

SOUTH AFRICA / JUDGMENT

Mmebe v Nashakele Specialist Imports (Pty) Ltd (34961/2015/75(1)(b)) [2017] ZANCT 1 (13 February 2017)

[2017] ZANCT 1

COURT

National Consumer Tribunal

BEFORE

J Maseko, D Terblanche, F Sibanda

CASE / FILE NUMBER

34961/2015/75(1)(b)

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN

THE NATIONAL CONSUMER TRIBUNAL

HELD

AT CENTURION

CASE

NO: 34961/2015/75(1)(b)

In

the matter between:

SAMUEL
MMEBE
APPLICANT
and
NASHAKELE
SPECIALIST IMPORTS (PTY)
LTD
RESPONDENT

CORAM:

Prof
J Maseko - Presiding member
Ms.
D Terblanche - Member
Mr.
F Sibanda - Member

JUDGMENT**AND REASONS****PARTIES**

1. The Applicant is Mr Samuel Mmebe (hereinafter referred to as the “Applicant” or “Mmebe”), an adult male

residing in Rustenburg. Mr Mmebe acted in his own stead throughout the proceedings.

2. The Respondent is NASHAKELE SPECIALIST IMPORTS (hereinafter referred to as the “Respondent” or “Nashakele”). The Respondent was represented throughout the proceedings by Counsel.

APPLICATION

3. This is an application in terms of Section 75(1)(b) of the Consumer Protection Act, Act 68 of 2008 (the “CPA”), for leave to the Applicant to refer his complaint directly to the National Consumer Tribunal (hereinafter the “Tribunal”) after it had been non-referred by the National Consumer Commission (hereinafter the “NCC” or the “Commission”)

and for the Tribunal to then consider the complaint once and if leave was granted.

4. The Tribunal will, as is usual in applications of this nature, first consider whether it will grant the Applicant leave to directly refer the matter to it and only if it does grant the leave, will the Tribunal consider whether it could grant the relief sought.

RELIEF SOUGHT

5. The relief the Applicant applied from the Tribunal are -

5.1. For an order for leave to refer his complaint directly to the Tribunal; and

5.2. That the Tribunal orders the Respondent to refund certain moneys paid by the Applicant to the Respondent.

6. The refund relates to payment made for goods in respect of a contract the Applicant and the Respondent entered into, that the Applicant

purportedly cancelled.

7. The Applicant clarified at the hearing that his claim relates purely to the difference between what he paid for all the business units and the price of the business units he received.

8. The Applicant abandoned all other issues.

THE MAIN ISSUES IN DISPUTE

9. The main issues before the Tribunal are -

- 9.1. Whether the Applicant ordered, as “Special-order goods”, including among others, a 1,6m wide digital outdoor printer or a 1.8m wide digital outdoor printer;
- 9.2. Whether the Applicant could legally cancel the “special order” that included the 1,6m wide digital outdoor printer based on the claim that the Respondent had ordered goods the Applicant had not agreed to or contracted for; and
- 9.3. If the Applicant could legally cancel the order that included the 1,6m wide outdoor digital printer, what amount in money should be refunded, taking into account the various other business units he ordered and received from the Respondent.

APPLICATION FOR LEAVE

10. Section 75(1) of the CPA requires of the National Consumer Commission (the NCC) to issue a notice of non-referral in response to a complaint as a pre-requisite for a direct referral in terms of section 75(1) (b) by a complainant to the Tribunal.
11. The notice of non-referral from the Commission in this matter is dated 17 September 2015 and was attached by the Applicant to his application to the Tribunal.
12. On the face of the notice it appears that the NCC non-referred Applicant’s complaint on the basis that it “... Does not allege facts which, if true, would constitute grounds for a remedy under the Consumer Protection Act, 2008.”
13. In order to grant leave for the direct referral to the Tribunal; the Tribunal has to determine whether the Applicant alleges facts “... which, if true, would constitute grounds for a remedy under the Consumer Protection Act, 2008” and testing their evidence on those facts against the standard of proof for proceedings before the Tribunal.
14. The standard of proof for proceedings before the Tribunal is set out in section 117 which provides that “... in any proceedings before the Tribunal... the standard of proof is on a balance of probabilities.”
15. The Tribunal decided that as the determination of the matter turns on factual findings on the evidence led by the parties and which party’s version is more likely to be true, it had to hold a hearing into the matter and afford each of the parties an opportunity to state their case and lead their evidence in support of their respective versions.

CONTEXT

16. It is appropriate to set out a brief background and context to the disputes between the parties.
17. On 11 April 2013 the Applicant contacted the Respondent’s offices for information about business units Applicant had seen on the Respondent’s website.

18. It is in dispute between the parties as to which website the Applicant saw the business units. Nothing turns on which website he saw the business units he enquired into, and we will therefore not get into it. This is because it is common cause that the business units in question had been posted on a website at the time the Applicant spotted them and made his enquiry.
19. After receiving the initial enquiry from the Applicant, Tthe Respondent's office emailed a few business unit options for Applicant's consideration via email. These emails have been put before the Tribunal in support of Applicant's assertion that he always wanted to and in fact ordered a 1,8m wide digital outdoor printer.
20. The Applicant visited the Respondent's office in Midrand on 19 April 2013. At this meeting Applicant and Respondent discussed various Customised Business Units, to be tailored specifically for and based on the Applicant's business requirements. This is based on the common cause fact that the Respondent does not sell equipment as a retailer of goods would do, but sell customised and specialised "business solutions" crafted after understanding the needs of a client.
21. According to the Respondent they, the Applicant and Respondent, at the meeting agreed to a tailored package that included a 1,6m wide digital outdoor printer. This inclusion of the printer was not being sold as a stand-alone piece of equipment, but as a component of one of the customised / tailored business solutions. Respondent alleged that Applicant, as a new entrant into the print market, agreed to the recommended customisation of the business solution as opposed to individual stand alone business units that the Applicant had enquired on. This customised solution advised to the Applicant, was to include a 1,6 m wide digital outdoor printer. This change from purchasing an advertised business unit including a 1.8m printer had been made; based on Respondent's professional opinion and experience in the field.
22. There is a dispute between the Applicant and the Respondent about which digital outdoor printer Applicant required, agreed on and ordered as part of the abovementioned Customised Business solution. It is, however, common cause, that the parties did meet and discussed a customised package as the Respondent are a specialist importer as their name also suggests. They do not sell stand alone equipment. They also do not sell the business units as advertised, as they interview enquirers and customise the business solutions to meet the needs of these enquirers. And the need for this is that the Respondent makes its business from supplying repairs and consumables to such clients. It is therefore, in the interests of the Respondent that such enquirers, succeed, once their businesses commence.
23. Applicant insists that he never changed his mind from the business unit that included a 1,8 m wide digital printer he was initially quoted on by Respondent via email, prior to the meeting to customise the business solution.

24. Respondent in turn insists that Applicant changed and agreed to the inclusion of a 1,6m wide outdoor digital printer after their discussion and upon his advice on 19 April 2013.
25. Two pro-forma invoices were sent to the Applicant from the Respondent's office on 25 April 2013 - one for a package including a 1.6m wide outdoor digital printer; and another one a package including a 1,8m wide digital outdoor printer.
26. In respect of these invoices Applicant alleges that the one including the 1,8 m wide printer was the correct invoice and was generated in accordance with his agreement with the Respondent and based on which he paid the 80% deposit.

27.0 Respondent on the other hand alleges that on the initial invoice the description was correctly reflected as for a 1,6m wide printer. Respondent further gave evidence that its staff member mistakenly agreed to change the description from 1,6m to 1,8m, on Applicant's insistence not knowing the components of the business units Applicant and Respondent agreed upon and their cost implications, and therefore changed it. And it is common cause between the parties that this was indeed done by a junior official who had not been part of the customisation of the package in the absence of the main consultant. This, according to the Respondent, was further rectified on the return of the main official of the Respondent who reverted the

customised quotation to that agreed between the parties in the customisation meeting.

28. The Applicant confirmed at the hearing, that he had paid the deposit in the sum of R300 000.00 (three hundred thousand rand) being 80% of the of the total order amount, (based on the customised package invoice) to the Respondent on 25 April 2013, as per the Respondent's Terms and Conditions. Accordingly, the parties estimated that the date of arrival for the printer would be towards the third week to the end of June 2013.
29. Other interactions between the parties included but were not necessarily limited to, training; email communications; etceteras over the months between when Applicant initiated contact with Respondent and June 2013 when Applicant attempted to cancel the agreement for the digital outdoor printer, not all of which is relevant.
30. Respondent and its witnesses' allege that during all the consultations, training, meetings and installation proceedings, the Applicant did not once indicate

that he was dissatisfied with the 1.6m digital printer or the Customised Proposal as accepted by the Applicant. In fact an evaluation by the Applicant even goes as far as stating that:

"Always a pleasure dealing with Michelle. Will buy more machines from you guys."[1]

31. Respondent alleged that during a workshop held between 14 May 2013 to 16 May 2013 the Applicant signed off the Tax Invoice containing the original Customised proposal containing the reference to the 1,6m wide digital outdoor printer. Applicant disputes the authenticity of his alleged signature on the tax invoice. The document containing the Applicant's original signature was introduced in evidence and accepted and inspected by the Tribunal and is included in the Pleadings Bundle on page 44A.
32. Several other transactions were concluded and delivered on between the parties which bears no relevance to the primary dispute between the parties and will not be dealt with in this judgment.
33. Applicant alleged that he only became aware that the printer that was ordered for his package was a 1,6m wide digital outdoor printer, when he received documentation he requested from the Respondent "for insurance purposes", on 13 June 2013. Respondent denied this and referred to the invoices emailed to Applicant on 25 April 2013 and signed by Applicant on 14 May 2013.
34. On 15 June 2013[2] the Applicant attempted to cancel the order for the digital outdoor printer via email, informing Respondent "I no longer have a desire to have the other machine still outstanding because I am convinced I will not get value for money..." and "... I had to buy another machine just to stay in business whilst waiting for you guys to deliver on your promise." This was followed by:

"...I just bought some other machine and it was delivered to me two days after paying for it, training of two days given onsite when the machine arrived, with inks already loaded and with spare capacity. And the machine is equivalent to two of you guys machine at a costs of almost one machine of yours..."(sic).
35. According to the Respondent the 1,6m wide digital outdoor printer arrived at port in South Africa on 19 June 2013 and was readied for delivery to the Applicant, which delivery the Applicant refuses to accept to date. This was within the estimated delivery time as per the proposal and agreement with the Applicant.
36. According to Respondent on 20 June 2013 Respondent's representative met with the Applicant at the Applicant's premises. At this meeting the Applicant had turned hostile and proceeded to ban Respondent from his premises and from making any more deliveries to him or his business.
37. On 22 July 2013 Respondent's representative informed the Applicant that the Respondent does not accept cancellation of his order and the outstanding balance of his order in the amount of R 68 784.30 is due and payable.

ANALYSIS

OF THE FACTS AND EVIDENCE

38. It is clear from the papers put before the Tribunal and common cause between the parties, that the outdoor digital printer (irrespective

of whether it is a 1,6m or a 1,8m) is “Special-order goods” as defined in the CPA and had to be specially ordered from overseas; Applicant agreed to pay a 80% deposit and paid it accordingly; and the goods would arrive approximately 6 (six) to 8 (eight) weeks from date of receipt of the deposit payment in South Africa i.e. between the third week and the end of June

2013. The goods arrived before the end of June 2013, which falls within the agreed period for the delivery.

39. “Special-order goods” is defined in section 1 of the CPA to mean “goods that a supplier expressly or implicitly required or expected to procure, create or alter specifically to satisfy the client’s requirements.”

40. Section 17 of the CPA provides that the rights to cancel contained in that section “... does not apply to a franchise agreement or in respect of special-order goods.”

41. The Applicant will, however, always have the right to cancel an agreement if, unbeknown to him, the Respondent ordered the incorrect goods i.e in this matter if the Respondent ordered a 1,6m wide digital outdoor printer instead of a 1,8m wide digital outdoor printer IF the latter is what they agreed upon and contracted for.

42. Having carefully considered the facts, the evidence led by the parties, submissions and written argument made before and to the Tribunal over the four days of the hearing, it is clear to the Tribunal; on a balance of probabilities; and on the bases set out in paragraph 45 below, that the Applicant indeed agreed to the inclusion of a 1,6m wide digital outdoor printer in the tailored “business solution.”

43. This tailored package that included the 1,6m wide outdoor digital printer is “Special-order goods” as defined under the CPA. And therefore, in terms of section 17 of the CPA; the general rights of cancellation are not available to the Applicant.

44. This Tribunal came to the conclusion in paragraph 43 above for the following reasons-

44.1 Applicant as a new entrant into the business he wished to go into, met and discussed his business needs with the Respondent’s

representative. Between them, the parties agreed to tailor the business solution of the Applicant in line with oral recommendations

of the Respondent. Said oral recommendations had been informed by the needs of the Applicant who it is common cause, was a new entrant into the printing market.

44.1. The Tribunal accepts the Respondent’s evidence that the Applicant paid the 80% deposit upon the invoice for the which featured the 1,6m wide digital outdoor printer.

44.2. The Tribunal further accepts the Respondent's evidence corroborated by its' witnesses; that Applicant never raised concerns about the inclusion of the 1,6m wide printer. This is supported by the invoice of 14 May 2013, signed by Applicant, as evidence that Applicant expressly agreed to the the inclusion of the 1,6m wide digital outdoor printer in the tailored package.

44.3. With regard to Applicant's allegation that his signature on the originally signed invoice was forged, presumably by the Respondent,

the Tribunal considered signatures on other documents Applicant admitted to having signed. And the Tribunal concluded that the

signature on the originally signed invoice dated 14 May 2013 is most likely that of the Applicant.

44.4. When Applicant purportedly "cancelled" the agreement on 15 June 2013 via email; the Applicant made no mention whatsoever of the width of the 1.6m wide digital outdoor printer being in issue. Applicant instead mentioned that he felt; amongst others; he did not get value for money, had bought another printer; and received it very soon and without having had to wait for the delivery.

44.5. In the final analysis; it appears to the Tribunal that the Applicant got tired of waiting for the agreed upon delivery of the package he had purchased from Respondent; and had decided to purchase another printer from another supplier. He then needed to get out of his contract with the Respondent and to have the money paid to Respondent refunded. This view is bolstered by Applicant's own admission during the hearing that the printer he bought from another provider (while waiting for the order from Asia) is smaller than both the 1,8m wide digital printer, and the 1,6m wide digital printer ordered for him by the Respondent. It was common cause that the smaller printer acquired from another supplier, during the wait for the order from Asia was a 1.3m in size.

ORDER

45. The Tribunal therefore makes the following order -

45.1. The Applicant's application for direct referral to the Tribunal, is dismissed; and

45.2. There is no order made as to costs.

DATED AT CENTURION THIS 7th DAY OF FEBRUARY 2017.

SIGNED:

MS. D TERBLANCHE - MEMBER

Prof J Maseko (Presiding Member), Mr. F Sibanda (Member) concurring

[1] Page 50 of the case file signed on 7th June 2013.

- [2] It must be noted that the attempt at cancelling the order occurred a few days before the order was to land in South Africa after it had long left China where it was ordered 4 to 8 weeks as had been agreed between the parties.
-

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZANCT/2017/1.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/mmebe-v-nashakele-unknown-topic-anct-2017>

Prepared on 10 October 2026 · Esheria