

SOUTH AFRICA / JUDGMENT

Modiba and Another v Oosthuizen (NW10/2018) [2018] ZACONAF 9 (13 August 2018) [2018] ZACONAF 9

COURT

Consumer Affairs Court

BEFORE

J Nkomo, Kgomongwe, Gaobepe, Khula

CASE / FILE NUMBER

NW10/2018

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Policy**IN****THE CONSUMER AFFAIRS COURT FOR THE NORTH WEST PROVINCE****HELD****AT MMABATHO****Case number:**

NW10/2018

In the matter

between:-

THABO MODIBA

1ST

PLAINTIFF

DONIOR

LEROTHO MODIBA

2ND

PLAINTIFF

and

WILLEM

OOSTHUIZEN

DEFENDANT

Coram:

J.Nkomo, Kgomongwe, Gaobepe and Khula

Heard:	17 July 2018
Delivered:	13 August 2018 In summary: Plaintiffs claim based on unsuccessful digging of borehole. Defendant undertaking to refund R 30 000.00 if borehole not repaired. Defendant not repairing borehole on 28 December 2016 as promised. Plaintiffs claim for payment of R 30 000.00. Defendant counterclaims R 22 000.00 in respect of first unsuccessful borehole.
Result:	Counterclaim not successful. Written undertaking to repair borehole found to be in terms of Section 54(2)(b) of the Consumer Protection Act 68 of 2008. Defendant found to be liable to plaintiffs in the amount of R 30 000.00. No costs except enforcement costs.

JUDGEMENT

John Nkomo (Members Kgomongwe, Gaobepe and Khula concurring)

Introduction

1. Consumer justice is still a new concept in our legal jurisprudence. The Consumer Protection Act[1](“the CPA”) only came into effect on 31 March 2011. It provides for the establishment of dispute resolution mechanisms such as this court. The establishment of courts also requires the enactment of separate legislation. Only in 2016 was the collateral legislative process finalized and was this court established. So, there is still much to learn for the court itself. Meanwhile precedents are a scarcity. Likewise, consumers and service providers are yet to learn about their rights and obligations arising from the CPA.
2. The digging of a borehole and its failure to yield water and a subsequent promise by the defendant to refund part of the contract price is he does not successfully resolve the problem is what gives rise to this dispute.
3. The plaintiffs are a husband and wife team. The husband is Mr. Thabo Mobiba and the wife is Donior Lerotho Modiba(“the plaintiffs”). They reported a dispute in the office of the Consumer Protector

against Mr. Willem Oosthuizen (“the defendant”) he is the owner and operator of a borehole digging rig who operates business from Plot 129, Noodhulp, Bela Bela[2], Province of Limpopo, Republic of South Africa.

Background

facts

4. It is not clear as to how the plaintiffs met the defendant and sought his services for the digging of a borehole at their homestead at house number M3353, Mmotong Section, Swaartdam in the Moretele area of the North West Province, Republic of South Africa. To this end the parties signed what is entitled “Drilling Arrangement”.

It is dated 15 June 2016, signed by the foreman on behalf of the defendant and it bears a signature on the part provided for the

client to sign. It is not clear as to which of one of the plaintiffs signed the arrangement. This is not important as the constitution of the arrangement is not in dispute.

5. The arrangement provided for the drilling of a 120 meter borehole with a casing of 50 meters. The costs of transport amounted to R 1 800.00 and was paid in advance. The digging of the borehole would cost R 30 000.00 whereas the casing would cost R 15 000.00. In total the cost of the exercise to the plaintiffs was the amount of R 45 000.00 with the transport excluded. An initial payment of R 30 000.00 was required for the works to commence.
6. On 18 June 2016 the plaintiff's paid the deposit of R 30 000.00 into an ABSA Bank account that had been provided. On 02 February 2017, a further payment of R 16 000.00 was paid to the defendant

who issued a receipt for it.

7. It is not clear as to when did the defendant commence with the works and finalize them. The plaintiffs state that it was around July 2016. A week after the completion of the works, the plaintiff realized that the borehole was blocked when he tried to equip it. On several occasions the plaintiff's tried to persuade the defendant to

come and remedy the situation but this was to no avail.

8. On 22 December 2016 the parties met and the defendant wrote the following on a piece of paper[3]:-

“22/12/16

Ek sal op die 28/12/16 die gat gaan reg maak. Gert Johannes Lindique Alberts

ID No [.....]

Signature.

As ek nie die gat gaan reg maak nie sale k die R 30 000.00 vir hom gee.

Signature Witness signature

Witness signature

Signature”

9. The defendant is in short stating that he will attend to repair the borehole on 28 December 2016 and that should he fail to do so, he will refund the amount of R 30 000.00 to the plaintiffs. It appears that the defendant did not do as he promised and eventually the plaintiffs reported the dispute on 15 June 2017. Summons was issued on 11 May 2018.
10. On 12 June 2018 the parties appeared before us in Mmabatho. The matter was postpend to 17 July 2018 at Brits. On 17 July 2018 the defendant introduced a counterclaim in the amount of R 22 000.00 which goes along the following lines. There was a first agreement in terms of which the defendant was to dig a 160 meters borehole at a total cost of R 52 000.00 of which only R 30 000.00 was paid. There is therefore a balance of R 22 000.00 outstanding. The counterclaim suggests that there were two boreholes that were dug, the first which did not yield water and the second one that forms the subject matter of the dispute. A caveat by the defendant with regard to the second borehole is that the it was dug for free.

The law

11. Section 54[4] of the CPA provides as follows:-

“ When a supplier undertakes to perform any services for or on behalf of a consumer, the consumer has a right to-

- (a) the timely performance and completion of those services, and timely notice of any unavoidable delay in the performance of the services;
- (b) the performance of the services in a manner and quality that persons are generally entitled to expect;
- (c) ...;
- (d) ...,

Having regard to the circumstances of the supply, and any specific criteria or conditions agreed between the supplier and the consumer before or during the performance of the services.

- (2) If a supplier fails to perform a service to the standards contemplated in subsection (1), the consumer may require the supplier to either-
 - (a) remedy any defect in the quality of the services performed or goods supplied; or
 - (b) refund to the consumer a reasonable portion of the price paid for the services performed and the goods supplied, having regard to the extent of the failure.”

Analysis and findings

12. Much of the facts in this matter are common cause except for the issue of the second borehole having been drilled for free as alleged by the defendant in the counterclaim. There is no detail provided to the court by the parties on what the dates are on which the first borehole was drilled. There is also no documentary proof provided by the defendant in support of first borehole.
13. The documentary evidence that has been adduced by the plaintiff is only in support of second borehole which is of the depth of 120 meters. The defendant did not place the correctness of this document into dispute. The court can under the circumstances accept what it contains to be correct. The documentary evidence contradicts the defendant's version that the second borehole was dug for free. The court should easily find that the version of the plaintiff stating that the second borehole was dug for a price is the version to be accepted on a balance of probabilities. Given the uncontested documentary evidence, the difference in the depths of the two boreholes, the written undertaking to repair or failing which to refund, it is almost certain that the second borehole was dug for the price reflected in the supporting document.
14. The defendant promised in writing to attend to the defective borehole on 28 December 2016. He did not do so and had committed to the fact that should he fail to do so he would refund the amount of R 30 000.00 to the plaintiffs. The question that arises from this in relation to the counterclaim is why would the defendant sign a document of this sort bearing the knowledge that he is owed the balance of R 22 000.00 in respect of the first borehole? Why did he not state that in the document? All these militate in favour of a finding to the effect that the counterclaim should be found to be unsuccessful.

Application of the law

15. In signing the undertaking to repair the second borehole, the defendant seems to have been admitting that there is a problem with it. This admission is anticipated in Section 54(2) of the CPA which provides that where the services do not meet the expected standard, the supplier may repair the defects to bring the service to the desired standard or alternatively and by agreement with the consumer, the price may be adjusted in terms of section 54(2)(b) of the CPA. The written undertaking signed by the defendant should therefore be found to be an agreement between the parties to reduce the price due to the defective nature of the services and as per Section 54(2)(b) of the CPA.

Order

16. Having regard to all of the above reasons, the following order is made:-
 1. The defendant's counterclaim does not succeed.
 2. The defendant is ordered to immediately pay the amount of R 30 000.00 to the plaintiff as well as interest at the prescribed rate from the date of judgement to the date of ultimate payment.

3. Each party shall pay its own costs except that the defendant shall be liable to the plaintiff for the costs that may be incurred in the competent court for the enforcement of this judgement.

Dated at Mmabatho on this the 10th day of August 2018.

John Nkomo

Chairperson

Plaintiffs: MR. AND MRS. MODIBA

C/O OFFICE OF THE INVESTIGATION OF UNFAIR BUSINESS PRACTICES

NWDC BUILDING

CNR. UNIVERSITY DRIVE & PROVIDENT STREET

MMABATHO

Email: Eletsogo@nwpg.gov.za

Defendant: WILLEM OOSTHUIZEN

PLOT 129, NOODHULP

BEL-BELA

LIMPOPO

Cell: 082 619 7249

- [1] Act 68 of 2008.
- [2] Formerly Warmbaths, a town which lies about 100 kilometers in the northerly direction from the City of Pretoria.
- [3] Hereinafter referred to as the undertaking.
- [4] Subsection 1 and 2 thereof.

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