

SOUTH AFRICA / JUDGMENT

Doyle v Killeen and Others (NCT/12984/2014/75(1)(b)CPA) [2014] ZANCT 43 (25 September 2014) [2014] ZANCT 43

COURT

National Consumer Tribunal

BEFORE

J Simpson, H Devraj, P Beck

CASE / FILE NUMBER

NCT/12984/2014/75(1)(b)CPA

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case number: NCT/12984/2014/75(1)(b)CPA

DATE: 25 SEPTEMBER 2014

In the matter between:

RICHARD ALLAN DOYLE.....APPLICANT

And

LOUISE KILLEEN.....FIRST RESPONDENT

TANYA MYBURGH.....SECOND RESPONDENT

KAPSTADT INTERNATIONAL.....THIRD RESPONDENT

Coram:

Adv J Simpson _ Presiding Member

H Devraj _ Member

Ms P Beck – Member

Date of Hearing – 25 September 2014

JUDGMENT AND

REASONS

APPLICANT

1. The Applicant in this matter is Richard Allan Doyle, an adult male residing in Tamboerskloof, Cape Town (“the Applicant”). The Applicant represented himself at the hearing.

RESPONDENTS

2. The First Respondent is Louise Killeen, an adult female estate agent, with her principal place of business at Gardens, Cape Town, represented at the hearing by Mr Chris Rigeo (“the First Respondent”).
3. The Second Respondent is Tanya Myburg, an adult female, residing at Bantry Bay, Cape Town, represented at the hearing by Mr John Gilmor (“the Second Respondent”).
4. The Third Respondent is Kapstadt International with registered address at Gardens, Cape Town, represented at the hearing by Mr Chris Rigeo. (“the Third Respondent”).

APPLICATION

5. This is an application in terms of section 75(1)(b) of the Consumer Protection Act, 68 of 2008 (“the Act”), for leave to apply directly to the National Consumer Tribunal (“Tribunal”) on the premise that the National Consumer Commission (“NCC”) issued a notice of non-referral in response to a complaint by the Applicant.

BACKGROUND

6. On or about July 2012, The Applicant purchased a property known as 20 Belle Ombre Road, Tamboerskloof, Cape Town (“the Property”) from the Second Respondent. The First Respondent was mandated by the Third Respondent to find a willing and able purchaser for the property. Flowing out of this mandate, the First Respondent introduced the Applicant to the Second Respondent’s property.
7. A sale agreement was concluded between the aforesaid parties. The sale was subject to a suspensive condition that a survey of the property be undertaken, prior to the transfer of the property, to establish that the property was free of any defects. During the course of the negotiations to purchase the property, the Applicant took the decision to remove the suspensive condition from the agreement. Thus transfer and registration of the property took place, in the name of the Applicant, without the property being surveyed.
8. Approximately two days after taking transfer of the property, the Applicant experienced roof leaks. The Applicant replaced the roof at his own expense and seeks to institute action against all the Respondent’s, jointly and severally, to recover the sum of R111 277.80 being the sum the Applicant spent to replace the entire roof and to repair defects in the property.

9. After several unsuccessful attempts, through the legal representatives of the parties, to resolve the matter, the Applicant lodged a complaint against the Respondents with the NCC. The NCC issued a notice of non-referral on the basis that the facts, if found to be true, do not constitute grounds for a remedy under the Act.
10. Flowing out of the NCC's notice of non-referral, the Applicant lodged an Application with the Tribunal for leave to refer the matter to the Tribunal.

PRELIMINARY

ISSUES

11. The Tribunal must first consider the issue of condonation and the late filing of the Second Respondent's opposing affidavit to the Applicant's Application.
12. The Tribunal must further consider the points in limine raised by the First, Second and Third Respondents. These are:
 - (i) The notice of non-referral issued by the NCC only refers to a complaint against the Second Respondent and does not bear any

reference to a complaint against the First and Third Respondents. The First and Third Respondent's are thus not properly before the Tribunal.

(ii) The Applicant is in contravention of Rule 16 of the Tribunal Rules[1] in that the Applicant has not formally joined the First and Third Respondents to the proceedings.

(iii) Further, the matter cannot be determined by the Tribunal because the CPA does not apply to this matter and a Civil Court is the proper forum to determine the matter.

APPLICANT'S PRAYERS

13. The Applicant prays for an order by the Tribunal directing that the Respondents jointly and severally refund the Applicant an amount of R111 271-80. This aspect can only be determined once leave to refer has been granted by the Tribunal and the merits of the matter are adjudicated upon.

CONDONATION

14. The Application in terms of section 101(1) of the CPA was filed with the Tribunal on 5 February 2014. The opposing affidavit of the Second Respondent was filed outside the 15 business day period allowed in terms of Tribunal Rules.
15. The Second Respondent therefore applied for condonation to the Tribunal for the late filing. Such application may be brought in terms of Rule 34 of the Tribunal Rules for an order to :
 - (a) Condone the late filing of a document or application;
 - (b) Extend or reduce the time allowed for filing or serving;

- (c) Condone the non-payment of a fee; or
 - (d) Condone any other departure from the rules or procedure.
16. The Tribunal may grant such Application on good cause shown.
17. In *Melane v Santam Insurance Company Limited*[2] it was held that:

The approach is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degrees of lateness, the explanation therefore, the prospects of success and the importance of the case. These facts are inter-related: they are not individually decisive. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay. There is a further principle which is applied and that is that without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused...cf *Chetty v Law Society of the Transvaal* 1985(2) SA 756 (A) at 765 A-C; *National Union of Mineworkers and Others v Western Holdings Gold Mine* 1994 15 ILJ 610 (LAC) at 613E.

The courts have traditionally demonstrated their reluctance to penalize a litigant on account of the conduct of his representative but it emphasized that there is a limit beyond which a litigant cannot escape the results of the representative's lack of diligence or the insufficiency of the information tendered. (*Salojee & Another NNO v Minister of Community Development* 1965

(2) A 135 (A) 140H-141B; *Buthlezi & Others v Eclipse Foundries Ltd* 18 ILJ 633 (A) at 6381-639A)."

18. In *Head of Department, Department of Education, Limpopo Province v Settlers Agriculture High School and Others*[3] it was held that the standard of considering an application of this nature is the interests of justice.
19. Whether it is in the interest of justice to grant condonation depends on the facts and circumstances of each case. It requires the exercise of a discretion on an objective conspectus of all the facts. Factors that are relevant include but are not limited to:
- (i) the nature of the relief sought;
 - (ii) the extent and cause of the delay;
 - (iii) the effect of the delay on the administration of justice and other litigants;
 - (iv) the reasonableness of the explanation for the delay;
 - (v) the importance of the issue to be raised in the intended appeal; and
 - (vi) the prospects of success. This aspect will be dealt with in the consideration of leave to refer.
20. From the dictum in *Melane* it was held that these factors are interrelated and should not be considered separately.

21. No objection to the granting of the Application for condonation was lodged by the Applicant or the First and Third Respondents to the matter. The Second Respondent has provided the Tribunal with a proper explanation for the delay in filing the Second Respondent's opposing papers. In this regard the Second Respondent submitted that she was overseas when the Applicant served the Application on the Attorneys who represented her in the transfer of the property. After the transfer of the property, the Second Respondent's attorneys closed their file. When the attorneys were served with the Application, they had no instructions to represent the Second Respondent. They obtained instructions belatedly from the Second Respondent and filed the opposing papers outside of the time period permitted in the Tribunal Rules. The Tribunal has considered the submissions made by the Second Respondent and the Tribunal is satisfied with the explanation provided. Furthermore, the delay was not excessive and accordingly, the Application for condonation is granted.

THE POINTS IN LIMINE

22. At the hearing the First and Third Respondents made submissions that a complaint was not lodged by the Applicant, with the NCC, against either the First or Third Respondents. This submission is based on the fact that the notice of non-referral of the NCC bears no reference to the First and Third Respondents. Thus the First and Third Respondents are not properly before the Tribunal and the case before the Tribunal against the First and Third Respondents stands to be dismissed.
23. Further, the Applicant has not formally joined the First and Third Respondents to the proceedings in terms of Rule 16 of the Tribunal Rules. Thus these parties are not properly before the Tribunal and the case against the First and Third Respondents should be dismissed by the Tribunal.
24. The main submission of the Second Respondent is that the CPA does not apply to the transaction; that the Tribunal is not the proper forum to hear this matter and that the correct forum to determine the matter is a Civil Court.
25. The Applicant made submissions at the hearing that he lodged the complaint with the NCC, against the First, Second and Third Respondents. As the Applicant, he is not in a position to provide the Tribunal with an explanation as to why the NCC only referred to the Second Respondent in the notice of non-referral. The Applicant stated that he could only assume that it was an oversight on the part of the NCC. In support of this submission the Applicant referred the Tribunal to his original complaint form which the Applicant submits refers to the complaint being lodged against all three Respondents.

CONSIDERATION OF THE POINTS IN LIMINE

26. The main contention of the First and Third Respondents is that the First and Third Respondent are not properly before the Tribunal in that no complaint was lodged against them with the NCC. This submission is based on the fact that the notice of non-referral of the NCC only refers to the Second Respondent.

27. The NCC may issue a notice of non-referral based on specific grounds as set out in section 72 of the Act. These grounds include the complaint appearing to be frivolous or vexatious and the complaint does not allege any facts which, if true, would constitute grounds for a remedy under the Act. There is no specific requirement in the Act that the party against whom the complaint is lodged be advised of the complaint or have to appear before the NCC. Further there is no requirement in the Act that specific parties be mentioned in the non-referral notice. It can therefore happen that the NCC issues a notice of non-referral to a complainant without the other party ever being advised of the complaint.
28. The fact that the Respondents in question were not specifically referred to in the notice of non-referral does not necessarily result in them not being properly before the Tribunal in terms of section 75(1)(b). The fact that the complaint lodged with the NCC and the application now before the Tribunal is the same, establishes a sufficient causal nexus between them. In any event, the Applicant in this matter clearly referred to all the Respondents in his complaint to the NCC and cannot be prejudiced if the NCC chose not to specifically refer to all the Respondents in the notice.

Therefore this point in limine must fail.

29. In so far as there has not been a proper joinder of the First and Third Respondents to the proceedings in terms of Tribunal Rule 16, it is not necessary for the Tribunal to make a finding on this issue because of the finding in paragraph 28.
30. Whether or not the Act has application to this matter or whether a civil court is the appropriate forum will be considered as a whole with the main application.

THE APPLICATION FOR LEAVE

The Applicant, at the hearing, made the following submissions:-

31. The Applicant seeks to hold the First, Second and Third Respondents liable for the replacement cost of the roof and repairs to the property in the amount of R111 217, 80. The legal basis for this claim is:
- (i) non-compliance with the Act;
 - (ii) fraudulent concealment of defects and
 - (iii) the actio quanti minoris.
32. The Applicant submits that the Act is applicable to the transaction and that the Tribunal has the necessary jurisdiction to adjudicate the matter. The Applicant, a lay person, based his legal submissions, as he stated at the hearing, on submissions made by his attorney in a letter sent to the Third Respondent on 25 September 2012, prior to the complaint being lodged with the NCC.

33. For the purposes of this judgment, the Tribunal will only summarise the essence of the legal submissions made.
34. The argument of the Applicant is that the First and Third Respondents were both acting in the ordinary course of their business; that the Act applies to the estate agency and to the estate agent, who were both, he submits, acting in the ordinary course of their business. This submission is based on the definition of transaction in Section 1 of the Act read with section 5 of the Act and the definition of business in section 1 of the Act. Further these parties fall within the definition of “supplier” in section 1 of the Act since they marketed the goods (i.e. the property) and services (the introduction of the Second Respondent to the Applicant).
35. Further, the seller (the Second Respondent), in terms of the operation of section 113 of the Act, is jointly and severally liable for that which the seller’s agent (the First and Third Respondents) did or omitted to do in the course of their activities on behalf of the principal, being the seller (the Second Respondent).
36. The submission then goes further to argue that the extent of the non-compliance with the Act, amongst others, is that :
- (i) The First Respondent did not comply with section 4(1)(b) of the Act in respect of disclosing defects in the roof and that these areas were painted over by the Second Respondent, in order to hide the defects which amounts to deception on the part of the Second Respondent;
 - (ii) The First Respondent contravened section 4(5)(b) and (c) and section 29 of the Act by engaging in unconscionable, misleading and deceptive conduct that was reasonably likely to mislead or deceive the Applicant; by making representations about the house for which the First Respondent did not have reasonable grounds for believing those representations were true; and by marketing the property in a manner reasonably likely to imply a false or misleading representation concerning the property in a misleading and deceptive way;
 - (iii) Payment of the agent’s commission in terms of clause 9.1 of the Agreement is in contravention of section 48(1)(a)(i) of the Act, which requires the price to be fair, reasonable and just;
 - (iv) The entire agreement is unfair, unreasonable and unjust in terms of section 48(2)(c) of the Act in that the Applicant relied on a false, misleading and or deceptive representation namely the clause in the Agreement that “The seller warrants that he (sic) is unaware of any latent defects in the property.” In terms of section 51(3) of the Act, the entire transaction and the agreement may well be void as a result.
 - (v) The voetstoets clause in the agreement is unfair, unreasonable and unjust as contemplated in section 48 of the Act;
 - (vi) The property is not “reasonably suitable for the purposes for which intended”, as required by section 55 of the Act;

The First and Second Respondents made the following submissions at the hearing:-

37. That the Act does not apply to this transaction and thus it cannot be averred that there was non-compliance with the Act. The basis for this submission is that in terms of the definition section in the Act, the Second Respondent cannot be viewed as a supplier in terms of the Act because the sale of the property was not done in the normal course of the Second Respondent's business, neither is the Second Respondent a property trader.
38. The First, Second and Third Respondents dispute that there was any misrepresentation of the condition of the property or that there was fraudulent concealment of the defects. The Second Respondent stated that she disclosed to the First Respondent the repairs undertaken to the roof in the past five years and that it was the responsibility of the First Respondent to disclose this to the Applicant. This disclosure by the Second Respondent is disputed by the First Respondent. In any event the First, Second and Third

Respondents dispute that there was any fraudulent non-disclosure on either of their parts.

39. The First, Second and Third Respondents dispute the claim against them for the reasons stated above. It is the submission of these Respondents that a Civil Court is the proper forum to hear the matter.

CONSIDERATION OF THE EVIDENCE ON THE APPLICATION FOR LEAVE AND THE LAW

40. The NCC issued a Notice of non-referral to the Applicant, dated 28 January 2014, in the prescribed form, as provided for in Section 72(1) of the Act. The specific notice of non-referral avers that the NCC held the view that the complaint does not allege any facts which, if true, would constitute grounds for a remedy under the Act. Section 75(1)(b) of the Act stipulates that the Applicant may, in the event of the issuing of a notice of non-referral by the NCC, refer the matter directly to the Tribunal, with the leave of the Tribunal.
41. In the matter of *Westinghouse Brake and Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd*[4], the following was held: "It is a general rule in the construction of statutes that a deliberate change of expression is prima facie taken to import a change of intention". The specific provisions of Section 75(1)(b) of the Act and the requirement of the granting of leave to refer contained therein is

such a "deliberate change of expression". By including this requirement the legislature expressed its intention of a separate requirement namely that a Section 75(1)(b) referral cannot be adjudicated on without the applicant in a specific matter first having obtained leave from the Tribunal to make such a referral.

42. When determining whether the Applicant should be granted leave to refer the matter to the Tribunal, the Tribunal must consider 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 the *Westinghouse Brake and Equipment (Pty) Ltd* – matter, as cited above, 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.”

43. The Tribunal, when considering whether to grant the Applicant leave to refer or not, use the same test as applied[5] in the High Court for applications for “leave” and will therefore consider:
- (i) The Applicant’s reasonable prospects of success with the referral;
 - (ii) Whether the matter is of substantial importance to the parties.

Substantial importance of the matter to the Applicant

44. The Tribunal will deal with the substantial importance requirement first. The Applicant seeks to hold the First, Second and Third Respondents liable for the replacement cost of the roof in the amount of R111 271,80. The Applicant took transfer of the property on or about May 2012. When the Applicant experienced roof leaks, two days after occupation of the property, he briefed an attorney, appointed an expert within a month after occupation of the property to provide him with an assessment of the condition of the roof and obtained an expert legal opinion. The Applicant then, based on these advices, sent a letter of demand to the Respondents. The Respondents disputed the claim and subsequently the Applicant lodged a complaint with the NCC, which ultimately resulted in the letter of non-referral and the current Application before the Tribunal. The matter is evidently of substantial importance to the Applicant, considering the effort of the Applicant over the past two years to obtain redress, together with the value of the Applicant’s claim.

Reasonable Prospects of success

45. Secondly, the Tribunal considered the Applicant’s prospects of success. This aspect hinges on whether the Tribunal is of the view that the Applicant’s claim falls within the ambit of the Act and whether the Applicant may be assisted with a certificate in terms of Section 115(2) of the Act, following a declaration of prohibited conduct by the Tribunal. On the aspect of the reasonable prospects of success the Tribunal must first determine whether the matter falls to be determined in terms of the Act.
46. The Applicant has not clearly stated what order he seeks from the Tribunal but based on the contents of the various documents attached to his application, it appears he is seeking the following:
- (i) That the Tribunal finds the Respondents guilty of prohibited conduct, more particularly having transgressed the sections of the Act referred to in paragraph 36 above, in that the Respondents acted in the ordinary course of business in their dealings with the Applicant; and;

(ii) That the Tribunal finds the Respondents jointly and severally liable for the actions of the Second Respondent's agents, the First and Third Respondents, and therefore be ordered to pay damages to the Applicant in the amount of R111 271.80.

47. As the Applicant refers to a claim for damages, it appears that the Applicant may be relying on the provisions of section 115 (2) of the Act which reads as follows:

A person who has suffered loss or damage as a result of prohibited conduct, or dereliction of required conduct –

- (a) May not institute a claim in a civil court for the assessment of the amount or awarding damages if that person has consented to an award of damages in a consent order; or
- (b) If entitled to commence an action referred to in paragraph (a) when instituting proceedings, must file with the registrar or the clerk of the court a notice from the Chairperson of the Tribunal in the prescribed form –
 - (i) Certifying whether the conduct constituting the basis of the action has been found to be prohibited conduct in terms of the Act;
- (ii) Stating the Tribunal's finding, if any; and
- (iii) Setting out the section of this Act in terms of which the Tribunal made its finding, if any.

48. The basic background facts before the Tribunal at this stage, to which the Tribunal must consider applying the Act is the following –

The Applicant purchased a property from the Second Respondent. The First Respondent is an estate agent employed by the Third Respondent. The First Respondent marketed the property on behalf of the Second Respondent. The Applicant had to replace the roof of the property after purchasing it and is now seeking to claim the costs of this repair from the Respondents.

Application of the Act to the basic facts presented:

49. The Tribunal will first consider the application of the Act as it relates to the Second Respondent, being the seller of the property.

50. Section 3 of the Act states the following –

“Purpose and policy of Act

- 3. (1) The purposes of this Act are to promote and advance the social and economic welfare of consumers in South Africa by—
 - (a) establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally;

(b) reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by consumers—

(i) who are low-income persons or persons comprising low-income communities;

(ii) who live in remote, isolated or low-density population areas or communities;

(iii) who are minors, seniors or other similarly vulnerable consumers; or

(iv) whose ability to read and comprehend any advertisement, agreement, mark, instruction, label, warning, notice or other visual

representation is limited by reason of low literacy, vision impairment or limited fluency in the language in which the representation is produced, published or presented;

(c) promoting fair business practices;

(d) protecting consumers from—

(i) unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices; and

(ii) deceptive, misleading, unfair or fraudulent conduct;

(e) improving consumer awareness and information and encouraging responsible and informed consumer choice and behaviour;

(f) promoting consumer confidence, empowerment, and the development of a culture of consumer responsibility, through individual and group education, vigilance, advocacy and activism;

(g) providing for a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions;

and

(h) providing for an accessible, consistent, harmonised, effective and efficient system of redress for consumers.”

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51. A consumer is defined in the definitions section of the Act as the following –

“consumer”, in respect of any particular goods or services, means—

- (a) a person to whom those particular goods or services are marketed in the ordinary course of the supplier’s business;
- (b) a person who has entered into a transaction with a supplier in the ordinary course of the supplier’s business, unless the transaction is exempt from the application of this Act by section 5(2) or in terms of section 5(3);
- (c) if the context so requires or permits, a user of those particular goods or a recipient or beneficiary of those particular services,

irrespective of whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those particular

goods or services; and

- (d) a franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5(6)(b) to (e);

52. Section 5(1) of the Act states the following –

“5.

- (1) This Act applies to—

- (a) every transaction occurring within the Republic, unless it is exempted by subsection (2), or in terms of subsections (3) and (4);
 - (b) the promotion of any goods or services, or of the supplier of any goods or services, within the Republic, unless—
 - (i) those goods or services could not reasonably be the subject of a transaction to which this Act applies in terms of paragraph (a); or
 - (ii) the promotion of those goods or services has been exempted in terms of subsections (3) and (4);
 - (c) goods or services that are supplied or performed in terms of a transaction to which this Act applies, irrespective of whether any of those goods or services are offered or supplied in conjunction with any other goods or services, or separate from any other goods or services; and
 - (d) goods that are supplied in terms of a transaction that is exempt from the application of this Act, but only to the extent provided for in subsection (5).”
53. One needs to determine what is a transaction as referred to in section 5(1)(a). In the definition section of the Act a transaction is defined as the following –
- “(a) in respect of a person acting in the ordinary course of business:*
- (i) an agreement between or among that person and one or more other persons for the supply or potential supply of any goods or services in exchange for consideration; or
 - (ii) the supply by that person of any goods or services in exchange for consideration; or
 - (iii) the performance by, or at the direction of any services of, that person of any services for or at the direction of the consumer for consideration; or ...”
54. The definition section in the Act provides a definition for the word business -
- “business” means the continual marketing of any goods and services.”*
55. Based on section 3 of the Act, the definition of transaction and the various references in the Act to suppliers, course of business, business and market, it is clear that the intention of the legislature was that the Act would not apply to persons selling goods as once-off transactions, as distinct from the selling of goods as a continual enterprise. This would appear correct as it would be unreasonable to expect of every person selling his personal property in a once-off transaction to know every relevant provision of the Act and to take the necessary steps to ensure complete compliance with the Act.
56. One of the primary factors determining whether a transaction falls within the Act would therefore be the question as to whether the transaction occurred within the ordinary course of business. Making a determination on this factor can however be difficult.

57. The definition of transaction refers to a person acting in the ordinary course of business. The Act however does not provide a definition for ordinary course of business. What constitutes the ordinary course of business was considered in cases such as *Gazit Properties v Botha N.O.* (873/10) [2011] ZASCA 199. In this matter the Court stated as follows -

“This means that one first has to have regard to the nature of the obligation in terms of which the disposition or payment was made.

This was made clear by Van Winsen JA in *Hendriks NO v Swanepoel* 1962

- (4) SA 338 (A) at 345B when he said the following:

‘Die Hof benader die vraag of ‘n transaksie in die gewone loop van sake geskied het, objektief wanneer hy hom afvra of, in ag genome die voorwaardes van die ooreenkoms en die omstandighede waaronder dit aangegaan is, die bedoelde ooreenkoms een is wat normaalweg tussen solvente besigheidsmense aangegaan sou word.’”

58. In *Al-Kharafi and Sons’s and another v Pema and Others NNO* (2008/12359)

[2008] ZAGPHC 273 the Court, in considering whether a transaction was in the ordinary course of business referred to the matter of *Van Zyl & Others NNO v Turner & Another NNO*[6] where the court formulated the approach to determine whether a transaction is ‘in the ordinary course of business’:

“One of these principles is that the test is an objective one. The Court must ask itself whether, given all the circumstances under which the disposition was made, it is in accordance with ordinary business methods obtaining amongst solvent men of business. Regard must therefore be had to all the circumstances, including the actions of both parties to the transaction. As appears from the formulation of the principle, the fact that one of the parties to the transaction was insolvent at the time is, however, to be excluded from the circumstances which are relevant.”

59. Although the above cases considered the phrase in the context of the Insolvency Act, one can glean from them that an objective evaluation is needed. All relevant factors would need to be considered to determine whether a person acted within the ordinary course of business. These factors could include, but are not limited to, the following:

- Whether the person has a registered business
- The nature of the business that the person engages in
- The nature of the goods normally sold by the person
- The frequency with which the goods are sold by the person
- Whether the person advertises or markets his goods on a frequent or ongoing basis

60. In the matter before the Tribunal, no evidence was led or arguments submitted, to show that the Second Respondent sold the property in the ordinary course of business. Based on the evidence available the Second Respondent sold her property as a once-off transaction and does not in any way engage in the business of selling properties. The Tribunal therefore finds that the Act does not apply to the sale of the property between the Applicant and the Second Respondent.
61. The Tribunal will now evaluate whether the Act applies to the First and Third Respondent in the context of the Applicant's claim. In order to do this the Tribunal must firstly consider the nature of the relationship between the Respondents.
62. To establish a connection between the Respondents in terms of the Act, the Applicant referred to section 113 of the Act. Section 113 of the Act states as follows:

"(1) If an employee or agent of a person is liable in terms of this Act for anything done or omitted in the course of that person's

employment or activities on behalf of their principle, the employer or principle is jointly and severally liable to that person."

63. The Act does not provide a definition for agent. Agency is described by Bowstead as the relationship that exists "between two persons, one of whom [the principal] expressly or impliedly consents that the other [the agent] should act on his behalf, and the other of whom similarly consents so to act or so acts".[7]
64. Blacks Law Dictionary (7th ed.) defines a broker as:

"...an agent who acts as intermediary or negotiator between prospective buyers and sellers; a person employed to make bargains and contracts

between other persons in matters of trade, commerce and shipping."

A broker-agent is defined as:

"A person who acts as an intermediary ... and as representative of one of them."

"These definitions basically mean that brokers act as middlemen and broker-agents and agents act as representatives of a party to a transaction. Real estate brokers do not always act as agents in legal terms in every transaction they are involved in though. The fact that one party is described as 'agent' in a document is not conclusive. Even if the parties have designated their contract by a particular name or have otherwise attempted to disguise the nature of the transaction, the court will examine the facts of the case and determine the true nature of the contract." [8]

65. The term estate agent as used by the parties to describe the First and Third Respondents is therefore not sufficient to establish that the First Respondent acted as an agent of the Second Respondent who would then be the principle. The Applicant did not submit any evidence of any agency or other agreement between the First and Second Respondent to the Tribunal. The only agreement or contract between the parties which is available is the offer to

purchase contract between the Applicant and the Second Respondent. This agreement contains a paragraph referring to the agent as being the effective cause of the sale and entitled to a commission value. This agreement does not provide any evidence of a true agent and principle relationship as required by section 113. Based on the evidence available the First and Third Respondents merely marketed the property on behalf of the Second Respondent but did not represent the Second Respondent in an agent and principle relationship which could make the provisions of section 113 relevant to the matter.

66. In as much as the Act does not define an agent or an estate agent, a supplier in the Act is defined as a person who markets any goods and services. On the evidence available the First Respondent is a registered estate agent and markets her services as such. Therefore, when the First Respondent markets the property to the public, on the instruction of the seller (the Second Respondent) she could be considered to be a “supplier” vis a vis the Applicant and any other potential purchaser. As such the First Respondent’s marketing practices will have to comply with the various applicable sections of the Act such as, section 40 regarding unconscionable conduct and section 41 regarding false, misleading or deceptive misrepresentations.
67. The Applicant’s main contention appears to be the defect in the roof and is primarily seeking to hold the seller responsible for the defect. The Applicant has then sought to tie the First and Second Respondents to the alleged actions of the Second Respondent and thereby render them all jointly and severally liable. In this regard the Applicant has not submitted any evidence of the First and Third Respondents having prior knowledge of the alleged defects in the roof and failing to disclose it to the Applicant. The Applicant has further not submitted any evidence of the First and Third Respondents having contravened any applicable sections of the Act.
68. It further bears mentioning that even if the First and Third Respondents were found guilty of prohibited conduct the Tribunal could not make an award of damages. The Tribunal could only consider imposing a fine on the First and Third Respondents. The Applicant could then further apply for a notice in terms of section 115(2) of the Act.
69. Although not directly relevant to the specific matter and claim before the Tribunal, it can be noted that section 27 of the Act refers to disclosures by an intermediary. Section 27 states as follows:

“Disclosure by intermediaries

27.

- (1) An intermediary must—
- (a) disclose prescribed information to—

- (i) any person whom the intermediary solicits or agrees to represent with respect to the sale of any property or services, or from whom the intermediary accepts any property for the purpose of offering it for sale; and
- (ii) any person from whom the intermediary solicits an offer, or to whom the intermediary offers to supply or supplies—
 - (aa) any service to be performed by a third person; or
 - (bb) any goods or property belonging to a third person; and
- (b) keep the prescribed records of all relationships and transactions contemplated in this section.
- (2) Subsection (1) does not apply to an intermediary who is—
 - (a) the executor or other administrator of a deceased's estate, in respect of any property of that estate;
 - (b) the liquidator of an insolvent estate, in respect of any property of that estate; or
 - (c) a trustee in respect of any trust property.
- (3) The Minister may prescribe—
 - (a) the information, including the manner and form of delivery of any such information, that an intermediary, or different categories of intermediary, must provide in terms of this section; and
 - (b) any records, including the form and content of any such records, that an intermediary, or different categories of intermediary, must keep in terms of this section.”
- 70. An intermediary is defined in the Act as –

“intermediary” means a person who, in the ordinary course of business and for remuneration or gain, engages in the business of—

 - (a) representing another person with respect to the actual or potential supply of any goods or services;
 - (b) accepting possession of any goods or other property from a person for the purpose of offering the property for sale; or
 - (c) offering to sell to a consumer, soliciting offers for or selling to a consumer and goods or property that belongs to a third person, or service to be supplied by a third person, but does not include a person whose activities as an intermediary are regulated in terms of any other national legislation;
- 71. The prescribed information referred to in section 27(3) is contained in paragraphs 9 and 10 of the Consumer Protection Act regulations.[9]

72. Considering the definition of an intermediary and the contents of section 27, it would appear that section 27 could apply to an estate agent and therefore the First and Third Respondents. The section requires an intermediary to disclose the prescribed information and retain prescribed records for a period of three years. As referred to previously, no evidence was submitted to the Tribunal regarding section 27 of the Act and the Applicant's claim does not relate to this aspect.

CONCLUSION

73. The Tribunal finds that there is no reasonable prospect of success in this matter.

ORDER

74. Accordingly, the Tribunal makes the following order-

- (1) Leave to refer is not granted to the Applicant.
- (2) No order as to costs.

Dated at Johannesburg on the 5th day of November 2014.

[signed]

Ms PA Beck

Presiding Member

H Devraj (Member) and Adv J Simpson (Member) 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 "the Tribunal Rules").
- [2] 1962 (4) SA 531 (A) at 532C-F.
- [3] 2003 (11) BCLR 1212 (CC) at para[11].
- [4] 1986
- (2) SA 555 (A) at par 15.
- [5] Refer to MV Chauke v Standard Bank et al NCT/4658/2012/141(1)(P) and Coertze and Burger v Young NCT/7142/2012/73(3)&75(1)(b) CPA
- [6] 1998
- (2) SA 236 (C) paras 33 to 42 at para 34 and see Gore NO & Others v Shell South Africa (Pty) Ltd [2003] 4 All SA 370 (C) at 373-4; Illings (Acceptance) Co (Pty) Ltd v Ensor NO 1982 (1) SA 570 (A) 581A-B; Est Van Schalkwyk v Hayman and Lessem 1947

- (2) SA 1035 (C) at 1044-5. In *Fourie's Trustee v Van Rhijn*, 1922 OPD 1 at 4-5 it was said: ‘The disposition is either in the ordinary course of business, or it is not; the standard is a concrete and objective one, and it has regard to the “disposition”. The disposition is the transaction taking place between payor and payee, and it is not relevant in this connection to ask what were the payor’s liabilities and assets. The question to be decided is whether the payment is made in the way which among solvent businessmen is in the ordinary course of business’. Collusion is no requirement for the applicability of s 46, and the applicants correctly did not proceed with their argument in this respect.
- [7] Bowstead on Agency, 15th ed. (1985).
- [8] Abid at 32.
- [9] Consumer Protection Act Regulations GN R293 in GG 34180 of 1 April 2011.

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