

SOUTH AFRICA / JUDGMENT

Miya v MiWay Insurance Company Limited (NCT/43934/2016/75(1)(b))

[2017] ZANCT 93 (4 August 2017)

[2017] ZANCT 93**COURT**

National Consumer Tribunal

BEFORE

J Simpson, H Devraj, P Beck

CASE / FILE NUMBER

NCT/43934/2016/75(1)(b)

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Source record**IN****THE NATIONAL CONSUMER TRIBUNAL****HELD****IN CENTURION****Case**

number:	NCT/43934/2016/75(1) (b) In
the matter between:	SIPHESIHLE CLEMENT HLAKANIPHA MIYA APPLICANT and MIWAY INSURANCE COMPANY LIMITED RESPONDENT
Coram:	Adv J Simpson- Presiding Member Ms H Devraj - Member Ms P Beck - Member Date
of hearing:	17 June 2017

JUDGMENT**– POINT IN LIMINE AND REASONS****THE PARTIES**

1. The Applicant is Siphesihle Clement Hlakanipha Miya an adult male consumer (“the Applicant”) residing in Durban,

Kwazulu Natal.

2. The Respondent is Miway Insurance Company Limited, a company with limited liability duly incorporated and registered in terms of the Company Laws of the Republic of South Africa with its principal place of business situated at 48 Sterling Road, Samrand Business Park, Cosmosdal,

Gauteng (“the Respondent”).

THE APPLICATION

3. This is an application by the Applicant for leave to refer his complaint, which was non-referred by the National Consumer Commission (the “NCC” or “Commission”), directly to the National Consumer Tribunal (the “Tribunal”) in terms of section 75(1) (b) of the Consumer Protection Act, 2008 (the “CPA”). The Respondent opposed the application.
4. The Commission non-referred the Applicant’s complaint on the basis that “... the complaint does not allege facts, that if true, would constitute grounds under the Consumer Protection Act, 2008.” The Commission stated under cover of the letter, dated 24 March 2016 and signed by the Commissioner on 31 March 2016 accompanying their non-referral notice, that it does not have jurisdiction to deal with the Applicant’s matter referring the Applicant to the Ombudsman for Short Term Insurance.

BACKGROUND

5. The Applicant is a consumer, an insured of the Respondent, under an insurance policy entered into between the Applicant and the

Respondent.

6. On or about 15 August 2015 the Applicant lodged a claim with the Respondent for damages to the insured vehicle as a result of a

collision between the Applicant’s vehicle and another vehicle. The Applicant informed the Respondent that the accident occurred on 15 August 2015.

7. The Respondent, in terms of the agreement, thereafter authorised repairs to the insured vehicle to the amount of R49 722, 72. The Respondent thereafter, again in terms of the agreement, authorised car rental to the benefit of the Applicant in the amount of R6 050,
44. A further amount of R5 753, 00 was also paid for the towing of the vehicle and R4 617, 00 for storage of the vehicle, all in terms of the agreement. The total amount paid by the Respondent to the Applicant was the amount of R66 143, 16.
8. On or about 22 October 2015, the Respondent became aware that the incident as referred to above occurred on 14 August 2015 and not on 15 August 2015, as informed by the Applicant. As a result, on 22 October 2015, the Respondent rejected the Applicant's claim on the basis that the amount of R66 143, 16 was not due in terms of the insurance claim to the Applicant and thus the Applicant was unjustly enriched at the expense of the Respondent.
9. The Applicant approached National Consumer Commission who referred the Applicant to the Ombudsman for Short term insurance and issued a notice of non-referral. The Ombudsman for short term insurance, after investigating the claim, rejected the claim on the basis of insufficient evidence to confirm the date of the incident and suggested that the Applicant approach a private attorney to proceed further with the matter should the Applicant wish to do so.
10. The Applicant approached the Tribunal and the matter was set down for the hearing of an Application in terms of Section 75(1)(b) of the Act.

THE HEARING

11. A hearing was convened for and held on 19 June 2017 in Centurion. The Applicant represented himself and the Respondent was represented by Mr. Coertzer.
12. The Respondent initially raised four points in limine on the papers but decided at the hearing not to proceed with all the points in limine but only with one (1) main point in limine to the effect that the Tribunal does not have jurisdiction to hear the matter.
13. As a possible determination of the point in limine in favour of the Respondent was going to be dispositive of the matter, the Tribunal decided to first hear the parties on it and after hearing the parties deliberated on whether to continue to hear the main matter or not.
14. After careful consideration, the Tribunal decided and informed the parties that it will decide the point in limine and issue its' judgment and reasons for the case to take its course.

POINT IN LIMINE – JURISDICTION OF THE TRIBUNAL

15. The Respondent opposed the Applicant's application for leave to refer his complaint directly to the Tribunal on the basis that the Applicant is not a consumer as defined in the CPA and that the Tribunal accordingly does not have jurisdiction to hear the application.

16. The bases for the Respondent's contention are that -

16.1. The Tribunal does not have jurisdiction in terms of the Consumer Protection Act read with the National Credit Act to entertain this complaint;

16.2. The Tribunal has jurisdiction over credit agreements in terms of the National Credit Act, 34 of 2005 as amended;

16.3. However the following exclusions exist in terms of Section 8(2) of the National Credit Act, which read as follows:

"An agreement, irrespective of its form, is not a credit agreement if it is:

(a) A policy of insurance or credit extended by an insurer solely to maintain the payment of premiums on a policy of insurance."

17. The Respondent argued that in terms of the aforementioned provisions the Tribunal, in regard to the National Credit Act, does not have jurisdiction over a dispute between an insurer and the insured which is governed by the provisions of the Short Term Insurance Act.

18. The Applicant made submissions that the Applicant approached an official at the Department of Trade and Industry who advised the Applicant that the Applicant had a very good case in law. The Applicant also sought independent legal advice and received advice to the effect that the Applicant had a strong case. Hence the Applicant brought an application to the Tribunal.

19. The Applicant made submissions to the effect that the exclusion of short term insurance from the CPA was not valid. The Applicant did not fully develop the submissions on this point, save to say that he consulted with an official from the DTI who advised him that the Tribunal does have jurisdiction to hear the matter as did a private attorney, hence the referral of the matter to the Tribunal. The Applicant also submitted that he required more time to research the issue in order to fully respond to the point in limine. The Tribunal considered this factor, however came to the conclusion that the Tribunal was in a position to decide the matter on the facts and the law as it currently stands.

THE APPLICABLE LAW AND ANALYSIS

20. Ordinarily, in applications of this nature the Tribunal first considers whether to grant leave and then deliberate on the merits of the main applications, after having heard the parties.

21. In this matter and for the reasons above the Tribunal will focus on the point in limine raised and make a determination on and of the implications thereof.

22. The heart of the main point raised in limine is whether the Tribunal has jurisdiction to hear the application.

23. It is trite law that the Tribunal is a creature of statute. As such it is empowered to only hear matters that it is specifically empowered by statute to hear. The Tribunal was established in terms of the NCA (as amended) and had its functions and powers extended with the passage of the Consumer Protection Act, Act 68 of 2008 (CPA) and derives its jurisdiction from these laws.
24. The purpose of the CPA as set out in section 3(1) is:
- “... to promote and advance the social and economic welfare of consumers (our emphasis) in South Africa by...”*
25. The Respondent submitted that the CPA contains provisions relating to the jurisdiction and powers of the Tribunal and other dispute resolution bodies. As such the Tribunal does not have the jurisdiction to decide the matter for the following reasons:

Section “69 Enforcement of rights by a consumer”

A person contemplated in section 4 (1) may seek to enforce any right in terms of this Act or in terms of a transaction or agreement, or otherwise resolve any dispute with a supplier, by-

- (a) referring the matter directly to the Tribunal, if such a direct referral is permitted by this Act in the case of the particular dispute;
- (b) referring the matter to the applicable ombud with jurisdiction, if the supplier is subject to the jurisdiction of any such ombud;
- (c) if the matter does not concern a supplier contemplated in paragraph (b)-
- (i) referring the matter to the applicable industry ombud, accredited in terms of section 82 (6), if the supplier is subject to any such ombud; or
- (ii) applying to the consumer court of the province with jurisdiction over the matter, if there is such a consumer court, subject to the law established or governing that consumer court; referring the matter to another alternative dispute resolution agent contemplated in section 70; or
- (iv) filing a complaint with the Commission in accordance with section 71; or
- (d) approaching a court with jurisdiction over the matter, if all other remedies available to that person in terms of national legislation have been exhausted.”

26. However, according to the Financial Services Laws General Amendment Act, 2013 (Act No.45 of 2013), Section 66 of the Financial Services Laws General Amendment Act, 2013 amended Section 28 of the principle Act in the following manner:

“28(1) The provisions of this act shall not effect the operation of any bank or mutual bank registered in terms of the Banks Act, 1990 (Act No. 94 of 1990), or the Mutual Banks Act, Act, 1993 (Act No 124 of 1993), respectively, in respect of any bank or mutual bank business carried on by such bank or mutual bank in accordance with the provisions of the said Acts.

(2)(a) Subject to subsections (1) and (4), the provisions of Financial Services Board legislation prevail over any provision of other legislation that conflicts with or is inconsistent with a provision of Financial Services Board legislation.

(b) Without derogating from the generality of paragraph (a), the Consumer Protection Act 2008, (Act No.68 of 2008), does not apply to-

(i) any function, act, transaction, goods or services that is or are subject to Financial Services Board legislation; or

(ii) the board or a registrar referred to in Financial Services Board legislation.”

27. Accordingly, when dealing with conflicting legislation, if two different pieces of legislation are in conflict, they must be read together in an effort to resolve the problem. If the conflict cannot be resolved and both enactments deal with the same issue, the earlier one will be repealed by implication by the later one.

28. For the purposes of this matter, the Financial Services Laws General Amendment Act of 2013 was promulgated after the Consumer Protection Act of 2008. Furthermore, the Financial Services Laws General Amendment Act of 2013 has an express provision regarding the applicability of the Consumer Protection Act.

30. The Ombudsman for Short-term Insurance has been granted recognition in terms of the FSOS Act and all personal short-term insurers have agreed to abide by the Ombudsman’s decisions. As such the Ombudsman for Short-term Insurance is appointed by industry and not statute. The Ombudsman for Short-term Insurance does however meet the definition of ‘ombud with jurisdiction’ being an accredited ombud for a financial institution.

31. Section 69(c) of the CPA provides for a complaint to be filed with the Respondent in accordance with section 71 of the CPA “if the matter does not concern a supplier contemplated in paragraph (b)”. The Applicant is a supplier ‘subject to the jurisdiction of the Ombudsman for Short-term Insurance’. Further, a consumer may not enforce his rights by referring the matter to the Tribunal, but rather to the Ombudsman for Short-term Insurance in terms of section 69(b) of the CPA.

32. In terms of section 69 of the CPA, as the matter fell within the jurisdiction of the Ombudsman for Short-term Insurance, the Tribunal

should therefore not deal with the matter and the complainant was not entitled to enforce his rights by referring the matter to the Tribunal, but should have referred the matter to the Ombudsman for Short-term Insurance (which the Complainant subsequently did) and whose decision the Applicant should have abided with thereby resolving the matter alternatively, the Applicant had the option to refer the matter to a court of law.

33. In accordance with Item 10 of Schedule 2 of the CPA the insurance industry had until 30 September 2012 to review the provisions in the Insurance Acts, the Rules and the Regulations to ensure that these measures are aligned with the consumer protection measures of the CPA. Should the Acts be so aligned, the CPA will then apply fully to the insurance industry.
34. The services that constitute the assumption or undertaking of risk will therefore be regulated by the Short-term Insurance Act (hereinafter *“the STIA”*) and any ‘advice’ or ‘intermediary services’ will be regulated by the FAIS Act and not the CPA (until the deadline is met).
35. Although there is no blanket exclusion for the insurance industry from the CPA under section 5(3), the submission of the Applicant is that the ‘carve-out’ of the definition of service makes it clear that the undertaking or assumption of risk is not a service as that term is defined in the CPA. The financial services industry was permanently excluded from the provisions of the Consumer Protection Act 2008, (Act No.68 of 2008), when the Financial Services Laws General Amendment Act of 2013 was promulgated in January 2014.
36. The Tribunal will therefore not have jurisdiction to deal with matters relating to the Financial Services Industry.
37. Accordingly, having considered and interpreted the above sections in the context of the facts the Tribunal concluded and is satisfied that it does not have jurisdiction to deal with the Applicant’s complaint. Further, with regard to the relief sought by the Applicant, namely for the payment and damages, that also falls outside the ambit of the orders the Tribunal may issue in terms of the National Credit Act, Act 34 of 2005 and the CPA.
38. It was further therefore not necessary for the Tribunal to look at the prospects of success and the other factors which would have been pertinent to an application such as this, in the light of the point in limine raised.

COSTS

39. The awarding of costs is governed by section 147 of the National Credit Act, 2005 (NCA). Section 147 provides for the awarding of costs in very limited circumstances where a complainant refers a matter to the Tribunal after having received a notice of non-referral from the National Credit Regulator or the National Consumer Commission. If the circumstances do not fall within this exception the general rule that each party bears its own costs must be observed. This interpretation is unavoidable because section 147 (1) uses the word “must” and not “may” indicating that the Tribunal is not granted a discretion in this circumstances.
40. The Tribunal’s rules also deal with the awarding of costs. Rule 25(7) of the Tribunal Rules provides:

“The Tribunal may award punitive costs against any party who is found to have made frivolous or vexatious applications to the Tribunal.”

41. This rule allows the Tribunal to award punitive costs but only in circumstances where a party made a frivolous or vexatious application. Therefore, just as with section 147, punitive costs can only be awarded in the narrow circumstances provided for by the rules.
42. The Tribunal is a creature of statute and as such its powers are limited to those provided for in the statutes that govern it. At this stage the Tribunal is governed by the NCA, the CPA and its rules and these governing pieces of legislation only provide for the awarding of costs in very limited circumstances.
43. In short, therefore, the Tribunal cannot extend its powers to award costs outside the power which is given to it by statute. To do so would be contrary to the principle of the rule of law. After listening to the Applicant the Tribunal is not convinced that the Applicant acted in a frivolous or vexatious manner in bringing the application before the Tribunal.

ORDER

44. Accordingly, the Tribunal makes the following order:

44.1. The Applicant's application for leave to refer the matter directly to the Tribunal is refused and

44.2. No order is made as to costs.

Dated at Johannesburg on this 4th day of August 2017

[Signed]

P A BECK

TRIBUNAL MEMBER

Concurring Ms H Devraj (member) and Adv J Simpson (Presiding member)

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