

SOUTH AFRICA / JUDGMENT

Haibo Clothing (Pty) Ltd v National Consumer Commission (NCT/164573/2020/101(1)) [2020] ZANCT 19 (22 October 2020)

[2020] ZANCT 19**COURT**

National Consumer Tribunal

BEFORE

P A Beck, B Dumisa, J Simpson

CASE / FILE NUMBER

NCT/164573/2020/101(1)

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Source record**IN****THE NATIONAL CONSUMER TRIBUNAL****HELD****IN CENTURION****Case****Number:** NCT/164573/2020/101(1)**In****the matter between:**

HAIBO
CLOTHING (PTY)
LTD APPLICANT
AND
NATIONAL
CONSUMER
COMMISSION RESPONDENT

Coram:

Ms
P A Beck - Presiding
Tribunal member
Prof
B Dumisa - Tribunal Member
Adv
J Simpson - Tribunal Member
Date
of adjudication 22 October 2020 via Zoom audio and video transmission

JUDGMENT**AND ORDER****APPLICANT**

1. The Applicant is Haibo Clothing (Pty) Ltd (referred to as the “Applicant,”) a private company duly registered and incorporated in terms of the company laws of South Africa with its principal place of business at Unit B, Blackburn Park, 3 Papillo Close, Cornubia, 4339, Kwazulu Natal, South Africa.
2. Adv PJ Wallis instructed by Shepstone Wylie Attorneys represented the Applicant at the hearing.

RESPONDENT

3. The Respondent is the National Consumer Commission (the “NCC”) an organ of state established in terms of section 85(1) of the Consumer Protection Act 68 of 2008 (the" CPA") having its registered address at SABS Offices, 1 Dr Lategan Road, Groenkloof, Pretoria, (hereinafter the “Respondent” or the “NCC”).
4. Mr Joseph Selolo, the Director of Prosecutions at the NCC represented the Respondent at the hearing. Mr Selolo was assisted by Mr Mr Ludwick Biyana, a Legal Advisor in the employ of the NCC.

APPLICATION TYPE

5. This is an application to the National Consumer Tribunal (the “Tribunal”) to review the notice issued by the NCC in terms of sections 60(3) and 101 of the Consumer Protection Act 68 of, 2008, (the “CPA.”) The Applicant applied to the National Consumer Tribunal (the "Tribunal") to object to the Compliance Notice dated 17 June 2020, which the Respondent issued against the Applicant in terms Regulation 42 of the CPA. The Applicant brings this application to the Tribunal under section 60(3) of the CPA. The Applicant asks the Tribunal to review and set aside the notice, on grounds that the Respondent has incorrectly interpreted the Act and Regulations; that the actions of the Respondent are unreasonable; and that the forfeiture order of the Respondent is draconian.

CONDONATION FOR LATE FILING

6. The Compliance Notice is dated 17 June 2020. The Notice states that the Applicant had 15 business days to apply to the Tribunal for a review of the Notice. Therefore, the Applicant had to file the application by 8 July 2020.
7. The application was only lodged on 24 July 2020, approximately two weeks late.

8. Under normal circumstances the Tribunal Registrar should have informed the Applicant that it would have to file a separate application for condonation. Only if the condonation was granted, would the matter then proceed to hearing.
9. In this matter it appears that the Registrar did not inform the Applicant of the condonation requirement and permitted the application to be filed.
10. The Applicant included a request for condonation in its founding affidavit. It stated that numerous

attempts were made to file the application in time but it was unsuccessful due to filing and process requirements.

11. The NCC stated that it does not oppose the application for condonation.
12. In the interest of justice, the Tribunal will make an exception in this particular matter and consider the application for condonation as part of the hearing and judgment in the matter.
13. The Respondent did not object to the late filing of the application for review of the compliance notice. Rule 34 (2) states: “The

Tribunal may grant the order on good cause shown.” The Tribunal is satisfied with the reasons advanced by the Respondent for the late filing of the Application for review of the compliance notice, and grants condonation to the Applicant.

BACKGROUND

14. On or about 2 March 2020, the Applicant imported through the Durban Port of Entry a consignment containing the following pieces of clothing:

14.1 7583 ladies skirts; and

14.2 15000 pieces of pre-boys track pants.

15. In March 2020, the Respondent received notification from the South African Revenue Services (“SARS”) that a certain

consignment imported through the Durban Port of entry on behalf of the Applicant was detained by the Customs Department of SARS under case number 344884255.

16. The detention of the Goods was on behalf of the Respondent in terms of Section 113(8) of the Customs and Excise Act 91 of 1964. The basis of the detention was that the goods do not comply with the labelling requirements of Regulation 6 as published in Gazette number 293 of 1 April 2011 (the Regulations) published in terms of Section 120 (1) of the CPA.
17. The goods in paragraph 14.1 do not comply with the Act in the following manner:

17.1 the trade description applied to the goods does not state clearly the country of origin or the country in which they were manufactured. This is a contravention of Section 24(5)(a) read with Regulation 6(1)(a)(i);

17.2 The goods do not conform to the South African national standards for fibre content and care labelling as required in terms of the provisions of Government notice No. 2410 of 2000, published in the Government Gazette of 30 June 2000. This is a contravention of Section 24(5)(b) read with Regulation 6(1)(b); and

17.3 The trade description applied to the goods has either been altered, defaced, removed or obscured in a manner calculated to mislead consumers. This is a contravention of Section 24(2)(b) read with Section 110(1).

18. The goods in paragraph 14.2 do not comply with the Act in the following manner:

18.1 The trade description applied to the goods is written in a foreign language and is therefore not in plain language as contemplated in the Act. This is a contravention of Section 22(1)(b) read with Regulation 6(1)(a)(i);

18.2 The trade description applied to the goods does not clearly state the country of their origin or the country in which they were manufactured. This is a contravention of Section 24(5)(a) read with Regulation 6(1)(a)(i);

18.3 The goods do not conform to the South African national standards for fibre content and care labelling as required in terms of the Provisions of Government Notice 2410 of 2000, published in the Gazette of 30 June 2000. This is a contravention of Section 24(5) read with Regulation 6(1)(b).

19. Prior to the goods arriving in the Republic, the labels on the goods were mutilated rendering the goods referred to above as grey goods / parallel goods. The Applicant had no control over how mutilation was done. The goods in question are cancelled stock bought by the Applicant for re-sale in South Africa.

20. It was the Applicant's intention to sew new labels onto the imported goods, which complies with the CPA, prior to the clothing

being made available to consumers; and prior to the goods being made available to the Applicant's customers such as Jam Clothing and Pepkor.

21. On 17 June 2020 the NCC issued a Compliance Notice to the Applicant which stated that the contents of the Applicant's

shipments do not comply with Section 24(5)(a) read with Regulation 6(1)(a)(i); Section 24(5)(b) read with Regulation 6(1)(b); Section

24(2)(b) read with Section 110(1); and Section 22(1)(b) read with Regulation 6(1)(a)(i).

22. The Compliance Notice elaborated further that the Goods do not conform to the South African national standards for fibre content and care labelling as required in terms of the Provisions of Government Notice No 2410 of 2000 published in Gazette of 30 June 2000 and that this is a contravention of Section 24(5)(b) read with Regulation 6(1)(b.)
23. The Compliance Notice further detailed out the steps the Applicant was required to take in order to satisfy the notice, in that the Applicant is required to:
 - 23.1 remove the goods to their country of origin, or off the African continent at its own cost within 15 days of receipt of the notice; alternatively;
 - 23.2 destroy the goods locally at an accredited destruction facility within 15 days of receipt of the notice; and
 - 23.3 Refrain from importing goods, into the Republic of South Africa, in contravention of the following provisions of the Act:
 - 23.3.1.1 Section 22(1)((b) read with Regulation 6(1)(a)(i);
 - 23.3.1.2 Section 24(2)(b) read with Section 110(1);
 - 23.3.1.3 Section 24(5)(a) read with Regulation 6(1)(a)(i);and
 - 23.3.1.4 Section 24(5)(b) read with Regulation 6(1)(b.)

THE APPLICANTS GROUNDS FOR OBJECTION

24. Michael Johnston, the director of the Applicant, deposed to the Applicant's founding affidavit, setting out the Applicant's case with supporting evidence. The Applicant did not call any witnesses at the hearing. In its affidavit the Applicant challenged the lawfulness of the compliance notice and requested condonation for the late filing of the application for review of the compliance notice. At the hearing the Applicant informed the Tribunal that it was not going to proceed with the challenge of the compliance notice, based on lawfulness, after due consideration it was going to proceed with the matter on the basis as set out in its heads of argument.
25. The Applicant contends in its heads of argument that it is entitled in terms of the Act, to import grey goods clothing with mutilated wash care/ labels provided that it attaches compliant labels prior to the point of sale.
26. The imported goods are brand name goods that are reconditioned; remade or rebuilt in conformation with Section 25 of the Act. The mutilation of the labels are at the instance of the seller and takes place in a manner controlled by the seller and not by the Applicant. The Applicant intends within the Republic to attach compliant labels prior to sale of the goods to the consumer.

27. The Applicant contends that its interpretation of the Act to attach complaint labels as referred to above, conforms with the language and purpose of the Act and Regulations; protects the consumer; and encourages employment in the Republic; and that in so doing it had no intention of misleading consumers.
28. The Applicant contends that a proper interpretation of Section 22 read with Regulation 6 is that a label may be applied prior to the point of sale and immediately upon entry into the Republic; that the Applicant only becomes an importer at the time of import and is only liable to comply with the Act upon the goods reaching the Republic.
29. The effect of the Applicant's interpretation of the Act complies with the purpose of the Act in that employment is created

domestically with the re-sewing of the labels on the goods; and the consumer is protected by the sale and marketing with compliant

labels.

30. The Applicant seeks an order setting aside the compliance notice; in the alternative an order that is provided for in the Act or an innovative order that better, advances, protects, promotes, assures the realisation for consumers of their rights in terms of the Act; and that the Tribunal should facilitate an embargoed release of the goods to enable compliant tags to be sewn onto the goods in the Republic.
31. The Applicant submits that a forfeiture order would in contrast, disadvantage consumers by reducing their choice; result in reduced

employment in the Republic; prejudice the Applicant financially and would not in any way benefit the consumer.

THE RESPONDENTS CASE

32. The Respondent's Legal Advisor, submitted heads of argument in response to the Applicant's submissions; and in defence of the Compliance Notice the Respondent issued. The Respondent noted that the Applicant was not proceeding with the challenge of the lawfulness of the compliance notice.
33. The salient issues raised in the heads of argument of the Respondent are set out below in the following paragraphs.
34. The Respondent contends that the goods are non-compliant and in contravention of the Act and Regulations because at the time of the goods arriving in the Republic:
 - 34.1 The goods did not indicate the country of origin or manufacture;
 - 34.2 The goods did not conform to national standards of content and care labelling;
 - 34.3 The trade description applied to the goods was altered; defaced; removed or

obscured in a manner intended to deceive the consumer; and

34.4 The trade description of some of the goods is in a foreign language.

35. The Respondent argued that the Applicant's intention to rectify the non-compliance by attaching compliant labelling whilst the goods are already in the country demonstrates the Applicant's intention not to comply with the Act and Regulations. The Respondent contends that the Applicant's view that it is only non-compliant if it sells the goods with non-compliant labelling cannot be sustained.
36. The Respondent avers that the Applicant's grounds for review of a Compliance Notice cannot stand in law because they do not constitute valid grounds for the review or setting aside of a Compliance Notice. The Respondent asks the Tribunal to dismiss application on the basis that the Applicant failed to make out a proper case for such a relief.
37. Respondent submitted further that –
- 37.1 the Compliance Notice was issued by an authorised person in accordance with an established legal basis; making it valid for the conduct identified as a contravention of the CPA ; issued to the correct party; and in a fair, reasonable and legal manner; and meeting all the requirements of the Promotion of Administration of Justice Act 3 of 2000;
- 37.2 in as much as the Applicant challenged the validity or otherwise of the Compliance Notice, or contended that the Respondent failed to comply with the requirements for the issuing of a Compliance Notice this argument was abandoned at the hearing; and
- 37.3 the Respondent avers that the Applicant cannot therefore, pursue a legal remedy to rectify labelling once goods have entered the Republic, if the incorrect labelling arises in connection with the Applicant's own illegal act.
38. The Respondent submitted that the Applicant had not placed the factual and legal basis before the Tribunal, to warrant the review or setting aside of the Compliance Notice. The Respondent asks the Tribunal to dismiss the Applicant's grounds for the review application and to uphold the compliance notice.

ANALYSIS OF THE CASE – THE LAW AND THE FACTS

39. Chapter 6, Part A of the CPA, titled: "ENFORCEMENT OF ACT", section 99 thereof, provides the following: "The Commission is responsible to enforce this Act by-
- (a)
- (b).....
- (c).....
- (d).....
- (e) issuing and enforcing compliance notice" (underlining, own emphasis).

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40. Initially the Applicant challenged the validity of the Compliance Notice and questioned the lawfulness thereof. At the hearing of the matter the Applicant abandoned all the arguments advanced in its founding affidavit with the exception of one single issue being whether the Act and Regulations require the goods in question to be compliant at point of entry into the Republic or prior to the sale of the goods to the consumer.
41. The Respondent did not object to the late filing of the application for review of the compliance notice. Rule 34 (2) states: “The Tribunal may grant the order on good cause shown.” The Tribunal is satisfied with the reasons advanced by the Respondent for the late filing of the Application for review of the compliance notice, and grants condonation to the Applicant.
42. Section 100 (3) of the CPA provides that, subject to subsection (2), the Commission may issue a compliance notice in the prescribed form to a person or association of persons whom the Commission on reasonable grounds believes has engaged in prohibited conduct. Subsection (4) states that a compliance notice issued in terms of this section remains in force until it is set aside by the Tribunal, or a court upon review of a Tribunal decision concerning the notice, or the Commission issues a compliance certificate contemplated in subsection (5). In terms of subsection (6), the Commission may either approach the Tribunal for the imposition of an administrative fine; or refer the matter to the National Prosecuting Authority, if a person to whom the compliance notice is issued, fails to comply with the notice.
43. The Respondent is adamant that the Applicant has failed to make out a sufficient case setting out valid and good reasons or grounds why the Compliance Notice must be set aside. The Applicant’s case hinges on the following grounds:
- 43.1 the error on the labelling of the garments is beyond its control;
- 43.2 Applicant cooperated with the Respondent in attempting to resolve the issue of the labelling;
- 43.3 the Applicant has offered to rectify the error or the non-compliance;
- 43.4 the destruction of the goods or sending the goods back to the supplier for re-labelling is draconian and costly which far outweighs the error or the non-compliance;
- 43.5 the Applicant only becomes an importer at the point of import of the goods; and
- 43.6 that the correct labelling may be applied at point of sale not at the point of entry into the Republic.
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44. According to the Respondent, the Applicant has proposed to rectify the non-compliance by removing the incorrect labels, and replacing them with the 'correct' ones. The problem, argues the Respondent, is that the labels for the consignments are non-complaint for the reasons stated in 17 and 18 above. According to the Respondent, by replacing the incorrect labels, the Applicant has to be allowed to complete the importation of goods. This alone, according to the Respondent, is a contravention of the CPA.
45. The Respondent further argued that the Applicant simply wishes to disregard the contravention by attempting to rectify it, and negotiate its way out of the alleged prohibited conduct. The Applicant, however, refutes this assertion by the Respondent.
46. At this point it would be pertinent to look at the purpose of the Compliance Notice. The purpose of

the Compliance Notice is to bring to an end, the prohibited conduct of importing goods in contravention of the CPA and the Regulations, and to prevent the repeat of similar conduct from occurring in the future. The Compliance Notice is issued on account of a violation,

which may be escalated to higher level in the event of non-compliance by the recipient of the notice. It is a step to correct a certain breach of law or by-law. If the recipient of the notice queries or disputes the issuing of the notice, he/she may apply for its variation through established tribunals. By issuing the Compliance Notice, the Respondent requires the Applicant to amend its conduct. In the matter before us the Applicant has not disputed the purpose of issuing the Compliance Notice.

47. The Applicant agreed by abandoning the dispute of the lawfulness of the compliance notice that the Respondent, an administrative body created by statute, was within its rights to issue the notice. Accordingly, once the purpose of the compliance notice is established, there is no room to object to the issuing of the notice. The Applicant did not dispute its responsibility for or ownership of the goods as "importer" of the said goods. The Applicant also did not dispute the status of the goods as "imported" at the time of the issuing of the compliance notice.

48. Section 22(1)(b) of the CPA states as follows:

"The producer of a notice, document or visual presentation that is required, in terms of this Act or any other law, to be produced,

provided or displayed to a consumer, must produce, provide or display that notice, document or visual representation –

(a)....

- (b) in plain language, if not form has been prescribed for that notice, document or visual representation.

49. Regulation 6(1)(a)(i) states as follows:

Product labelling and Trade descriptions: textiles, clothing, shoes and leather goods.

“(1) In order to assist consumers in making informed decisions or choices, for purposes of subsections (4) and (5) of section 24 of the Act and subject to sub regulation (2), the importation into or the sale in the Republic of the goods specified in Annexure “D,” irrespective of whether such goods were manufactured or adapted in the Republic or elsewhere, is prohibited unless –

- (a) A trade description, meeting the requirements of section 22 of the Act, is applied to such goods in a conspicuous and easily legible manner stating clearly –
 - (i) The country in which they were manufactured, produced or adapted.””
50. The Applicant undertook to amend the labelling of the goods and in so doing has admitted that

the goods are in contravention of the CPA and the regulations.

51. The definition of an importer is as follows:

“with respect to any particular goods, means a person who brings those goods, or causes them to be brought, from outside the Republic into the Republic, with the intention of making them available for supply in the ordinary course of business.”

52. It is obvious to the Tribunal on a plain reading of the definition of an “importer” in the Act, that the Applicant falls squarely within the definition of an importer, and that any argument that the Applicant only becomes an importer of goods once the goods enters the Republic cannot be sustained, and is therefore rejected by the Tribunal.

CONCLUSION

53. The Applicant in its submissions, asks the Tribunal to order that the Applicant “take embargo release of the “non-compliant”

goods and for them to be permitted, as was always their intention, to sew on labels which are compliant with the CPA and thereafter, have the NCC re-inspect the goods and issue a release once satisfied that the goods comply with the CPA. An alternative would be to allow the goods to move to an appropriate alternative facility, for the labelling to take place.”

54. Whilst the Tribunal empathizes with the Applicant on this score, there is nothing in the CPA which allows the Tribunal to grant this form of “interim relief”. The Act clearly prohibits the importation or sale of goods with non-compliant labels. The Act or Regulations do not set out any form of procedure which allows a period within which non-conforming goods may be rectified. Such a process would require detailed time periods and processes. If the legislature intended such a process it would have provided for it in the Act or Regulations. The only conclusion that can be drawn from this is that the legislature intended that goods must be fully compliant with the Act before they arrive in South Africa. The only way in which the Act can be enforced is to either send the non-compliant goods back to the country

of origin or the goods must be destroyed; and allowing the goods to remain in South Africa in any form would essentially condone the importation of illegal goods, contrary to the Act.

55. It is no longer in dispute that the Respondent did not comply with its statutory or administrative duties.
56. Accordingly, the Tribunal finds that Respondent acted in accordance with the requirements of the law when it issued the Compliance Notice. The Applicant has failed to establish valid grounds for the setting aside of the Compliance Notice in part, or in its entirety. The Applicant's application cannot, on the basis of the afore-going, succeed.

ORDER

57. After considering all the submissions made by the parties, the following order is handed down:

57.1 The Tribunal dismisses the Applicant's review application; and accordingly confirms the Compliance Notice;

57.2 The Applicant is ordered to comply with the Compliance Notice; and

57.3 No order is made regarding costs.

DATED ON THIS 29th DAY OF OCTOBER 2020

MS P A BECK

PRESIDING MEMBER

Prof B Dumisa (Tribunal Member) and Adv J Simpson (Tribunal Member) concurring.

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