

SOUTH AFRICA / JUDGMENT

Motswai v House and Home (NCT33263/2015/75(1)(b)CPA) [2016] ZANCT 20 (7 July 2016) [2016] ZANCT 20

COURT

National Consumer Tribunal

BEFORE

Penny Beck-Paxton, FK Manamela, Bonke Dumisa

CASE / FILE NUMBER

NCT33263/2015/75(1)(b)CPA

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IN

THE NATIONAL CONSUMER TRIBUNAL

HELD

IN CENTURION

Case

number: NCT33263/2015/75(1)(b)
CPA
In

the matter between: MOTSWAI,
LETLAPA SHADRACK
APPLICANT
and
HOUSE
&
HOME
RESPONDENT
[a
trading Division of Shoprite Checkers
Pty
Ltd]

Coram: Ms
Penny Beck-Paxton _ Presiding Member
Adv.
FK Manamela _
Member
Prof
Bonke Dumisa
_ Member
Date
of Hearing
–
8 March
2016

JUDGMENT

AND REASONS

APPLICANT

1. The Applicant in this matter is Letlapa Shadrach Motswai, a major male person residing at O., A., Gauteng (“the Applicant”).

RESPONDENT

2. The Respondent is House & Home, a trading Division of Shoprite Checkers (Pty) Ltd, a company duly registered in terms of the relevant company laws of the Republic of South Africa, (“the Respondent”).

APPLICATION TYPE

3. This is an application in terms of section 75(1) (b) of the Consumer Protection Act 68 of 2008 (“the Act”), for leave to apply directly to the Tribunal on the grounds that the National Consumer Commission (“NCC”) issued a notice of non-referral in response to a complaint by the Applicant, stating that the complaint does not allege any facts, which, if true, would constitute grounds for a remedy under the Consumer Protection Act, 2008.

4. At the hearing of this application the Applicant represented himself. The Respondent was represented by Mr Mogamat Botha of Van Der Spuy Attorneys in Cape Town.
5. The Tribunal has jurisdiction to hear this Application in terms of section 101(1) of the Consumer Protection Act.
6. On 31 January 2011, the Applicant, ("Motswai") purchased a Mancini three piece leather uppers lounge suite from the Respondent in the amount of R20049.00 (twenty thousand and forty nine rand) at the Respondent's branch of Kolonade Shopping Centre in Pretoria. The Applicant alleges that the couches were not of genuine leather in that the outside part of the couches, (the parts where one sits, leans and rests arms), are of another material but genuine leather. The Applicant further alleges that the Respondent misrepresented the facts that the quality of the couches were made of material known as genuine leather in that the couches started peeling off, showing a shiny reddish under-layer that resembled plastic, within one year of purchasing the couches. Within one year of purchasing the couches may be approximated to, on or about January 2012.
7. The Applicant reported the matter to the Respondent, who refused to accept the complaint until the Applicant produced proof of purchase.

On 12 December 2014, the Applicant, after finding the proof of purchase, went back to the Respondent and demanded assistance. Due to the December holidays and suppliers having gone into recess, the Applicant was allegedly asked to return to the store on 12 January 2015, when all the staff would have returned from the summer recess. The Applicant then went to the Respondent's branch on 14 January 2015. On 16 January 2015, the Respondent fetched the couches from the Applicant's house and took them in for examination. When Applicant visited the Respondent's store on 22 January 2015 to inquire about progress, he discovered that the couches were broken. On that day presumably, the Respondent then offered to repair them at its own cost. The Applicant refused the Respondent's offer and demanded a full refund of the amount paid.

8. The results of the testing of the material, conducted by H Van Wyk Furniture Repairs is dated 22 January 2015 and points to the allegation (which the Applicant denied), that the damage was attributable to excessive cleaning and body perspiration. The Applicant allegedly made numerous attempts to the Respondent's store [and the Ombud for Consumer Goods and Services] in an effort to resolve the complaint, to no avail.
9. The Applicant then approached the National Consumer Commission (NCC) on 27 June 2015 to lodge a formal complaint. The NCC, in response to the Applicant's complaint, issued a notice of non-referral dated 7 September 2015 stating that the transaction complained of occurred before the general effective date of the CPA, being 1 April 2011, thereby ousting the NCC's jurisdiction to deal with the matter.
10. The Applicant approaches the Tribunal for leave to refer the complaint directly to the Tribunal.

11. Prior to the hearing of this matter, the Respondent had on 2 March 2016 filed and served an application to postpone the matter on the basis that the main application was not ready to be heard by the Tribunal in that the time periods in respect of the Respondent's

application for Condonation had not lapsed in order to allow the matter to be heard on 8 March 2016. The Respondent's

submissions

were sound. The condonation application was served and filed on 22 February 2016, notwithstanding the Respondent's argument that its opposition to the Applicants main matter was not out of time. At all material times after the Applicant had referred its main application, the Respondent had to wait for annexures to the complaint in order to reply fully to the Applicant's allegations. There is correspondence in the file showing several requests for annexures.

12. The Applicant (Motswai) did not file papers in opposition to the condonation application as he is entitled to do should he so choose

as allowed in terms of the Rules of the Tribunal. In that respect the Respondent argues that the matter would not have been set down for hearing while this process of exchange of papers had not been completed in order to render the matter ready for hearing.

13. The Applicant opposed the postponement application shortly before the hearing of 8 March 2016. The Tribunal heard the postponement

application and thereafter proceeded to hear the Applicant's leave application as it was the matter appropriately scheduled for hearing by the Tribunal.

SUBMISSIONS

BY THE RESPONDENT

Preliminary

issues

14. The Respondent's Regional Manager, ERROL JAMES LOUIS ANDRE deposed to Respondent's opposing affidavit and raised certain technical points on the advice of legal counsel. These points were raised in limine and questioned the legality of the matter being dealt with by the Tribunal. In essence these preliminary points question the jurisdiction of the Tribunal in dealing with the main application. Briefly these legal issues are the following:

14.1 whether or not the application for leave to approach the Tribunal directly should be granted, notwithstanding the fact that the NCC has issued a notice of non-referral;

14. 2 that the provisions of the CPA are not applicable to this matter in view of the fact that the transaction took place on 31 January 2011, before the general effective date of the CPA, being 1 April 2011; and also

14.3 That the matter had prescribed and that the Applicant cannot approach the Tribunal in terms of section 116 of the Act; And to this extent, the Tribunal has no jurisdiction to hear this matter.

The Applicant's response to the preliminary issues

15. The Applicant admitted that the lounge suite was purchased in January 2011, being the date preceding the application of the CPA, being 1 April 2011.
16. The Applicant further conceded that the issue of the non-applicability of the CPA was raised by the NCC, but that he felt the treatment he received from the Applicant (House and Home) was unfair and dishonest; and felt helpless to see the Respondent go unpunished.
17. Further that the Tribunal, according to the Applicant, is competent to hear this matter, specifically on the basis that the NCC has referred him to the Tribunal.

THE APPLICABILITY OF THE CPA

18. The general effective date upon which the CPA came into operation is 1 April 2011.

The transaction which forms the basis of this complaint was concluded in January 2011, granted.

The issues raised by the Applicant in this matter relate to the occurrence of the act or omission that is the cause of the complaint

the Applicant wishes the Tribunal to address. The cause of action arose, in my view, in January / February 2012, that is, within a year of the Applicant purchasing the couches, being January 2011, according to what is set out above. The cause of action is not the transaction, the alleged poor quality of the goods, is.

19. Item 3 of Schedule 2 of the CPA determines the extent to which the CPA applies to "pre-existing transactions and agreements." The CPA does not apply to any transaction concluded, or agreement entered into, before the general effective date of the CPA being 1 April 2011.
20. Section 53 and 58 of the CPA apply to pre-existing transactions: "only with respect to goods and services supplied to the consumer in terms of the agreement, on or after the effective date.
21. The CPA does not apply retrospectively to transactions or agreements concluded before the general effective date, 1 April 2011. This is the ground upon which the NCC relied on when it issued a notice of non-referral. The Applicant is not precluded from approaching the Tribunal in terms of section 116 to refer the matter directly to the Tribunal, on account of an act or omission committed by the Respondent, and the period within which such act or

omission occurred, is not in excess of three years. The crux of the Applicant's case is that, the couches were of poor quality or the Respondent misrepresented the facts regarding the quality of the couches. This was in 2012. The transaction or agreement, in this regard, the sale agreement may have taken place prior to the general effective date, but the cause of action (the complaint about the quality of the couches) occurred in 2012.

22. Simply put, on 12 December 2014, the Applicant, after having been to the Respondent's place of business in January 2012 (within one year of purchase) and the latter's refusal to accept the complaint without proof of purchase, then found the proof of purchase and went back to the Respondent and demanded assistance in December 2014. Due to the December holidays and the suppliers having gone into recess, the Applicant was asked to return to the store on 12 January 2015. In essence, the Applicant reported the matter to the Respondent within 2 years and 11 months (11 January 2012 - 12 December 2014) of discovering the peeling off of the couches. The Applicant was within the period required by the Act to refer the matter directly to the Tribunal. The limitation of bringing action as prescribed by section 116 of the CPA does not apply in this matter. Accordingly the matter had not yet prescribed, and the Tribunal has jurisdiction to hear this matter. The Respondent's defence raised in limine is misguided and consequently, fails.
23. The Tribunal will deal with the legal requirements of the notice of non-referral and referral of matters in general

Referral of Matters and The Notice of Non Referral

24. The fact that the NCC did not refer (and issued a notice of non-referral) does not mean the Applicant cannot do so. The Act specifically allows that. In my view the Respondent is misguided in its submission as set out in paragraph 14.1 above.
25. In terms of Section 69)(a) of the Act, a person may seek to enforce any right in terms of the Act or in terms of an agreement, by referring the matter directly to the Tribunal in the case of that particular dispute, if such a direct referral is permitted by this Act
26. Sections 70, 72 and 73 make reference to alternative dispute resolution, other than the National Consumer Commission - Section 70 specifically provides the following:

A consumer may seek to resolve any dispute in respect of a transaction or agreement with a supplier by referring the matter to an alternative dispute resolution agent who may be-

- (a) An ombud with jurisdiction, if the supplier is subject to the jurisdiction of any such ombud;
- (b) And industry ombud accredited in terms of section 82(6), if the supplier is subject to the jurisdiction of any such ombud;
- (c) A person or entity providing conciliation, mediation or arbitration services to assist in the resolution of consumer disputes, other than an ombud with jurisdiction, or an accredited industry ombud, or

(d) Applying to the consumer court of the province with jurisdiction over the matter, if there is such a consumer court, subject to the law establishing or governing that consumer court.

27. Section 72 deals with the issuing of a Notice of Non Referral and provides as follows:

(1) Upon initiating or receiving a complaint in terms of this Act, the Commission may-

(a) issue a notice of non-referral to the complainant in the prescribed form, if the complaint-

(i).....

(ii) does not allege any facts which, if true, would constitute grounds for remedy under this Act, or

(iii) is prevented, in terms of section 116, from being referred to the Tribunal

(b)

(c)

(d)

Section 73 provides for circumstances under which the NCC may issue a notice of non-referral,

(1) After concluding an investigation into a complaint, the Commission may-

(a) issue a notice of non-referral to the complainant in the prescribed form;

(b)

(c)

(2).....

(a).....

(ii).....or

(b) to the Tribunal

28. The NCC issued a Notice of Non-referral to the Applicant on 7 September 2015 (received by Applicant on 18 September 2015), as provided for in Section 72(1)(a)(ii) of the Act. The specific notice of non-referral states that the NCC held the view that the NCC does not have jurisdiction to provide the complainant with redress as the complaint does not allege facts constituting grounds for a remedy under the Consumer Protection Act. Section 75(1) (b) of the Act stipulates that the complainant concerned may (in the event of the issuing of a notice of non-referral by the NCC), refer the matter directly to the Tribunal, with leave of the Tribunal.(own emphasis). The Tribunal wishes to point out that the “referral to the Tribunal ” as expressed in the NCC’s notice of non-referral, is not the only referral point. There are other alternative dispute resolution agents, including a consumer authority of a province; an industry ombud; which the Applicant may be referred

to, for assistance as provided for under sections 70, 72 and 73. The Applicant (Complainant) must be afforded the most convenient and expeditious route to resolve a consumer dispute and find recourse especially in circumstances where the jurisdiction of the NCC and the Tribunal is allegedly excluded. The provincial consumer protection authorities and ombud schemes are at the coal face of attending to consumer disputes, if the NCC cannot attend to these disputes on the strength of an alleged legal technicality. It is unfortunate that the Consumer Goods and Services Ombud could not offer assistance after the Applicant had approached them.

29. In the matter of *Westinghouse Brake and Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd*[1], the following was held: "It is a general rule in the construction of statutes that a deliberate change of expression is prima facie taken to import a change of intention".[2] The specific provisions of Section 75(1) (b) of the Act and the requirement of the granting of leave to refer contained therein is such a "deliberate change of expression".

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

30. When 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."

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

31.1 The Applicant's reasonable prospects of success with the referral;

31.2 Whether the matter is of substantial importance to the Applicant or Respondent.

32. The Applicant's prospects of success with the referral depends on whether the Tribunal is of the view that the issue at hand falls within the ambit of a contractual dispute related to goods and services, or whether the Applicant may be assisted with a certificate in terms of Section 115(2) of the Act, following a declaration of prohibited conduct

33. The matter is evidently of substantial importance to the Applicant, considering the amount paid by the Applicant to the Respondent, for goods allegedly of poor quality – this is the cause of action. The Applicant feels aggrieved by the Respondent's conduct, who according to the Applicant, misrepresented the facts regarding the quality or make of the goods. Equally so, the matter is of substantial importance to the Respondent, demonstrated by the interaction the Respondent had with the Applicant.
34. The Tribunal rejects the preliminary point that the Applicant's complaint predates the general effective date of 1 April 2011. The cause of action, occasioned by the Respondent's act or omission falls within the ambit of the operation of the CPA. The issue of the general effective date of the coming into operation of the CPA, only relates to transactions that preceded the general effective date. This is not the query of the Applicant. The Applicant is concerned about the poor quality of the couches, the subject matter of his complaint.
35. Further, in adjudicating matters, the Tribunal being a creature of statute, can only make orders provided for in the Act, and in terms of the powers conferred upon it under the National Credit Act. By virtue of the afore-going, the Tribunal has jurisdiction to hear the main matter, for which leave is sought in this application.

ORDER

36. Accordingly, the Tribunal makes the following order-

29.1 the application for leave to refer directly to the Tribunal is granted.

29.2 there is no order as to costs.

Dated at CENTURION on this __Day of __ 2016

[Signed]

Adv FK Manamela

Ms Penny Beck-Paxton (Presiding Member) and Prof Bonke Dumisa (Member), concurring

[1] 1 986 (2) SA 555 (A) at par 15.

[2] 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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