

SOUTH AFRICA / JUDGMENT

Forrest v Malabar Hill (Pty) Ltd (NCT/287104/2023/75(2)(b)) [2024] ZANCT 31 (31 August 2024) [2024] ZANCT 31

COURT

National Consumer Tribunal

BEFORE

MC Peenze, Z Ntuli, C Sassman

CASE / FILE NUMBER

NCT/287104/2023/75(1)(b)

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Source record**IN THE NATIONAL CONSUMER
TRIBUNAL****HELD IN CENTURION****Case****number:** NCT/287104/2023/75(1)(b)**In****the matter between:**TONI
FORREST
APPLICANT
and
MALABAR
HILL (PTY) LTD
RESPONDENT**Coram:**Dr
MC Peenze
- Presiding Tribunal member
Ms
Z Ntuli
- Tribunal member
Adv
C Sassman
- Tribunal member
Date
of hearing
- 30 August 2024
Date
of judgment

- 31 August 2024

JUDGMENT

AND REASONS

THE PARTIES

1. The applicant is Toni Forrest (the applicant). The applicant is a consumer, as defined in section 1 of the Consumer Protection Act 68 of 2008 (the CPA). At the hearing, the applicant represented herself.
2. The respondent is Malabar Hill (Pty) Ltd (the respondent). The respondent is a supplier, as defined in section 1 of the CPA. Marie Claire Evans, the respondent's director, represented the respondent at the hearing.

TERMINOLOGY

3. A reference to a section in this judgment refers to a section of the CPA.

APPLICATION TYPE

4. This is an application in terms of section 75(1)(b). In this application, the applicant, with leave granted by the Tribunal, seeks redress against the respondent. The applicant alleges that the respondent contravened the CPA by selling her a carpet which did not conform to the material specifications of a special order and seeks a refund of the purchase price.

BACKGROUND

5. The applicant alleges that she received a quotation for a carpet from the respondent on 28 November 2022 and proceeded to purchase the carpet online for R11,633,00. The carpet colour was described as cork. The ordered carpet was not the respondent's standard size, which meant it had to be customised for the applicant. The carpet was delivered on 8 December 2022. The applicant alleges that the colour of the carpet delivered was labelled as light beige, not cork. Further, the size did not match the dimensions ordered. She was not happy with the carpet and requested a refund.
6. The respondent's terms and conditions at the time of purchase permitted returns within ten days, with no exclusion for customised orders or sale items. The respondent allegedly changed the terms and conditions on its website on 13 December 2022, after she had requested a refund, to the effect that no refunds were allowed for custom-made or sale items. After that, the respondent informed her that a refund was not possible. On 13 January 2023, the respondent collected the carpet for inspection. She was told that the binding was fixed to address the size issue, but the colour discrepancy remained disputed.

7. The applicant filed a complaint with the Consumer Goods and Services Ombud (CGSO), but the case was terminated on 17 March 2023 due to a lack of co-operation from the respondent. The applicant referred the complaint to the National Consumer Commission (NCC), which issued a notice of non-referral on 31 May 2023.
2023. The NCC stated that the remedy sought cannot be granted as the matter related to a particular order. The applicant escalated the matter to the Tribunal. She believes she is entitled to a refund as the terms and conditions permit it. She cited sections 41, 48, 49, 51, and 55 of the CPA to substantiate her claim.
8. The Tribunal must decide whether the applicant is entitled to the remedy sought.
9. The respondent opposes the application.

THE APPLICANT'S

SUBMISSIONS

10. The applicant submitted that the colour of the carpet, as displayed on the website, was different from the actual colour. As she requested a custom-made carpet to fit the colour combinations in her living room, she expected the colour to be the same as reflected in the online photo. However, once the applicant received the carpet, she noticed its colour differed from the one in the online photo. The respondent should have outlined that colour discrepancies could be expected on their website. According to the applicant, she could not inspect the product before purchase, and no sample materials were provided.
11. In addition to the colour discrepancy, the carpet was also wrongly sized and did not meet the applicant's requirements in the online order.
12. The applicant referred to the conditions of purchase that were changed the day after her complaint and submitted that the conditions were changed to prevent her from claiming a refund.
13. The applicant is seeking an order for a full refund of the purchase price.

THE RESPONDENT'S

SUBMISSIONS

14. The respondent submitted that it cannot be held responsible for a consumer's expectation that the colour online would be the same as the actual product. According to the respondent, great care is taken to place a professional photo of all products online, and the colour difference is not drastic. The respondent refers to the carpet's colour as a neutral colour that would fit the colour scheme of the applicant's living room.

15. The respondent acknowledged that the carpet was delivered in the wrong size but explained that they corrected it. However, after correcting the sizing, the applicant refused to accept the carpet's return.
16. The respondent disputed that the conditions for return were changed in retaliation to the applicant's complaint. It explained that it occurred as a precaution, as the business ran several Black Friday deals.
17. The respondent requests that the application be dismissed.

APPLICABLE SECTIONS OF THE ACT

18. Section 55(2)(a)-(c) states that consumers have the right to receive goods that are reasonably suitable for their intended purposes. They have a right to goods of good quality and in good working order. The goods must be free of defects and be useable and durable for a reasonable time.
19. Section 55(3)(a)-(b) states that if a consumer has specifically informed the supplier of the particular purpose for which the consumer wishes to acquire any goods or the use to which the consumer intends to apply those goods, and the supplier
 - (a) ordinarily offers to supply such goods, or (b) acts in a manner consistent with being knowledgeable about the use of those goods,
20. Section 56(2)(a) states that within six months after the delivery of goods to a consumer, the consumer may return the goods to the supplier, without penalty and at the supplier's risk and expense, if the goods fail to satisfy the requirements and standards contemplated in section 55. The supplier must, at the direction of the consumer, either repair or replace the failed, unsafe, or defective goods.
21. Section 19(5)(b) states that, when a supplier tenders delivery to a consumer of any goods, the supplier must, on request, allow the consumer a reasonable opportunity to examine those goods for the purpose of ascertaining whether the consumer is satisfied that the goods –
 - a. Are of a type and quality reasonably contemplated in the agreement and meet the tests set out in sections 18(3) and (4); and
 - b. In the case of a special-order agreement, reasonably conform to the material specifications of the special order.
22. Section 20(2)(b) states that the consumer may return goods to the supplier and receive a full refund of any consideration paid for those goods if the supplier has delivered goods that the consumer did not have an opportunity to examine before delivery, and the consumer has rejected delivery of those goods for any of the reasons contemplated in section 19(5).

23. Section 22(2)(b) states that when a notice, document or visual representation is in plain language, it is reasonable to conclude that an ordinary consumer of the class of persons for whom the notice, document or visual representation is intended with average literacy skills and minimal experience as a consumer of the relevant goods or services, could be expected to understand the content, significance and import of the notice, document or visual representation without undue effort, having regard to
- a. ...
 - b. The organisation, form and style of the notice, document or visual representation.
24. Section 18(3) states that if the consumer has agreed to purchase goods solely based on a description or sample, or both, provided by the supplier, the goods delivered to the consumer must in all material respects and characteristics correspond to that which an ordinary alert consumer would have been entitled to expect based on the description or a reasonable examination of the sample, as the case may be.
25. Section 51(1)(b)(i)-(ii) states that a supplier must not make a transaction or agreement subject to any term or condition if it directly or indirectly purports to:
- a. waive or deprive a consumer of a right in terms of the CPA; or
 - b. avoid a supplier's obligation or duty.

CONSIDERATION OF PROHIBITED CONDUCT

26. The Tribunal has considered whether the respondent's conduct constitutes prohibited conduct^[1] in terms of the CPA. In doing so, the Tribunal is mindful of its wide-ranging powers to make appropriate orders concerning prohibited conduct.^[2]
27. In the present matter, the applicant argued that the respondent contravened section 55(3)(a) and (b). The respondent denied the existence of any defects in the carpet and argued that the colour is only slightly different from the product's colour online. The respondent further submitted that it did not believe the applicant's issues with the carpet were severe enough to warrant a return or replacement and acted within its rights to insist on resizing the carpet.
28. The definition of goods in section 1 of the CPA includes any tangible object, including goods bought online. However, not every fault can be construed as a defect, as defined in section 53. In this context, the fault would have to be a material imperfection that renders the goods less acceptable than persons generally would be reasonably entitled to expect when purchasing a new custom-made carpet for a specific use.
29. It is not disputed that the applicant explained her expectations before the order was finalised. The applicant was specific about the colour of the carpet, which should blend well with her living room colour scheme. The respondent explained that the carpet's colour was only slightly different from the picture online but did not persuade the Tribunal that it

provided the applicant with a sample of the carpet's colour to confirm that it corresponded with the applicant's expectations. Given that the applicant has agreed to purchase the carpet solely based on the picture online, the carpet delivered to the applicant should have corresponded to the colour reflected in the online photo and the exact measurements reflected in the order. The colour and size of the carpet are perceived as the material characteristics that the applicant was entitled to expect.

30. According to the undisputed evidence before the Tribunal, the applicant did not receive a carpet, as indicated in the online order's specifications. The applicant put up a convincing case in which the respondent showed no sympathy or understanding when the applicant brought the carpet's non-conformance to the order specification to its attention. The respondent insisted on resizing the carpet, which would not resolve the wrong colour dispute.
31. The Tribunal further finds that the carpet's visual representation online did not adequately resemble the actual colour of the custom-made carpet. Therefore, the applicant could not reasonably be expected to understand the content of the visual representation without undue effort. To the extent that the photo is not a replica of the actual colour, the respondent was expected to provide such an explanation on the website and offer consumers the opportunity to inspect the material and colour of the carpet. The consumer cannot be expected to know or understand the complexities of a particular material used in carpeting unless advised by the supplier. In this matter, the respondent failed to allow the consumer a reasonable opportunity to examine the carpet to ascertain whether she was satisfied that the carpet was the correct colour and corresponded with the photo on the website. On her return of the carpet to the respondent, the applicant was entitled to receive a full refund of the purchase price per section 20(2)(b), as the respondent delivered the carpet without the applicant having had an opportunity to examine it before delivery.
32. The Tribunal is persuaded that the applicant specifically informed the respondent of the particular purpose for which she wished to acquire the carpet. Further, the respondent acted in a manner consistent with being knowledgeable about providing custom-made carpets. Given that the carpet did not comply with the specifications as ordered, it is not reasonably suitable for its intended purposes. The Tribunal, therefore, finds that the respondent contravened section 55(3)(b).
33. The Tribunal further considered the conditions for return on the respondent's website, which outlines that custom-made goods may not be returned. The Tribunal is persuaded that the conditions of return, as reflected on the respondent's website, are in contravention of section 51(1)(b)(i)-(ii), to the extent that they prohibit a consumer from returning a custom-made product.

CONCLUSION

34. The Tribunal finds that the respondent infringed upon the applicant's rights to choose or examine goods and sold a carpet to the applicant in contravention of sections 18(3), read with sections 19(5)(b), 20(2)(b) and 22(2)(b). The respondent contravened section 55(3)(b), as the carpet's colour did not correspond with the online colour and rendered the carpet less useful than persons are generally entitled to expect when purchasing a carpet of a specific colour and size.
35. The respondent issued terms and conditions on its website containing prohibited return conditions. The respondent intended to deprive the applicant of her right to receive goods of good quality and to avoid its obligations under the CPA. In doing so, the supplier has further contravened sections 51(1)(b)(i) and (ii).
36. The rights afforded to consumers under the CPA are there to protect them. An infringement of those rights could have serious financial consequences for a consumer. The applicant is, therefore, entitled to a refund.

ORDER

37. Accordingly, the Tribunal makes the following order:

37.1 The respondent has contravened the following sections of the CPA:

- (a) section 18(3), read with sections 19(5)(b), 20(2)(b) and 22(2)(b);
- (b) section 55(3)(b); and
- (c) section 51(1)(b)(i) and (ii).

37.2 The respondent's contravention of the above sections of the CPA is declared prohibited conduct.

37.3 The respondent is ordered to refund the applicant the purchase price of R11 633.00 within ten days of this judgment's issuance.

37.4 There is no cost order.

Dr MC Peenze

Presiding Tribunal member

Tribunal members Ms Z Ntuli and Adv C Sassman concur.

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

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

ZACSA 104 (24 June 2022).

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