

SOUTH AFRICA / JUDGMENT

Mosoma v Venter (NCT/74875/2017/75(1)(b)) [2017] ZANCT 88 (31 July 2017) [2017] ZANCT 88

COURT

National Consumer Tribunal

BEFORE

J Simpson, F Manamela, B Dumisa

CASE / FILE NUMBER

NCT/74875/2017/75(1)(b)

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IN

THE NATIONAL CONSUMER TRIBUNAL

HELD

IN CENTURION

Case

number: NCT/74875/2017/75(1)(b)

In

the matter between:

THEMISHI
MOSOMA
APPLICANT
and
AMM
VENTER
RESPONDENT

Coram: Adv.
J. Simpson
–
Presiding
member
Adv.
F. Manamela
–
Member
Prof.
B. Dumisa
–
Member
Date
of Hearing
–
24 July 2017

JUDGMENT

AND REASONS

APPLICANT

1. The Applicant in this matter is Mr Mosoma, a major male (hereinafter referred to as “the Applicant or “Mr Mosoma”). Mr Mosoma appeared in person at the hearing and represented himself.

RESPONDENT

2. The Respondent is cited by the Applicant as AMM Venter. According to the Respondent it is in fact Que Dee Trading 13 (Pty) Ltd trading as Used Sales and Auctioneers. The Respondent has raised this aspect as a point in limine. The Respondent is hereinafter referred to as “the Respondent”. At the hearing the Respondent was represented by Adv B Bergenthuin, of the Pretoria bar, instructed by the firm Budren Swart and Botha Attorneys Inc.

APPLICATION TYPE

3. This is an application in terms of Section 75(1)(b) of the Consumer Protection Act 68 of 2008 (“the CPA”).
4. Section 75(1)(b) of the CPA provides that:

“If the Commission issues a notice of non-referral in response to a complaint, other than on the grounds contemplated in section 116, the complainant concerned may refer the matter directly to...the Tribunal, with leave of the Tribunal.”

5. In an application of this nature the Tribunal must therefore first consider whether it will grant the Applicant leave to hear the

matter. If the leave is granted then the Tribunal will consider the main merits of the Application in a separate hearing.

POINT IN LIMINE

6. The Respondent submitted that the name AMM Venter is simply a reference on the invoice provided to Mr Mosoma. The Respondent is in fact Que Dee Trading 13 (Pty) Ltd trading as Used Sales and Auctioneers. The Respondent submits that this incorrect citing of the Respondent constitutes a misjoinder and the application should be dismissed on this basis alone.
7. The Applicant submitted at the hearing that he dealt with Mr Venter on an ongoing basis and paid the purchase price of the vehicle into his account. The invoice issued by Used Sales and Auctioneers shows the name of AMM Venter and the account number into which payments must be made. In his view Mr Venter is the owner of the Respondent.
8. The Tribunal reserved judgment on the point in limine raised at the hearing.
9. For the purposes of this judgment the Tribunal is not going to deal with this point in detail. There appears to be a dispute of fact as to whether or not AMM Venter exists or not. It is further unclear at this stage whether AMM Venter is the actual Respondent in the matter. This issue would have to be decided on the evidence, should the matter progress to that stage. For the purposes of this judgment the Tribunal finds that the matter can proceed.
10. The point in limine is therefore dismissed.

BACKGROUND

11. Mr Mosoma did not provide much information regarding the detailed facts of the matter but the Respondent's answering affidavit assisted in this regard. There is a material difference between the versions offered by the Applicant and Respondent.
12. Mr Mosoma appears to be a contractor involved in the road construction industry. During January 2015 he purchased a 2x4 Caterpillar TLB construction vehicle ("Caterpillar or the vehicle") from the Respondent for the amount of R140 000.00. It is at this point that the two versions differ materially.
13. According to Mr Mosoma he never used the vehicle but subsequently discovered that the Caterpillar was not suitable as it was too small and asked the Respondent to sell the vehicle for him. The Respondent agreed and sold the vehicle to another person for R142 000.00. The Respondent has however failed to transfer this money to him. Mr Mosoma wants the Tribunal to order the Respondent to pay him the sum of R140 000.00 plus interest.

14. According to the Respondent Mr Mosoma returned the Caterpillar two months after purchasing it. The Respondent agreed to sell the Caterpillar on his behalf and to pay him the price obtained, whatever this amount may be. Before the Caterpillar was sold Mr Mosoma expressed interest in purchasing a Mercedes Benz tipper truck. The Respondent informed him that they could order such a truck and the purchase price would be R285 000.00. Mr Mosoma agreed and they proceeded to obtain the truck for him by paying the seller the cost price for the truck. If the Caterpillar was sold the price obtained could be used towards the cost of the tipper truck.
15. At some stage the Respondent was made aware that Mr Mosoma had obtained a purchaser for the Caterpillar – a Mr Mothube. Mr Mothube paid an amount of R138 000.00 to the Respondent by electronic transfer and R4000.00 in cash. However, within 5 days after collecting the Caterpillar, Mr Mothube cancelled the purchase. He stated that the Caterpillar was defective as it was overheating. The Respondent agreed to collect the Caterpillar from him and to refund the R138 000.00 paid. The balance of R4000.00 was used as the fee to collect the Caterpillar from Mr Mothube. This was agreed to by Mr Mothube. The Respondent avers that the Caterpillar was in perfect working order when it was sold to Mr Mosoma. It therefore must have been damaged while in Mr Mosoma's possession.
16. The Respondent tenders the return of the Caterpillar to Mr Mosoma. The Respondent is further of the view that Mr Mosoma is in default of his contract to purchase the tipper truck. That is however a separate transaction which is not related to this matter.

APPLICATION FOR LEAVE

17. In the matter of *Coertze and Burger v Young*[1] the Tribunal considered the factors which must be evaluated regarding leave. The Tribunal held that the following two factors should be considered:
 - 17.1 The Applicant's reasonable prospects of success with the referral; and
 - 17.2 Whether the matter is of substantial importance to the Applicant or the Respondent.
18. It is firstly very clear that the matter is of substantial importance to both parties. Mr Mosoma has gone to a great deal of effort to lodge the complaint with the NCR, the Motor Industry Ombudsman and then to pursue it further with the Tribunal. Similarly, the Respondent has a vested interest in defending the claim.
19. The prospects of success however require more extensive consideration.

Prospects of success on the merits

20. Irrespective of the differences between the two versions offered by the parties, the following appear to be common cause –
 - The Applicant purchased the Caterpillar from the Respondent for R140 000.00.

- The Caterpillar was returned to the Respondent.
- The Respondent is currently in possession of the Caterpillar and tenders return of it to the Applicant.
- The Applicant did not report or mention any defect in the Caterpillar when he purchased it
- The Applicant did not make any submission or allegation that the Respondent misled him in any way regarding the attributes of the

Caterpillar and its intended use. The Applicant, in its own admission, indicated that the specifications of the vehicle did not

meet the purpose for which he had intended to use it, that is, road construction. According to him, he purchased a 4x2 instead of a 4x4 caterpillar.

- The Applicant returned the Caterpillar by agreement and the parties agreed that the Respondent would sell the Caterpillar on behalf of the Applicant. The Respondent is not in possession of the R140 000.00 as alleged by the Applicant.

21. The Applicant did not provide any submissions regarding the applicability of the CPA to his claim.
22. The Tribunal is mandated to apply the provisions of the CPA to any matter before it. On the evidence before the Tribunal there is no clear basis on which the CPA could be applied. There is no allegation that the Caterpillar was defective in any way. There is no allegation that the Respondent was in any way responsible for the Caterpillar not being used by the Applicant.
23. Under these circumstances the CPA does not find any application to the facts as presented by the Applicant.

COSTS

24. The Respondent requested the Tribunal to make a cost order against the Applicant in terms of section 147(2)(b) of the National Credit Act 34 of 2005[2] (NCA).
25. The general principle applied by the Tribunal, as required by section 147(1) of the NCA, is that each party must carry its own costs. The NCA does however provide for exceptions to this general principle. This application does fall within the exception provided for by section 147(2)(b) of the NCA.
26. The Tribunal was created to promote the overall objectives of the NCA as set out in section 3 of the Act. To this end consumers are permitted to approach the Tribunal directly under certain circumstances and to argue their case as best they can without the need for legal representation. It is therefore understandable that consumers will often fail to grasp legal technicalities and all the elements they need to argue in the Tribunal. It may therefore occur that a consumer approaches the Tribunal with a matter that does not fall within the ambit of

the relevant legislation. To punish consumers with a cost order under these circumstances can be seen to be unduly harsh and may have the effect of deterring consumers from pursuing legitimate complaints through the Tribunal. The Tribunal will therefore generally only consider awarding costs against a consumer where, for example, it is clear from the evidence that the consumer was frivolous or vexatious in pursuing the matter. This wording (“frivolous and vexatious”) is used throughout the Act to describe situations where a consumer’s actions should be censured.

27. In this matter there is no basis for a finding that the Applicant was frivolous or vexatious in pursuing his application. He had a bona fide belief that he had a legitimate claim against the Respondent. A cost order against him is therefore not warranted.

CONCLUSION

28. There is no reasonable prospect of the Applicant succeeding in his application against the Respondent.
29. There is no basis for a cost order being made against the Applicant.

ORDER

30. Accordingly, the Tribunal makes the following order –
- 30.1 The Applicant’s application for leave to refer the matter directly to the Tribunal is refused.
- 30.2 There is no order as to costs.

DATED ON THIS 31st DAY OF JULY 2017

[signed]

Adv J Simpson

Presiding Member

Prof Dumisa (member) and Adv Manamela (member) concurring.

[1] NCT/7142/2012/75(1)(b)&(2).

[2]

147. Costs.—(1) Subject to subsection (2), each party participating in a hearing must bear its own costs.
- (2) If the Tribunal— (a) has not made a finding against a respondent, the member of the Tribunal presiding at a hearing may award costs to the respondent
- and against a complainant who referred the complaint in terms of section 141 (1) or section 75 (1) (b) of the Consumer Protection Act, 2008, as the case may be; or [Para.

- (a) amended by s. 121 (1) of Act No. 68 of 2008 with effect from 31 March, 2011.] (b) has made a finding against a respondent, the member of the Tribunal presiding at a hearing may award costs against the respondent and to a complainant who referred the complaint in terms of section 141 (1) or section 75 (1) (b) of the Consumer Protection Act, 2008, as the case may be. [Para. (b) amended by s. 121 (1) of Act No. 68 of 2008 with effect from 31 March, 2011.]

[2]

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[Para.

- (a) amended by s. 121 (1) of Act No. 68 of 2008 with effect from 31 March, 2011.]

- (b) has made a finding against a respondent, the member of the Tribunal presiding at a hearing may

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[Para. (b) amended by s. 121 (1) of Act No. 68 of 2008 with effect from 31 March, 2011.]

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