

SOUTH AFRICA / JUDGMENT

Kwazulu Natal Consumer Protector and Another v Container Box Solutions (KZNCT04/2023) [2023] ZACONAF 6 (31 May 2023)

[2023] ZACONAF 6

COURT

Consumer Affairs Court

BEFORE

B. Dumisa, N Cawe, P. Dabideen

CASE / FILE NUMBER

KZNCT04/2023

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IN

THE

KWA

ZULU

NATALCONSUMER

TRIBUNAL

Case

Number

KZNCT04/2023

In

the

Ex

Parte

Application

of;

KWAZULU

NATAL CONSUMER PROTECTOR FIRST

APPLICANT

BERENIQUE

BALSDON SECOND

APPLICANT

And

CONTAINER

BOX

SOLUTIONS DEFENDANT

In

an Application For

Leave to Serve by

Substituted

Service

Coram:

Prof

B. Dumisa: Chairperson

& Presiding

Member

Ms

N Cawe: Deputy

Chairperson

Ms

P.

Dabideen: Member

Date

of Hearing: 16 May

2023

Date

of Judgment: 31 May

2023

APPLICATION

FOR

SUBSTITUTED

SERVICE:

JUDGEMENT

AND REASONS

APPLICANTS FIRST APPLICANT

1. The First Applicant in this matter is the OFFICE OF THE KWAZULU NATAL CONSUMER PROTECTOR, established in terms of Section 5 of the Kwa Zulu Natal Consumer Protector Act 04 of 2013 (the "Act") (hereinafter referred to as "the First Applicant"), with Head Offices at 270 Jabu Ndlovu Street, Pietermaritzburg, in the Province of KwaZulu-Natal.
2. The Office of the KwaZulu-Natal Consumer Protector falls under the Department of Economic Development, Tourism and Environmental Affairs (EDTEA) in the Province of KwaZulu-Natal.
3. At the hearing, the First Applicant was represented by Mr R Moodley , the Deputy Director in the Office of the Consumer Protector KwaZulu-Natal, in the employ of the First Applicant.

4. The First Applicants Investigation Report was deposited to by Thandeka Makhathini, an Investigator within the Office of the KwaZulu-Natal Consumer Protector, at its Head Offices at 270 Jabu Ndlovu Street, Pietermaritzburg, in the Province of KwaZulu-Natal.

SECOND APPLICANT

5. The Second Applicant in this matter is Berenique Balsdon a major female, who resides in Dundee in the Province of KwaZulu-Natal (hereinafter referred to as "the Second Applicant" or "the Consumer").
6. The Second Applicant lodged her complaint against the Respondent on the 23 February 2023.

APPLICATION TYPE AND ORDER SOUGHT

7 The First Applicant seeks leave to serve documents (relating to a consumer agreement dispute) on the Respondent ,by way of Substituted Service in terms of Regulation 12

(2) (d) of the KwaZulu-Natal Consumer Protection Act No 4 of 2013 (the Act).

7.1 The First Plaintiff sought an order in the following terms:

7.1.1 Publication of the Summons excluding the Founding Affidavit and Annexures in the Mercury Newspaper and Isolezwe newspaper within 14 calendar days of the granting of this order

7.1.2 Copy of the Summons the Founding Affidavit and Annexures by email where such email service can be effected to the last known email address supplied by the Defendant within seven calendar days from the granting of this order

7.1.3 Insofar as practically possible service of the summons excluding the founding affidavit and an Annexures) to be published on the Defendant's website within 7 (seven) days of the granting of this order to costs of the publication shall be paid by the first plaintiff three further and or alternative relief

7.2 The costs of the publication shall be paid by the First Plaintiff

7.3 Further and /or alternative relief

BACKGROUND

8 The First Applicant brought an application before the Tribunal as the Summons in this matter could not be served on the Defendant, as it was encountering difficulties in locating the whereabouts of the Defendant.

9 The First Applicant introduced into evidence a confirmatory affidavit, deposed to on 18 April 2023, by Mrs Thandeka Makhathini, Assistant Director, complaints handler in the Department of Economic Development, Tourism and Environmental Affairs. In terms of the affidavit the deponent attempted to telephone and email the Defendant to discuss the consumers complaint but was unsuccessful .It was further established by the deponent that summons could not be served at the website address as the Defendant was unknown at that address.

APPLICABLE LAW

10 In order to establish whether the Tribunal can make an order for Substituted Service as requested by the First Applicant, one has to refer to both Section 21(1) and Regulation 12 of the Act, which both deal with proceedings before the Tribunal.

11 Section 21 reads as follows;

The proceedings before a Tribunal must-

- (a) Be initiated by summons in the prescribed form which must be served on the person concerned in any manner as may be prescribed, which may include service outside the Province

Regulation 12 reads as follows;

- (1) The proceedings in the Consumer Tribunal must be initiated by summons- (a)completed in accordance with the form in Annexure J1;
- (b) issued by the secretary of the Consumer Tribunal; and
- (c) served in accordance with sub regulation (2).
- (2) The service of the summons referred to in sub regulation
 - (1) may be-
 - (a)delivered by hand; (b)sent by registered mail; (c) facsimile transmission; or
 - (d) delivered by substituted service in a local newspaper. (Emphasis added) (3)The following shall suffice as proof of service of summons-
 - (a) in respect of summons served by hand, the proof of service completed by using the form in Annexure J4;
 - (b) in respect of service by facsimile, a confirmation of a successful transmission of the facsimile; or
 - (c) in respect of service by registered mail, a registered mail receipt.
 - (4) The respondent must, within seven days of receipt of summons-
 - (a) use the form in Annexure J2 to file a notice of intention to defend; or

- (b) use the form in Annexure J3 to file consent to judgement.
- (5) The Consumer Protector must file the summons and proof of service thereof with the secretary of the Consumer Tribunal.

APPLICATION OF THE LAW TO THE FACTS

12 The Tribunal can order Substituted Service in terms of regulation 12 (1)

- (d) and can determine whether it is reasonably necessary to depart from the various methods of service provided for in the Act and the Regulations.

13 Substituted Service, though provided for in the Regulations is, however, not defined as to when it should be resorted to.

14 The Tribunal has therefore, sought guidance from the High Court Act, Rules and Procedures (Act 10/2013) (emphasis added). In Rule 4 (2) of the High Court Rules ; "Not possible to effect service in any manner aforesaid" (Tribunal emphasis). This sub rule prescribes that Substituted Service is ordered when the defendant is believed to be in the Republic but one of the normal forms of service set out in the rules cannot be effected.

15 The First Applicant's case for Substituted Service is set out in the Confirmatory Affidavit of Mrs Thandeka Makhathini, It sets out clearly and in detail the steps taken by the Office of the Enforcement and Compliance unit of the Consumer Protector to locate the Defendant with the intention to serve documents regarding the consumer dispute. Service could not be effected in the "conventional" manner.

Findings

16 The Tribunal has considered the submissions made by the Applicant and the applicable legislation in its quest to weigh up whether Substituted Service is justified instead of the other prescribed methods of service of notices, as set out in Regulation 12 (1) of the Act and the Tribunal Regulations.

17 After considering Rule 4 (2) of the High Court Rules the Tribunal is satisfied that the applicable guideline that 'Substituted service is ordered when the defendant is believed to be in the Republic but one of the normal forms of service set out in the Rules cannot be effected'. It is clear that the normal forms of service cannot be utilized and that the Tribunal is to give directions authorising some form of Substituted Service, which Rule 12 (1) (d) prescribes as publication in a local newspaper.

ORDER

- 18. Accordingly The Tribunal Makes The Following Order ; The First Applicant is hereby authorized and directed to

18.1 Publish the Summons excluding the Founding Affidavit and Annexures in local newspaper within an area in which the Defendant carries on business 14 calendar days of the granting of this order

18.2 Copy of the Summons the Founding Affidavit and Annexures by email where such email service can be effected to the last known email address supplied by the Defendant within seven calendar days from the granting of this order

18.3 Insofar as practically possible service of the summons excluding the founding affidavit and an Annexures) to be published on the Defendant's website within 7 (seven) days of the granting of this order

18.4 The costs of the publication shall be paid by the First Plaintiff

Ms NOMAGCISA CAWE

Dated 31 MAY 2023

Prof B. Dumisa (Chairperson and Presiding Member) and Ms. P Dabideen (Member) concurred

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Prepared on 13 October 2026 · Esheria