

SOUTH AFRICA / JUDGMENT

Gogwana v Border Aluminium (Pty) Ltd (NCT/97615/2017/75(1)(b)) [2018] ZANCT 59 (16 August 2018) [2018] ZANCT 59

COURT

National Consumer Tribunal

BEFORE

B.C. Dumisa

CASE / FILE NUMBER

NCT/97615/2017/75(1)(b)

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IN

THE NATIONAL CONSUMER TRIBUNAL

HELD

IN CENTURION

Case

number: NCT/97615/2017/75(1)(b)

In

the matter between:

PUMEZA
GOGWANA
APPLICANT
and
BORDER
ALUMINIUM (PTY)
LTD
RESPONDENT

Coram: Prof.
B. Dumisa -
Presiding member
(Single Member)
Date
of Hearing -
03 August
2018

JUDGMENT

AND REASONS

APPLICANT

1. The Applicant in this matter is PUMEZA GOGWANA, a major female (hereinafter referred to as the Applicant"), who lives at [...], in the Province of the Western Cape. She represented himself at the hearing.

RESPONDENT

2. The Respondent is BORDER ALUMINIUM (PTY) LTD, a private company with registration number 20141/ 38808/07, operating from 1 Recreation

Road, Arcadia, East London, in the Province of the Eastern Cape (Hereinafter referred to as "the Respondent"). The Application was unopposed, hence the Respondent did not attend.

APPLICATION TYPE

3. This is an application in terms of Section 75(1)(b) of the Consumer Protection Act 68 of 2008 ("the CPA").
4. This is an unopposed application, where the Tribunal must consider whether there are reasonable grounds to grant the Applicant leave to directly refer the matter to the Tribunal to hear the matter. If the leave is granted then the Tribunal will consider the merits of the Application.

APPLICATION FOR LEAVE

5. Section 75(1) of the Act requires that the NCC issues a notice of non-referral in response to a complaint as a pre-requisite for a referral in terms of that section to the Tribunal.
6. The Applicant attached the Notice of non-referral from the NCC to the application.
7. In the matter of Coertze and Burger v Young^[1] the Tribunal considered the factors which must be evaluated regarding leave. The Tribunal held that the following two factors should be considered:

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

7.2 Whether the matter is of substantial importance to the Applicant or the Respondent.

8. It was firstly very clear that the matter was of substantial importance to the Applicant. She had gone to a great deal of effort to lodge this complaint with the National Consumer Commission (NCC), which issued him a Notice of Non-Referral on 13 September 2017; and she had now approached the Tribunal for an application for leave to refer the matter directly to the Tribunal for a hearing.

BACKGROUND

9. It must be noted that the Applicant's pleadings were not indexed or set out in a very clear manner. The Tribunal therefore had to sift through the various documents, or emails, to try and determine a coherent version of what occurred. For coherence, the Tribunal had to consider this matter from a number of angles, namely, from the submissions by the Applicant, from the perspective of the Office of the Eastern Cape Consumer Protector, from the perspective of the Consumer Goods & Services Ombud (CGSO), and from the perspective of the National Consumer Commission (NCC).

APPLICANT'S

SUBMISSIONS

10. The most relevant aspects regarding the Applicant's case were to be considered as follows:

10.1 The Applicant decided to lodge her application to the NCT in the form of an Affidavit, sworn under oath at the Mombray Police Station, in Cape Town;

10.2 The Applicant said she wanted to purchase four black aluminium windows;

10.3 She said she instead got a quote for the manufacture and supply of four bronze windows; This was the Respondent's quote number 3595, for a total amount of R7432.80, dated on the 21st of July 2015, for four aluminium bronze windows of different sizes;

10.4 She said she was told she could still have black aluminium, despite getting a quote for bronze windows, purportedly since bronze and black aluminium windows were in the same category and purportedly since they had the same price;

10.5 She thus paid a deposit of R5233.00, through EFT, on the 21st of July 2015;

10.6 There was at least a six months' gap between the time the Applicant paid her deposit in July 2015 and the time she went back to the Respondent to finally instruct them to manufacture those windows in January 2016;

10.7 She said she decided to change the size of the windows in January 2016, before finalizing the order;

10.8 On the 18th of January 2016, a new order, under same Quotation number 3595, was issued by one Duran Alberts for the manufacture and installation of four Bronze aluminium windows (of sizes different from the initial quote of the 21st of July 2015). This new quote was just confusing, because the amounts shown just did not add up;

10.9 On the 28th of January 2016, yet another quote was issued, under the same quote number 3595, but this one was now for only two sliding windows ; which showed that after the deduction of her deposit paid on the 21st of July 2015, her only outstanding balance was R102.20;

10.10 There is a confusing twist to the Applicant's submissions, as she added that when she went back on the 28th of January, by now she had to deal with a new person, Duran Alberts, and not Leslie that she initially dealt with in July 2015, who had purportedly said that she would be given the black aluminium windows at the same price as the bronze aluminium windows; but. to her surprise, Duran Alberts told her on the 28th of January 2016 that-

10.10.1 Black aluminium windows were in a different category from the bronze aluminium windows she had ordered and paid for in July 2015;

10.10.2 She was expected to pay an extra R900 "in order to upgrade to black aluminium windows".

11. There are thus different versions of what actually happened when the Applicant changed the sizes of the windows:

11.1 One version is per the quote issued on 28 January 2016, which shows her now only owing a balance of R102,20, for the manufacture and supply of two bronze sliding doors. She said she paid the R102,20 on this date. The Applicant did not provide proof of this payment;

11.2 The other version is that of the Applicant being required to pay an extra R900 in order to upgrade to black aluminium windows. The Applicant could not supply the written confirmation of this;

11.3 There is no explanation about what happened to the new quote as issued by Duran Alberts (the Manager) on the 18th of January 2018, which was also for bronze aluminium windows.

12. The Applicant says there were unfruitful efforts to clear the issue of the colour of the windows with the Respondents; this ultimately

resulted in her deciding to cancel the order and demanding her money back.

13. When the Applicant could not get the cooperation of the Respondents, she approached the Office of the Eastern Cape Consumer Protector, where one Mr Langa Mzinyathi:

13.1 Purportedly got the Respondent's undertaking to refund the Applicant, subject to them charging the Applicant 15 percent as they would have had to return to the suppliers the bronze material they had ordered for her windows;

13.2 She said she consented to this arrangement;

13.3 But, she was never paid back her money;

13.4 On following up this issue, the Office of the Eastern Cape Consumer Protector said the Respondents had simply said they were not going to refund her;

13.5 The Office of the Eastern Cape Consumer Protector thereafter referred this matter to the Consumer Goods & Services Ombud (CGSO}, on grounds that the Respondents were just not cooperative.

14. The CGSO did not spend more time on this, stating that the Respondents were just not cooperative, just not responding to the CGSO queries.

15. The CGSO in turn referred this matter further to the NCC.

16. The NCC in turn, decided to issue a notice of non-referral on grounds that:

16.1 This dispute was as a result of dispute of facts;

16.2 And that NCC was not mandated to resolve contractual disputes, and that this could only be appropriately addressed by a Court of Law.

17. It was because of the NCC's notice of non-referral that the Applicant came to the Tribunal

18. The Applicant, in her response to the NCC's notice of non-referral, argued in her written submissions that the NCC has misdirected itself in arriving at its decision in that they did not take into consideration the following:

18.1 Right to cancel advance reservations, bookings. and order (Section 17);

18.2 Right to choose or examine goods (Section 18);

18.3 Right to information in plain and understandable language (Section 22);

18.4 Right to identification of deliveries, installers, and others (Section 28);

18.5 Right to changes, deferrals and waivers, and substitution of goods (46);

RESPONDENT'S

SUBMISSIONS

19. There were no formal submissions by the Respondents to the NCT, despite being properly served.

20. The Respondents were also not cooperative with the Applicant.

21. The Respondents were also not cooperative with the Office of the Eastern Cape Consumer Protector.

22. They were also not cooperative with the CGSO.

CONSIDERATIONS OF THIS MATTER BY THE NATIONAL CONSUMER COMMISSION

23. There were many twists and turns to the Applicant's submissions, which somehow sometimes created perceptions of inconsistencies in her

submissions.

24. What was clear though was that the Applicant had neither the aluminium windows nor her money after her dealings with the Respondents.
25. On the other hand, the Respondents had the Applicant's money, with no certainty if they ever manufactured those aluminium windows.
26. The Respondent's dismissive attitude towards everyone trying to resolve this dispute pointed to a service provider who dares the consumers to take them to a Court of Law, presumably believing that many consumers cannot afford the high court route in search for redress.
27. The NCC did not necessarily apply its mind to all the other merits of the case, save to say that they did not have the jurisdiction to deal with issues of dispute of facts (contractual disputes.)
28. It is on those basis the Applicant approached the Tribunal for a referral in terms of Section 75(1)(b) of the CPA.

THE PROVISIONS OF THE CPA

29. Section 17 Consumer's right to cancel advance reservation, booking or order

"(2) Subject to subsections (3) and (4), a consumer has the right to cancel any advance booking, reservation or order for any goods or services to be supplies.

- (3) A supplier who makes commitment or accepts a reservation to supply goods or services on a later date may-

- (a) require payment of a reasonable deposit in advance; and
- (b) impose a reasonable charge for cancellation of the order or reservation, subject to subsection (5)"

30. Section 18 Consumer's right to choose or examine goods

- (3) If the consumer has agreed to purchase goods solely on the basis of 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 on a reasonable examination of the sample, as the case may be."

31. Section 22 Right to information in plain and understandable language

"(2) For the purposes of this Act, a notice, document or visual representation is in plain language if 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 with undue effort, having regard to-

- (a) the context, comprehensiveness and consistency of the notice, document or visual representation;
- (b) the organisation, form and style of the notice, documents or visual representation;
- (c) the vocabulary, usage and sentence structure of the notice, document or visual representation; and
- (d) the use of any illustration, example, headings or other aids to reading and understanding."

32. Section 28 Identification of deliverers, installers and others

"Whenever a person is engaged in direct marketing in person at the premises of a consumer, or performing any services for a consumer at any such premises, or delivering any goods to, or installing any goods for, a consumer, at any such premises, that person must-

- (a) visibly wear or display a badge or similar identification device that satisfies any prescribed standards; or
- (b) provide suitable identification on request by the consumer."

33. Section 46 Changes, deferrals and waivers, and substitution of goods

"(1) The supply of goods and services as a result of a change to an existing agreement, or a deferral or waiver of a right under an existing agreement, is not to be treated as creating a new agreement for the purposes of this Act, if the change, deferral or waiver is made in accordance with this Act or agreement.

- (2) If, after delivery to the consumer of goods that are the subject of a transaction, the consumer and the supplier agree to substitute other goods for all or part of the goods sold-
- (a) from the date of delivery of the substituted goods, the transaction applies to the substituted goods rather than the goods originally described; and
- (b) if the transaction was the subject of a written agreement or the sales records identified any specific goods, the supplier must prepare and deliver to the consumer an amended agreement or sales record, describing the substituted goods, but without making any other changes to the original document. "

APPROPRIATE RELIEF

34. In her application, as per prescribed Form T1.73(3) & 75(1)(b) & (2) CPA, under Part D "Order Sought from the Tribunal", the Applicant wrote "Refund of the monies deposited for the quotation since windows were not received".
35. The Applicant, in her application to the NCT, indicated that the NCT had to consider various CPA provisions in arriving at the decision why she was entitled to the refund. She gave detailed submissions on each one of the CPA provisions to highlight why she was entitled to redress under the CPA, using
- 35.1 Section 22: Right to information in plain and understandable language: She argued that the differences on whether she had specifically ordered bronze aluminium windows or black aluminium windows, despite the written quotations only mentioning only bronze aluminium could be attributed to conflicting pronouncements by two different staff members from the Respondents side;
- 35.2 Section 18: Consumer's right to choose or examine goods: READ TOGETHER WITH Section 46: Change, deferrals and waivers, and substitution of goods: She argued that, as a consumer, she had the right to change the colour of the windows from bronze to black, and could not be forced to accept windows with a colour that she did not want;
- 35.3 Section 17: Consumer's right to cancel advance reservation, booking or order: Despite the Section 17(1) provision of the CPA which says that this section does not apply to special order goods, the consumer cast doubt on whether the Respondents actually manufactured those windows or not, and insisted that she was entitled to cancel and a refund "Since the quotation to upgrade from bronze to black never materialized, I have the right to cancel the order and are entitled to a refund";
- 35.4 Section 28: Identification of deliverers, installers and others: She totally denied that the windows were ever delivered, adding she did not even have any statement which shows that any deliveries were made. Even the NCC, which seemed to depend so much on the verbal submissions by the Respondents that the windows were delivered, could not provide any written documents to prove the Respondent's assertions that those windows were ever made or delivered.
36. Under the circumstances it is possible that a full Tribunal Hearing can reasonably arrive at a different conclusion:

CONCLUSION

37. The Respondent was totally uncooperative with the Applicant, Office of the Eastern Cape Consumer Protector, Consumer Goods & Services Ombud (CGSO), the National Consumer Commission (NCC) despite the latter choosing to issue a notice of non-referral mostly based on what seemed to be the Respondent's verbal responses only. The Respondent was equally uncooperative with the National Consumer

Tribunal (NCT,)choosing not to respond to any of the correspondence from the NCT. It would not be in the interest of justice if this matter would not reach a full hearing stage, without the Respondent having been subjected to serious probing questions from the Tribunal on whether or not their behaviour was in line with the provisions of the CPA.

38. The Respondent's attitude that they would rather meet the Applicant in Court, if she so chooses, indicated scant regard for the CPA's preamble to the CPA which stipulates the objectives of the CPA as "To promote a fair, accessible and sustainable marketplace for consumer products and services and for that purpose to establish national norms and standards relating to consumer protection , to provide for improved standards on consumer information, to prohibit certain unfair marketing and business practices, to promote responsible consumer behaviour, to promote a consistent legislative and enforcement framework relating to consumer transactions and agreements"

ORDER

39. Accordingly, the Tribunal makes the following order:

39.1 The Applicant's application for leave to refer the matter directly to the Tribunal for a hearing is hereby GRANTED;

39.2 There is no order as to costs.

DATED ON THIS 16th DAY OF AUGUST 2018

[signed]

Prof B.C. Dumisa

Presiding member (Single Member)

[1] NCT/7142/2012175(1)(b)&(2).

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Prepared on 12 October 2026 · Esheria