

SOUTH AFRICA / JUDGMENT

International Version and Trading Projects (Pty) Ltd v National Consumer Commission (NCT/220923/2022/101(1)) [2022] ZANCT 40 (10 July 2022)

[2022] ZANCT 40

COURT

National Consumer Tribunal

BEFORE

P A Beck, L Best, M Peenze

CASE / FILE NUMBER

NCT/220923/2022/101(1)

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IN

THE NATIONAL CONSUMER TRIBUNAL HELD VIA THE MICROSOFT ONLINE PLATFORM

Case

Number: NCT/220923/2022/101(1)

In

the matter between:

INTERNATIONAL
VERSION AND TRADING PROJECTS (PTY) LTD
APPLICANT
AND
NATIONAL CONSUMER
COMMISSION
RESPONDENT

Coram:

Ms.
P A Beck
-Tribunal member
Dr.
L Best
-
Deputy Chairperson
Dr.
M Peenze
- Tribunal Member
Date
of adjudication 5 July 2022 via Microsoft audio and video
transmission
Date

of judgment – 10 July 2022

JUDGMENT

AND ORDER

APPLICANT

1. The applicant is International Version and Trading Projects (Pty) Ltd (“the applicant”) a private company duly registered and incorporated in terms of the company laws of South Africa with company registration number 2014/075627/07; and its principal place of business at 207/1 Maanganese Street, Ekundustria, Bronkhostspuit.
2. The applicant was represented by its Director, Ms. Erin Nan.

RESPONDENT

3. The respondent is the National Consumer Commission (“the NCC” or “the Commission”) an organ of state established in terms of section 85(1) of the Consumer Protection Act 68 of 2008 (“the Act or “the CPA”) having its registered address at SABS Offices, 1 Dr Lategan Road, Groenkloof, Pretoria (“the respondent” or “the “NCC”).
4. Mr J. Mbeje, a legal advisor in the employ of the NCC, represented the respondent at the hearing.

APPLICATION TYPE

5. This is an application to the National Consumer Tribunal (the “Tribunal”) to review the compliance 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 Tribunal objecting to the compliance notice dated 3 December 2021, which the respondent issued to the applicant in terms Regulation 42 of the CPA.
6. The applicant brings this application to the Tribunal under section 101 of the CPA. The applicant asks the Tribunal to review and set aside in whole or in part the compliance notice on the basis that it is unlawful; alternatively, the compliance notice is amended to allow the applicant an opportunity to remedy the non-compliance with the CPA.

CONDONATION FOR LATE FILING OF THE APPLICATION

7. On 9 March 2022, the applicant filed an application with the Tribunal to review a compliance notice issued by the Commission in terms of section 60(3) of the CPA together with its application for condonation for the late filing of the application. The application was filed on the respondent on the same day.
8. On 11 March 2022, the Registrar issued a Filing Notice and served it on the parties via e-mail.

9. On 18 March 2022, the respondent filed a notice to abide by the decision of the Tribunal with reference to the application for condonation.
10. In a judgment dated 21 April 2022, the Tribunal granted the applicant condonation for the late filing of the application; and further granted the respondent 15 business days from the date of the judgment to file its answering affidavit.
11. On 17 May 2022, the respondent served and filed its answering affidavit on the Tribunal and the applicant. On 23 May 2022, the applicant filed her replying affidavit.
12. On 8 June 2022, the Registrar of the Tribunal set the matter down for hearing on 5 July 2022.

POINTS IN LIMINE

13. The respondent raised two points in limine in its answering affidavit.
14. At the hearing of the matter the respondent withdrew the points in limine.
15. Accordingly, the Tribunal proceeded to hear the merits of the matter.

BACKGROUND

16. On 25 May 2021, the applicant imported 660 bales of blankets containing a total of 22 410 pieces of blankets from China.
17. On 6 December 2021, the NCC issued a Compliance Notice^[1] to the applicant which stated that the contents of the applicant's shipments do not comply with section 24(1)(a) and section 24(2)(a) read with Regulation 6(1)(a)(i) of the CPA.
18. The Compliance Notice elaborated further that the goods do not comply with the CPA in that the goods display a trade description that the country of origin of the goods is South Africa whereas the country where the goods were manufactured was China.
19. The Compliance Notice further detailed the steps the applicant is required to take in order to satisfy the Compliance Notice which steps are that the applicant must:
 - 19.1. remove the goods to their country of origin or off the African continent at its own cost; alternatively
 - 19.2. at its own cost have the goods mentioned in 19.1 (2.1 of the compliance notice) destroyed locally at an accredited destruction facility.
20. The notice included reference to a penalty that may be imposed in terms of the CPA of an amount of 10% of the applicant's annual turnover or 1 million Rand should the steps referred to in paragraph 2 of the compliance above not be taken by the applicant.

The Applicant's case

21. Erin Nan, the director of the applicant, deposed to the applicant's founding affidavit setting out the applicant's case.

22. The applicant submitted that she has been importing blankets from China for many years and this was the first time that an error with the trade description occurred. The applicant only became aware that the information on the trade description was incorrect when she received the compliance notice from the respondent. The respondent

informed the applicant that the goods would not be released to the applicant because the goods were found to be labelled “Made in South Africa” which was not the case. Accordingly, the applicant contravened sections 24(1)(a) and 24(2)(a) of the CPA, read with regulation 6(1) of the CPA.

23. The applicant investigated how the labelling error occurred. According to the applicant, the manufacturer informed the applicant that it intended to state on the label that the goods were manufactured for South Africa and not erroneously that the goods were “Made in South Africa.” At the time when the labelling error was made, the applicant had already placed the order; and the goods were manufactured for export to South Africa.
24. The applicant submitted that at no point did she instruct the manufacturer to label the goods as “Made in South Africa.” The applicant furthermore did not knowingly cause the label to state that the goods were “Made in South Africa” or knowingly intend to mislead consumers.
25. The applicant submitted that due to the high costs of storage of the embargoed goods which already was the sum of R960 000.00, she appealed to the respondent to release the goods to her for safekeeping, pending the ruling of the Tribunal. The respondent complied. She has already prepared the correct labelling which could be affixed to the goods within 2/3 days.
26. The applicant seeks an order setting aside the compliance notice. In the alternative, the applicant seeks an order that the compliance notice is amended to allow the applicant an opportunity to remedy the non-compliance with the CPA by removing the incorrect labelling; and replacing it with the correct labelling that reflects the correct country of origin of the goods as China and not South Africa.

The Respondent’s case

27. The salient issues raised by the respondent are set out below.
28. The respondent contends that the goods are non-compliant and in contravention of the CPA read with the regulations because at the time the goods arrived in South Africa, the goods indicated the country of origin of the goods as South Africa whereas it was China.
29. The respondent submitted that –
- 29.1. the respondent is empowered by section 73(1)(c) to issue a compliance notice after an investigation into a complaint;

29.2. an investigation was conducted by the respondent as is evidenced in the investigation report issued by an authorised person; the applicant was offered an opportunity to make representations as to why the compliance notice should not be issued in compliance with the Promotion of Administration of Justice Act 3 of 2000 (“PAJA”); and

29.3. the respondent acted within its powers in terms of the CPA.

30. The respondent argued that the labels of the goods do not meet the requirements of section 22 of the CPA in that the labels attached to the trade description of the goods reflects South Africa as country of origin whilst the country of origin is China.”[2] The respondent submitted further that whereas the section 24(5) of the CPA does not state when a trade description must be applied to goods by the manufacturer or the importer, regulation 6(1) stipulates that the manufacturer must apply the trade description to goods before the sale of the goods to the consumer. Thus the correct trade description must be applied to the goods before the “goods reach the shores of the Republic.”[3] Thus to allow the applicant the opportunity to correct the trade description of the goods within the Republic would be “tantamount to assisting the respondent (should read applicant) to import goods that are prohibited from being imported into the Republic.”[4]

31. At the hearing and in its heads of argument (not in the answering affidavit):

31.1. the respondent referred the Tribunal to the matter of GFI importers CC/NCC[5] submitting that the respondent does not agree with the finding of the Tribunal that the “compliance notice could have or should have allowed for the conditional release of the goods, so that compliance could be achieved. Only there and only then would they be imported in the sense intended by section 24 of the CPA;”

31.2. the respondent submitted at the hearing that the word “imported” is not defined in the CPA;

31.3. the respondent referred the Tribunal to section 10 of the Customs and Excise Act 61 of 1964 which deals with the prohibition on imported goods. Section 10 stipulates as follows: “(1) For the purposes of this Act all goods consigned to or brought into the Republic shall be deemed to have been imported into the Republic-

(a) in the case of goods consigned to a place in the Republic in a ship or aircraft, at the time when such ship or aircraft on the voyage or flight in question, first came within the control area of the port or airport authority at that place, or at the time of the landing of such goods at the place of actual discharge thereof in the Republic if such ship or aircraft did not on that voyage or flight call at the place to which the goods were consigned or if such goods were discharged before arrival of such ship or aircraft at the place to which such goods were consigned;” and

31.4. thus the deeming provisions of the aforementioned Act must be followed by any forum when defining the words “imported or importation” as intended in terms of section 24 of the CPA.

32. Therefore, the respondent submits that whenever such imported goods confined in a ship first arrive within the control of the port or airport authority if such aircraft landed within the control of the port or airport authority it is deemed to have been imported for the purposes of section 24 of the CPA. Thus if the goods are non-complainant with the trade description as required by the CPA the importation is complete and the importer would be in breach of section 24 of the CPA, read with regulation 6(1)(a).
33. Thus, defining of the word “imported” or “importation”
by the Tribunal is crucial to this case.
34. The respondent submits that the applicant’s request to remedy the breach is not a valid ground in law for the review of the compliance notice and should be ignored by the Tribunal.
35. The respondent asks the Tribunal to dismiss the application on the basis that the applicant failed to make out a proper case for such a relief; to uphold the compliance notice; and for an administrative fine of 10% of the annual turnover of the applicant or 1 million Rand, whichever is the greater.

THE LAW

36. 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 notices” (underlining, own emphasis).
37. Section 100 (1) 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 compliance notice, or the Commission issues a compliance certificate contemplated in subsection (5.) In terms of subsection (6), the Commission may either (a) approach the Tribunal for the imposition of an administrative fine; or (b) refer the matter to the National Prosecuting Authority, if a person to whom the compliance notice is issued, fails to comply with the notice.
38. Section 24(1)(a) stipulates as follows: Product labelling and trade descriptions “24(1) For the purposes of this section, a trade description is applied to goods if it is—(a) applied to the goods, or to any covering, label or reel in or on which the goods are packaged, or attached to the goods.”

39. Section 24(2)(a) stipulates as follows:

“(2) A person must not—

- (a) knowingly apply to any goods a trade description that is likely to mislead the consumer as to any matter implied or expressed in that trade description.”

40. Regulation 6(1)(a)(i) stipulates 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.”

41. An importer is defined in the CPA 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.”

CONSIDERATION OF THE MERITS

- 42. The respondent received notification from SARS as envisaged under Regulation 35(1)(a), alleging prohibited conduct on the part of the applicant through contraventions of the CPA, specifically section 24(1)(a); section 24(2)(a); read with Regulation 6(1)(a)(i.) The respondent initiated an investigation. The investigation report confirmed the applicant’s non-compliance with the CPA and the respondent resultantly issued the compliance notice to the applicant.
- 43. It is undisputed by the applicant that the incorrect trade description was attached to the goods and thus the applicant contravened section 24(1)(a) of the CPA.
- 44. Section 24(2)(a) states unequivocally that a person “may not knowingly apply to any goods a trade description that is likely to mislead the consumer as to any matter implied or expressed in that trade description.” [own emphasis]. The Collins English Dictionary explains the meaning of knowingly as: “If you knowingly do something wrong, you do it even though you know it is wrong.

Synonyms for knowingly are: deliberately, purposely, consciously, and intentionally.”

45. There are no facts before the Tribunal to suggest that the applicant requested the manufacturer to attach a trade description stating that the goods were “Made in South Africa”; or that the manufacturer attached the said trade description on behalf of the applicant. The applicant submitted that the first it knew that the incorrect trade description was attached to the goods was when the goods were not released by SARS, and the applicant received the compliance notice from the respondent.
46. In its answering affidavit the respondent does not dispute the applicant’s version that the manufacturer erroneously applied the incorrect trade description to the goods. The Tribunal is therefore satisfied that there was no intent on the part of the applicant to deliberately and purposely apply a non-compliant trade description to the goods and thus mislead consumers.
47. The respondent’s submission at the hearing and in its answering affidavit focuses on regulation 6(1) of the CPA that prohibits the importation of goods that do not comply with section 22 of the CPA. The respondent submitted that it is bound by the CPA that only provides for two options in the case of non-compliance with the CPA,
- being (i) return the goods to their country of origin for correct labelling or (ii) to destroy the goods.
48. According to the respondent, the applicant’s proposal to rectify the non-compliance by removing the “incorrect trade description” and replacing it with the “correct’ ones” is contrary to regulation 6(1) which prohibits the importation of non-compliant goods. The respondent argued at the hearing and in its heads of argument (not in its answering affidavit my emphasis) that the word importation is not defined in the CPA; and thus it is incumbent upon the Tribunal to make a finding on when goods are considered to be imported; and to consider the definition
- of the word “imported” as defined in section 10 of the Customs and Excise Act 61 of 1964. It is undisputed that the
- applicant is an importer as defined in the CPA.
49. At this point it would be pertinent to firstly consider the purpose of the compliance notice. The purpose of a compliance notice is to bring an end to the prohibited conduct of importing goods in contravention of the CPA and the regulations. The purpose of a compliance notice is to ensure that the supplier/importer complies with the CPA and other legislation – it is not to punish the importer – otherwise surely the respondent would simply have imposed an administrative penalty
50. In the matter *Murray, Cloete No, Klein, Norman No and Edwards v National Consumer Commission and 3 others*[6] the Tribunal explained that the purpose of a compliance notice is to ensure that a party who has not complied with the CPA is informed of its non-compliance and is given an opportunity to amend its ways and ensure that in future it complies with the Act. In *CJ Digital Marketing Consumer SMS Marketing CC v the National*

Consumer Commission[7] the Tribunal stated that a compliance notice is a 'second chance' for a transgressor to ensure that it brings its conduct

within the ambit of the CPA. If the transgressor complies with the compliance notice, then that is the end of the matter, but if a transgressor fails to comply with the compliance notice, the matter can be referred to the Tribunal for the imposition of an

administrative penalty.

51. Compliance with the CPA means that the trade description of goods imported into the Republic must comply with the CPA. There is no evidence to suggest that these are harmful goods or that anyone is being harmed by their importation. The NCC's concern seems to be that by allowing these non-compliant goods into the Republic and later enabling the supplier to rectify any problems it is in fact condoning non-compliance with the CPA.
52. All cases must however be dealt with by the NCC on a case-by-case basis with due consideration of each case based on its own set of facts; and for the law to be applied to each set of facts. This in our view would substantially comply with just administrative action. The reasonableness standard was dealt with in *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism*[8] where judge O'Regan set out a number of factors that can be used to determine if a decision is reasonable. These include: "the nature of the decision, the identity and expertise of the decision maker, the range of factors relevant to the decision, the

reasons

given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and wellbeing of those affected."[9]

53. Hoexter indicates that to determine whether or not a decision is reasonable, both the rationality and the proportionality of the decision need to be determined. The test to determine rationality was first formulated in *Carephone (Pty) Ltd v Marcus*,[10] and it was confirmed in the decision of the Sidumo[11] as follows: "[I]s there a rational objective basis justifying the conclusion made by the administrative decision-maker between the material properly

available to him and the conclusion he or she eventually arrived at?"[12]

54. A rational decision, therefore, means that one must be able to justify the decision based on the information known to the administrator and the reasons supplied for that decision.¹³ According to Woof et al,[13] proportionality refers to whether the manifestly disproportionate weight has been allocated to one or other consideration, relevant to the decision. Proportionality may also be defined as "the notion that one ought not to use a sledgehammer to crack a nut." [14] Hoexter states that proportionality's essential elements are balance and necessity, together with suitability.[15]

55. In our view such an approach confirms that the discretion exercised for each compliance notice must be on a case-by-case basis; and that the Commission should consider whether there are other less drastic

or more proportional powers available to secure compliance with the CPA. The effect of this compliance notice's directive is punitive in nature which should not be the exclusive purpose of a compliance notice. This approach has enormous financial consequences

for any importer. This is extremely harsh from the applicant's perspective, especially when the circumstances of this particular

case are taken into consideration.

56. The applicant appeals to the Tribunal to review or amend the compliance notice on the following grounds:

56.1 the error on the labelling of the garments was beyond her control;

56.2 the applicant co-operated with the respondent in attempting to resolve the issue of the trade description;

56.3 the applicant offers to rectify the error or the non-compliance by affixing the correct trade description to the goods;

56.4 the respondent has already released the goods into the control of the applicant subject to the decision of the Tribunal;

56.5 the applicant has already prepared the correct trade description and could affix the correct trade description to the goods within 2/3 days;

56.6 the respondent could inspect the correctness of the trade description before the goods are offered for sale to consumers; and

56.7 the storage costs of the goods at customs have already cost the applicant in excess of R900 000.00.

57. In these circumstances it is undisputed that the applicant did not intend to deceive consumers and that there was a genuine miscommunication when the applicant placed the order. It is further undisputed that the applicant has a long history of importing without any problems. On this set of facts, the approach should be for the compliance notice to allow the applicant to rectify any problems which may exist with the trade description of the goods before the goods are released for sale to consumers.

58. Turning to the respondent's submission that the Tribunal should make a finding on when importation is complete and define the meaning of the word "importation," this argument was not made in the respondent's answering affidavit but instead at the hearing; and in the respondent's heads of argument. This point will not be considered by the Tribunal because the respondent has not sought condonation from the Tribunal, in accordance with the rules,

to file supplementary papers. The applicant has further not been granted an opportunity to file its response to this particular point. There are therefore no submissions from the respondent before the Tribunal to consider that justify a departure from the findings in the matter of GFI importers CC/NCC[16] on when the importation of goods is complete.

59. The goods are currently in the custody of the applicant. Even though the goods have been released to the applicant as stated in the letter dated 31 March 2022, from the NCC to the applicant, the goods remain

under the control of customs pending the decision of the Tribunal. This in any event deals with the NCC's concern that the goods have now been finally imported into South Africa.

60. It is incumbent upon the Tribunal to acknowledge that the respondent's release of the goods to the applicant demonstrates the recognition by the NCC of the aim of the CPA as outlined in the Preamble to the CPA which is "to promote a fair, accessible and sustainable marketplace for consumer products; and that it is desirable to promote an economic environment that supports and strengthens a culture of consumer rights and responsibilities, business innovation and enhanced performance."

CONCLUSION

61. The applicant in its founding affidavit asks the Tribunal to order that the applicant be permitted, as was always her intention, to attach a trade description to the goods that are compliant with the CPA. Thereafter, have the NCC re-inspect the goods and issue a release or certificate once satisfied that the goods comply with the CPA.
62. The Act clearly prohibits the importation or sale of goods with a non-compliant trade description. The only conclusion that can be drawn from this is that the legislature intended that goods must be fully compliant with the CPA before they are offered for sale to consumers in the Republic of South Africa.
63. The Tribunal finds that the applicant in this matter has established valid grounds for the setting aside of the compliance notice in its entirety.
64. For all the reasons set out above the Tribunal concludes and finds that-
- 64.1 the compliance notice did not give the applicant an opportunity to comply. All it did was to direct the applicant to "return or destroy" the non-compliant goods;
- 64.2 the applicant did not knowingly apply to the goods, a trade description intending to mislead consumers; and
- 64.3 the compliance notice should have and could have allowed for the conditional release of the goods so that compliance could be achieved. Only thereafter would the goods be released for sale to consumers; and only then would they have been "imported"
- in the sense intended in section 24 of the CPA.

ORDER

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

65.1 The compliance notice is hereby cancelled.

65.2 The applicant must:

65.2.1 Within 15 business days of the date of this judgment being issued, attach a compliant trade description to each of the goods indicating the country of origin of the goods.

65.2.2 Within 30 business days of having been notified by the applicant that the compliant trade description has been attached, the respondent must inspect the goods and if satisfied, authorise the final release of the goods to the applicant.

65.3 No order is made as to costs.

DATED AT CENTURION ON THIS 10TH DAY OF JULY 2022.

MS. P A BECK TRIBUNAL MEMBER

Dr. L Best (Deputy Chairperson) and Dr. MC Peenze (Tribunal Member) concurring.

[1] Pg 33-35 of the bundle.

[2] Pg 72 of the bundle and paragraph 14.1(b) of the respondent's answering affidavit.

[3] Pg 72 paragraph 14(1)(c) of the respondent's answering affidavit.

[4] Pg 72 paragraph 14(1)(d) of the respondent's answering affidavit.

[5] NCT/203830/2021/101(1).

[6] NCT/4570/2012/101(1)(P) CPA.

[7] NCT/3584/2011/101(1).

[8] Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism [2004] ZACC 15; 2004 4 SA 490 (CC) para 45.

[9] Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism [2004] ZACC 15; 2004 4 SA 490 (CC) para 45.

[10] Carephone (Pty) Ltd v Marcus 1999 3 SA 304 (LAC).

[11] Sidumo and Another v Rustenburg Platinum Mines Ltd and Others (CCT 85/06) [2007] ZACC 22; [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24. (CC); (2007) 28 ILJ 2405 (CC)[2007] ZACC 22; ; 2008 (2) BCLR 158 (CC) (5 October 2007). This case established the test to be used by judges in reviewing awards made by commissioners.

- [12] Carephone (Pty) Ltd v Marcus 1999 3 SA 304 (LAC) para 25. 14. Hoexter Administrative Law 340.
- [12] Carephone (Pty) Ltd v Marcus 1999 3 SA 304 (LAC) para 25.
14. Hoexter Administrative Law 340.
- [13] Woof et al De Smith's Judicial Review Glossary.
- [14] S v Manamela [2000] ZACC 5; 2000 3 SA 1 (CC) para 34.
- [15] Hoexter Administrative Law 344.
- [16] NCT/203830/2021/101(1).
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