

SOUTH AFRICA / JUDGMENT

Culwick v Vodacom (Pty) Ltd (NCT/316719/2024/75(1)(b)) [2024] ZANCT 60 (13 November 2024) [2024] ZANCT 60

COURT

National Consumer Tribunal

BEFORE

M Peenze, CJ Ntsoane, S Hockey

CASE / FILE NUMBER

NCT/316719/2024/75(1)(b)

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IN THE NATIONAL CONSUMER
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HELD IN CENTURION

Case number: NCT/316719/2024/75(1)(b)

In the matter between: PAUL WHITTINGTON
CULWICK
APPLICANT
And
VODACOM (PTY)
LTD
RESPONDENT

Coram: Dr M Peenze
- Presiding
Tribunal
Member
Mr CJ Ntsoane
- Tribunal Member
Mr S Hockey
- Tribunal
Member
Date of Hearing
- 12 November 2024
Date of Judgment
- 13 November 2024

JUDGMENT

AND REASONS

1. The applicant is Paul Wittington Culwick (the applicant), a consumer as defined in section 1 of the Consumer Protection Act, 68 of 2008 (the CPA). At the hearing, the applicant represented himself.
2. The respondent is Vodacom (Pty) Ltd (the respondent), a company incorporated under the company laws of South Africa and a supplier as defined in section 1 of the CPA. The respondent did not file an answering affidavit in this matter and was not represented at the hearing, which proceeded in its absence.

TERMINOLOGY

3. A reference to a section in this judgment refers to a section of the CPA.
4. A reference to a rule refers to the “Regulations for matters relating to the functions of the Tribunal and Rules for the conduct

of matters before the National Consumer Tribunal”[1] (the rules).

TYPE OF APPLICATION

5. The applicant referred this matter to the National Consumer Tribunal (the Tribunal) in terms of section 75(1)(b). The applicant first referred his complaint to the National Consumer Commission (the NCC), who, after an assessment, concluded that the redress sought by the applicant could not be provided in terms of the CPA.
6. Regarding section 75(1)(b), if the NCC issues a notice of non-referral as it did in the present matter, the complainant may refer the matter directly to the Tribunal, with leave of the Tribunal. The Tribunal granted such leave on 17 July 2024.

CONSIDERATION OF THE EVIDENCE ON A DEFAULT BASIS

7. On 11 March 2024, the applicant filed the application with the Tribunal. The application was served on the respondent by email, by hand[2] and by registered mail.[3] On 8 May 2024, the Tribunal’s Registrar issued a notice of filing to all the parties.
8. Regarding Rule 13 of the rules, the respondent had 15 business days to serve an answering affidavit and file it with the Tribunal’s Registrar. The respondent failed to do so.
9. The applicant did not apply for a default order under rule 25(2).
10. On 22 October 2024, the Tribunal’s Registrar issued a notice of set down to all the parties, setting the matter down for hearing on a default basis due to the pleadings being closed.
11. At the commencement of the hearing, the Tribunal was satisfied that

the notice of set down was adequately served on the respondent. The matter proceeded on a default basis.

12. Rule 13(5) provides that:

“Any fact or allegation in the application or referral not specifically denied or admitted in the answering affidavit will be deemed to have been admitted.”

13. Therefore, in the absence of an answering affidavit filed by the respondent, the applicant’s application and all the allegations contained therein are deemed to be admitted.

FACTUAL BACKGROUND

14. On 18 November 2021, the applicant telephonically concluded a 24-month agreement with the respondent, through its business partner Rewardsco, to supply two Huawei Bi cell phones at R90.00 per month (the R90.00 agreement), which the applicant accepted. Before concluding this agreement, the applicant was on a month-to-month agreement (the initial agreement) with the respondent.

15. Around March 2022, the applicant noticed that the respondent did not execute the agreement and was overcharging him.

16. After the applicant complained to the respondent, the respondent delayed resolving the complaint. In 2023, the respondent made a settlement offer to the applicant, which he did not accept. Despite this, the respondent cancelled the agreement on its own terms, namely:

16.1. On 7 June 2023, the respondent cancelled the R90.00 agreement and placed the applicant on a new but more expensive month-to-month contract. According to the applicant, this new contract was less beneficial than the initial agreement. Instead of re-instating the initial agreement’s airtime packages, the applicant received more expensive ones.[4]

16.2. On 15 May 2023, the applicant was credited R5 799.74, allegedly a refund for the overcharging of fees. According to the applicant, this amount is less than the amount overcharged over the period.

16.3. On 30 June 2023, the applicant was debited R2 519.89 for cancelling the R90 agreement.

16.4. After cancellation, the respondent debited the applicant R5 855.13 for the cell phones the respondent collected.

17. The applicant alleges that the respondent contravened sections 23(6)(a), 29, 32, 40 and 41(1). He requested an order of prohibited conduct and a refund.

THE RELEVANT LEGAL PROVISIONS

18. In terms of section 1, 'unconscionable', when used with reference to any conduct, means-

(a) having a character contemplated in section 40; or

- (b) otherwise unethical or improper to a degree that would shock the conscience of a reasonable person.
- 19. Per section 40, a supplier or an agent of the supplier must not use pressure, duress, unfair tactics or any other similar conduct in connection with any-
 - (a) marketing of any goods or services;
 - (b) supply of goods or services to a consumer;
 - (c) negotiation, conclusion, execution or enforcement of an agreement to supply any goods or services to a consumer ".
- 20. Misleading or deceptive representations are described in section 41(1)(a), outlining that the supplier must not express or imply a false, misleading, or deceptive representation concerning a material fact to a consumer. Section 41(1)(b) prohibits using exaggeration, innuendo, or ambiguity as to a material fact.
- 21. Section 29 outlines the general standards for marketing of goods or services. A service provider must not market any goods or services:
 - (a) in a manner that is reasonably likely to imply a false or misleading representation concerning those goods or services, as contemplated in section 41; or
 - (b) in a manner that is misleading, fraudulent or deceptive in any way, including in respect of –
 - (i) the nature, properties, advantages or uses of the goods or services;
 - (ii) the manner in or conditions on which those goods or services may be supplied;
 - (iii) the price at which the goods may be supplied;
 - (iv) the sponsoring of any event; or
 - (v) any other material aspect of the goods or services.
- 22. Per section 32, the person directly marketing goods or services and concluding a transaction or agreement with a consumer must inform the consumer of the right to rescind that agreement, as set out in section 16. Such information must be provided in the prescribed manner and form.
- 23. Section 26 outlines the responsibilities of a supplier to provide a written record of each transaction to the consumer to whom any goods or services are supplied. This record must include:
 - (a) The supplier's full name, or registered business name, and VAT registration number, if any;
 - (b) the address of the premises at which, or from which, the goods or services were supplied;
 - (c) the date on which the transaction occurred;

- (d) a name or description of any goods or services supplied or to be supplied;
- (e) the unit price of any particular goods or services supplied or to be supplied;
- (f) the quantity of any particular goods or services supplied or to be supplied;
- (g) the total price of the transaction before any applicable taxes;
- (h) the amount of any applicable taxes; and
- (i) the total price of the transaction, including any applicable taxes.

CONSIDERATION OF PROHIBITED CONDUCT

24. The Tribunal has considered whether the respondent's conduct constitutes prohibited conduct^[5] in terms of the CPA. In doing so, the Tribunal is mindful of its wide-ranging powers to make appropriate orders concerning prohibited

conduct.^[6]

25. According to the undisputed evidence before the Tribunal, the respondent, through its business partner, directly marketed the R90.00 agreement with the applicant by alluding to the low price of R90.00 for two cell phones per month and no additional charges. The applicant was influenced to accept the R90.00 agreement based on the features explained during the marketing call. The undisputed evidence before the Tribunal confirms that the respondent had no intention to honour the R90.00 agreement. The respondent acknowledged that they inflated the price retroactively and invoiced the applicant more than R90.00 per month for the two phones. However, once it realised it was overcharging the applicant, the respondent was unwilling to honour the R90.00 agreement and continued to overcharge the applicant. Similarly, the respondent was unwilling to reinstate the initial agreement that was in place before it persuaded

the respondent to conclude the R90.00 agreement. It insisted on cancelling the R90.00 agreement and instituting a new month-to-month

contract with fewer benefits. The respondent then invoiced the applicant for the balance of the R90.00 agreement and invoiced the

applicant for collecting the two cell phones.

26. As the respondent, through direct marketing, created the false impression to the applicant that it would provide two cell phones for R90.00 per month and that there would be no further charges, the respondent misled the applicant into believing that the R90.00 agreement would be more advantageous than the initial agreement. The Tribunal is persuaded that the respondent used unfair tactics to induce the applicant to cancel the initial agreement and conclude the R90.00 agreement, which was more costly than marketed. When the applicant insisted that the R90.00 agreement be enforced, the respondent refused to honour the purchase and service agreement. The respondent further

refused to reinstate the initial agreement and unilaterally implemented a new month-to-month agreement with fewer benefits. The Tribunal, therefore, finds that the respondent contravened sections 40 and 41.

27. Since the respondent deceived the applicant by alluding to the price of R90.00 for two cell phones per month when it had no intention of honouring such price, the Tribunal is persuaded that the respondent presented the price misleadingly and deceptively. On the evidence before the Tribunal, the Tribunal is persuaded that the respondent persuaded the applicant to cancel the initial agreement by making statements regarding the conditions and services for the R90.00 agreement. These statements were deceptive as there was no intention to honour the conditions or price. Therefore, the Tribunal finds that the respondent contravened section 29(a) and
- (b).
28. The record further shows that the respondent failed to inform the consumer in the prescribed manner of the right to rescind the agreement within five days. Therefore, the Tribunal finds that the respondent transgressed section 32.
29. Since the agreement was concluded telephonically and in the absence of any evidence to the contrary, the Tribunal is persuaded that the respondent failed to provide the consumer with a written record of the sales transaction, especially pertaining to the date on which the transaction occurred, the description of the goods and services to be supplied, the number of such goods and services and the total price of the transaction. Therefore, the Tribunal finds that the respondent contravened section 26.

RELIEF

30. The Tribunal has jurisdiction to declare conduct prohibited in terms of the NCA and to make an appropriate order requiring repayment to the consumer of any excess amount charged or any other appropriate order required to give effect to a right as contemplated in the National Credit Act, 34 of 2005 or the CPA.[7]
31. The record confirms that the respondent required the applicant to pay a higher price for the two cell phones than the price communicated when concluding the R90.00 agreement. The respondent levied additional charges and overcharged the consumer R8 243.10 (without interest).[8] After the applicant complained, the respondent refunded R4 070.16. However, based on the evidence before the Tribunal, R3 247.06 remains to be refunded to the applicant.
32. After the respondent collected the two cell phones, the applicant's account was debited with R2 519.89. The account refers to this line item as "Equipment - Balance of contract," presumably referring to a cancellation fee for the balance of the remaining contract period. As the respondent initiated and finalised the cancellation without a settlement agreement, a cancellation fee is without merit and should be refunded.

33. The respondent further billed the applicant for cell phones delivered to Portion 14, Farm Rood, Champagne Valley, for R5 855.13. The invoice is dated 24 May 2023, and the line item refers to "despatch of phones".[9] The record confirms that no cell phones were delivered to this address, and the respondent did not provide an explanation for this invoice. However, as the two cell phones were collected at this address, the Tribunal accepts the applicant's surmise that the charge is, in fact, for collecting the cell phones from Wits End in Champagne Valley. As the record confirms that the respondent undertook to reverse the contract and collect the cell phones at their expense, any charge for collecting them is without merit and should be refunded.[10]

CONCLUSION

34. The applicant consistently requested the respondent to honour the R90.00 agreement, but the respondent consistently refused to honour it. Since a settlement agreement was never reached, the Tribunal is persuaded that the overcharged amount billed for cancelling the R90.00 agreement and the amount billed for collecting the cell phones should be refunded. Consequently, the Tribunal finds that the respondent must refund the applicant R11 622.08 as a repayment to him of the excess amounts charged. This amount is calculated as follows:

R3,247.06 - overcharges

R2,519.89 - cancellation fees

R5,855.13 - collection of phones

TOTAL: R11,622.08

35. The Tribunal also finds that the respondent showed no sympathy or understanding for the applicant when the applicant brought the

respondent's failure to provide the services and goods provided for in the R90.00 agreement to its attention. However, the Tribunal has no jurisdiction to make an order for general damages. What would be appropriate in the circumstances is for the applicant to institute a damages claim before an appropriate forum if he believes that he can prove such a claim.[11] In terms of section 115(2)(a), a person who has suffered loss or damage as a result of prohibited conduct must file with the registrar or clerk of the court a notice from the Chairperson of the Tribunal in the prescribed form:

"(i) certifying whether the conduct constituting the basis for the action has been found to be prohibited or required conduct in terms of [the CPA];

(ii) stating the date of the Tribunal's finding, if any; and

(iii) setting out the section of [the CPA] in terms of which the Tribunal made its finding, if any."

36. The certificate referred to in section 115(2)(b) is sufficient proof of its contents.[12]

ORDER

37. In the result, the Tribunal makes the following order:

37.1. It is declared that the respondent contravened the following provisions of the CPA:

37.1.1. Section 26;

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37.1.2. Section 29(a) and (b);

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37.1.3. Section 32;

37.1.4. Section 40; and

37.1.5. Section 41(1)(b).

37.2. These contraventions are declared prohibited conduct.

37.3. The applicant may request a certificate in terms of section 115 (2) (a) from the Chairperson of the Tribunal to claim his damages in a civil court.

37.4. The respondent is to refund the applicant R11,622.08 by depositing that amount into the applicant's chosen bank account within 15 business days of the issuance of this

judgment.

37.5. The respondent is to reinstate the initial agreement that was in place in November 2021.

37.6. There is no cost order.

[Signed]

DR. MC PEENZE PRESIDING MEMBER

Tribunal members Mr S Hockey and Mr CJ Ntsoane concur.

[1] Published in GN 789 in GG 34405 of 29 June 2007.

[2] See page 166 of the record.

[3] See page 171 of the record.

[4] See page 76 of the record.

[5] Prohibited conduct is defined in section 1 as meaning an act or omission in contravention of the Act.

[6] See National Credit Regulator v Dacqup Finances CC trading as ABC Financial Services – Pinetown and Another (382/2021) [2022]

ZACSA 104 (24 June 2022).

[7] Section 150 (a), (h) and (i).

[8] See record, pages 95, 105-106, 47-51 and 59-62. Also see page 75 of the record: The respondent's customer care line telephonically

confirmed that the Vodacom computer system reflected the decision to refund the applicant a total of R16 735.20. However, this amount was never paid.

[9] See page 76 of the record.

[10] See page 69 of the record.

[11] See *Steyn NO v Ronald Bobroff & Partners* [2012] ZASCA 184; 2013 (2) SA 311 (SCA).

[12] Section 115(3).

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