

SOUTH AFRICA / JUDGMENT

Maduna v Vodacom (NCT/32946/2015/140(1)(b)) [2017] ZANCT 108 (9 October 2017) [2017] ZANCT 108

COURT

National Consumer Tribunal

BEFORE

L. Best

CASE / FILE NUMBER

NCT/83384/2017/75(1)(b)

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IN

THE NATIONAL CONSUMER TRIBUNAL

HELD

IN CENTURION

Case

Number: NCT/83384/2017/75(1)(b)

In

the matter between:

PHUMO

KENNETH

MADUNA

APPLICANT

and

VODACOM

RESPONDENT

Dr

L. Best: Presiding

Date

of hearing - 6 October 2017

JUDGMENT**AND REASONS****APPLICANT**

1. The Applicant in this matter is Phuma Kenneth Maduna, an adult male and a consumer as defined by the Consumer Protection Act 68 of 2008 ("the Act") (hereinafter referred to as "the Applicant").
2. At the hearing, the Applicant represented himself.

RESPONDENT

3. The Respondent is Vodacom, with head office situated at 082 Vodacom Blvd, Midrand (hereinafter referred to as "the Respondent").
4. The Respondent was not present at the hearing.

APPLICATION TYPE

5. This is an application in terms of Section 75(1)(b) of the Act for leave to apply directly to the National Consumer Tribunal

("Tribunal") on the premise that the National Consumer Commission issued a notice of non-referral in response to a complaint

lodged with the National Consumer Commission by the Applicant.

BACKGROUND

6. The Applicant had a data contract (cell-phone number [0...]) with the Respondent for R75 per month for 24 months starting February 2017. The data contract account fell into arrears due to non-payment; whilst the Applicant was disputing a matter in relation to another contract with the Respondent. The data contract account was handed over for debt collection to the Respondent's collection attorneys; and the Applicant's details were subsequently listed with the credit bureaux.
7. On 23 January 2016 the Applicant received an SMS from Vodacom advising him that he had been upgraded with a new contract. The

Applicant contacted the Respondent on 25 January 2016 and indicated that he had not requested this upgrade contract and was of the view that this contract was entered into fraudulently. On the same day the Applicant sent an affidavit to the Respondent confirming this.

8. Despite these actions by the Applicant, as well as follow-up queries to the Respondent about the matter, the Applicant's bank account was debited with payment to the Respondent related to this upgrade contract.

9. The Applicant visited the Respondent's Head office in an attempt to resolve the matter about the disputed contract but also to no avail. As a result of this in-action on the part of the Respondent, the Applicant cancelled all payments through his bank to the Respondent. This included stopping payment for the data contract account on cell-number [0...]. As a result this the latter account fell into arrears.
10. The Applicant is of the view that his actions regarding stopping payment were justified; as it was only as a result of this that the Respondent investigated the disputed upgrade account. After the investigation the upgrade account was closed by the Respondent and all monies charged to the Applicant to date in relation to this account were reversed.
11. The Applicant's data contract account on cell-number [0...] remained in arrears. The Applicant laid a complaint with the National Consumer Commission (12/1/4/03-17/06765) as the Applicant is of the view that he is not liable for costs related to the account falling into arrears as he believes it is the actions of the Respondent that caused the account to fall into arrears due to their in- action and time delay in resolving the Applicant's dispute related to the upgrade contract.
12. On 8 May 2017 the National Consumer Commission issued a notice of non-referral in terms of section 72(1)(a) of the Act, on the basis that the Applicant did not allege any facts which, if true, would constitute grounds for a remedy under the Act.
13. The Applicant filed a section 75(1)(b) application as a result with the Tribunal for leave to refer the matter to the Tribunal.

THE HEARING

14. At the hearing on 6 October 2017, the Applicant informed the Tribunal that a settlement had been reached with the Respondent in relation to the in-arrears data contract account on cell-number [0...]. In terms of this, the Applicant paid an amount of R300; the Applicant's credit record was cleared and the account was closed.
15. The Applicant is satisfied with this settlement and regards the matter as being resolved. The Applicant further placed it on record before the Tribunal that there is email correspondence between the parties to this effect.
16. However, in view of the acrimonious relationship with the Respondent, there is a lack of trust. As a result, the Applicant wishes this settlement to be made an order of the Tribunal, in order to bind the Respondent.
17. The Applicant does not wish to with-draw the application for leave, despite the fact that there is no longer a contractual relationship

between the Applicant and the Respondent.

APPLICATION FOR LEAVE

18. The question of whether an application for leave is a separate step in a section 75(1)(b) application has been considered in a number of previous Tribunal cases.[1] Section 75(1)(b) of the Act stipulates that the Applicant may, in the event of the issuing of a Notice of non-referral by the National Consumer Commission, refer the matter directly to the Tribunal, with the leave of the Tribunal. In the matter of Westinghouse Brake and Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd[2], the following was held:

"...that, if possible, a statutory provision must be construed in such a way that effect is given to every word or phrase in it.... The reason is, of course, that the lawgiver, it must be supposed, will choose its words carefully in order to express its intention correctly, and will therefore not use any words that are superfluous, 'meaningless or otherwise otiose' "(per TROLLIP JA in S v Weinberg 1979 (3) SA 89 (A), at p 98 E -F)..[3]

19. The specific provisions of Section 75(1)(b) of the Act and the requirement of the granting of leave to refer contained therein must be construed as a specific intention of the legislature. By including this requirement, the legislature expressed its intention of a separate requirement namely that a section 75(1)(b) referral cannot be adjudicated on without the Applicant in a specific matter first having obtained leave from the Tribunal to make such a referral.
20. In determining whether the Applicant should be granted leave to refer the matter to the Tribunal, the Tribunal must consider the requirements for the granting of "leave". A similar application can be found in the High Court practice, where an

Applicant applies for leave to appeal a judgment. It was held in the Westinghouse Brake and Equipment (Pty) Ltd- matter, as cited above, that -

"in applications for leave to appeal properly brought before the appropriate court in terms of the old sec 20, read with sec 21 as it then was, the only relevant criteria were whether the applicant had reasonable prospects of success on appeal and whether or not the case was of substantial importance to the applicant or to both him and the respondent."

21. The Tribunal will therefore, when considering whether to grant the Applicant leave to refer or not, use the same test as applied in the High Court for applications for "leave" and will therefore consider:

21.1 Whether the matter is of substantial importance to the Applicant or Respondent;

21.2 The Applicant's reasonable prospects of success with the referral.

22. Based on the lengths the Applicant has gone to engage the Respondent on numerous occasions since January 2016, then lodging a complaint with the National Consumer Commission and ultimately the Tribunal and considering the effort of the Applicant to obtain redress, it is clear that the matter is of substantial importance to the Applicant. The Tribunal therefore finds that this requirement has been met.

23. Secondly, the Tribunal must consider the Applicant's reasonable prospects of success. This aspect hinges on whether the Tribunal is of the view that the Applicant's claim falls within the ambit of the Act.
24. Given that the parties have reached settlement, the aspects of which are satisfactory to the Applicant and that there is no longer any contract between the parties, there is effectively no matter to consider or grant leave to bring to the Tribunal.
25. In terms of the Applicant's plea made during the hearing that the settlement be made an order of the Tribunal, section 74 (1) of the Act only allows for a consent order in instances where the National Consumer Commission and respondent agree to proposed terms of the an appropriate order. This is
not applicable in the matter under consideration.
26. Although section 75 (4)(a) allows the Tribunal to make any applicable order contemplated in this Act, the Act does not make provision for such an order as that requested by the Applicant, particularly in view of the fact that the Respondent was not present to confirm the aspects of the settlement.
27. In considering the reasonable prospects of success, the Tribunal is satisfied that no such prospects exist, as the contract between the Applicant and the Respondent has been ended and a settlement satisfactory to the Applicant has been reached and the Applicant has emails from the Respondent confirming the settlement.
28. The Tribunal therefore refuses leave for the matter to be referred directly to the Tribunal.

Handed down on this 9th day of October 2017

{signed}

Dr L. Best

Presiding Member

- [1] Refer to *MV Chauke v Standard Bank et al* TRIBUNAU46582/ 012/14(11)(P) and *Coertze and Burger v Young* TRIBUNAU714/22012/73(3)&75(1)(b)CPA
- [2] 1986(2) SA 555 (A) at par 15.
- [3] See *Barrett, N .O. v Macquet*, 1947 (2) SA 1001(AD) at p 1012; *Port Elizabeth Municipal Council v Port Elizabeth Electric Tramway Co Ltd* 1947(2) SA 1269 (AD) at p 1279.

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