regard to the extent of the failure.
43. In the light of the above, the Applicants are entitled to choose whether they require to be refunded or whether they require for the defect in quality of service to be remedied. The Applicants opted for a refund of R17 000, 00 to which the Respondent agreed on more than one occasion.
44. The Respondent is accordingly, in the light of the foregoing, obliged to refund the Applicants a reasonable portion of the price paid for the services.
45. Weighing the services performed by the Respondent against what she undertook to do and did not do, the amount of R17 000-00 appears to be a reasonable refund.

FINDINGS

46. The Tribunal finds that the –

Applicants have made out a case that the Respondent is a service provider as defined in the Act.

Respondent has contravened section 54 of the CPA and consequently engaged in prohibited conduct as envisaged in section 1 of the CPA.

Applicants have established a basis upon which they are entitled to a remedy under the CPA.

Applicant are entitled to a refund in the amount of R17 000-00 based on the provisions of section 54(2)(b) of the CPA read with sections 54(1), 19(2)(a)(i), 69(1)(a) and 75(4)(b) of the CPA, and section 150(i) of the NCA.

ORDER

47. The Tribunal accordingly makes the following order –

47.1 Applicants are granted leave to refer the matter directly to the Tribunal; and

47.2 Respondent is ordered to refund the Applicants in the amount of R17 000-00 by no later than 31 October 2013.

Thus done and signed in Centurion this 13th day of September 2013

[signed]

Ms D. Terblanche

Presiding member

Ms P. Beck and Mr X May concurring

1 For the Conduct of Matters before the National Consumer Tribunal published under GN789 in GG30225 of 28 August 2007 as amended by GenN428 in GG34405 OF 29 June 2011 (hereinafter referred to as the “Rules of the Tribunal”).

2 Section 116 of the Act stipulates that “(1) A complaint in terms of this Act may not be referred or made to the Tribunal or to a consumer court more than three years after—

(a) the act or omission that is the cause of the complaint; or (b) in the case of a course of conduct or continuing practice, the date that the conduct or practice ceased. (2) A complaint in terms of this Act may not be referred to the Tribunal or to a consumer court in terms of this Act, against any person that is, or has been, a respondent in proceedings under another section of this Act relating substantially to the same conduct.”

3 MV Chauke v Standard Bank et al NCT/4658/2012/141(1)(P).

4 1986 (2) SA 555 (A) at par 15.

5 1986 (2) SA 555 (A)

6 Odendaal v Loggerenberg en Andere NNO (2) 1961

(1) SA 724

(0) at p 727 C; Attorney-General, Transvaal v Nokwe and Others 1962

(3) SA 803 (T), at p 807 A

7 Section 54(1)(a) of the CPA.

8 Section 54(1)(b) of the CPA.

9 Section 1 of the CPA defines an agreement to be an arrangement or understanding between or among two or more parties that purports to establish a relationship in law between or amongst them.

10 Definition according to the Oxford English Dictionary (OED).

11 Section 54(1)(a) of the CPA.

12 Section 54(1)(b) of the CPA.

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