
SOUTH AFRICA / JUDGMENT

Motswai v House and Home (NCT/33263/2015/75(1)(b)) [2017] ZANCT 57 (13 April 2017) [2017] ZANCT 57

COURT

National Consumer Tribunal

BEFORE

J Maseko, J Simpson, F Sibanda

CASE / FILE NUMBER

NCT/33263/2015/75(1)(b)

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case No: NCT/33263/2015/75(1) (b)

In the matter between:

LETLAPA SHADRACK MOTSWAI

APPLICANT

AND

HOUSE AND HOME

RESPONDENT

Coram:

Prof J Maseko - Presiding Member

Adv J Simpson - Member

Mr F Sibanda – Member

Date of Hearing: 13 March 2017

Date of Judgment: 13 April 2017

JUDGMENT AND REASONS

THE PARTIES

1. The Applicant is Letlapa Shadrack Motswai, a consumer who lodged a complaint with the National Consumer Commission (“the NCC”), in terms of section 71 of the Consumer Protection Act (“the CPA”), (hereinafter referred to as “the Applicant”). At the hearing the Applicant represented himself.
2. The Respondent is House and Home, a trading division of Shoprite Checkers (Pty) Ltd, a company duly registered in terms of the company laws of the Republic of South Africa (hereinafter referred to as “the Respondent”). At the hearing the Respondent was represented by Adv. RB Engela assisted by Mr. M. Botha of the Respondent.

JURISDICTION

3. The application is brought in terms of section 75(1) of the CPA wherein the Applicant seeks leave to refer a complaint directly to the Tribunal following a notice of non-referral issued by the NCC.
4. Section 75 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 –
 1. the consumer court, if any, in the province within which the complainant resides, or in which the respondent has its principle place of business in the Republic, subject to the provincial legislation governing the operation of that consumer court; or
 2. the Tribunal, with leave of the Tribunal.”
5. On this basis the Tribunal has jurisdiction to hear this matter.

ISSUES

TO BE DECIDED

6. The Tribunal must decide whether or not to grant leave to the Applicant to refer this matter directly to the Tribunal. In order to arrive at such a determination, the Tribunal is required to consider, among other things, the Applicant’s prospects of success, the importance of the case and whether the Tribunal can grant the relief sought.

BACKGROUND

7. On 31 January 2011, the Applicant purchased a Mancini three-piece leather upper lounge suite valued at R20 049.00 from the Respondent, under the impression that the couches were genuine leather upper.
8. According to the applicant the lounge suite started to peel off within a year of purchase.
9. The applicant went back to the Respondent to complain about the matter but was turned back because he did not produce a receipt as proof of purchase.

10. The Applicant later found the receipt and returned to the shop.
11. On 16 January 2015 the Respondent collected the couches from the Applicant for testing.
12. After the tests a letter was sent to the Applicant confirming that the couches were genuine leather and that the peeling was due to excessive cleaning and body perspiration.
13. The Applicant was not satisfied with the outcome and approached the Consumer Goods and Services Ombudsman who advised him to refer the matter to the NCC.
14. The Applicant subsequently lodged a complaint with the NCC on 27 June 2015.
15. After investigating the matter the NCC issued a notice of non-referral citing the fact that the transaction between the Applicant and the Respondent was entered into before 1 April 2011, which is the date on which the CPA became effective. Consequently the NCC has no jurisdiction to deal with the matter.
16. The Applicant then approached the Tribunal to seek leave to refer the matter directly to the Tribunal.
17. The matter was set down for hearing at the Tribunal on 8 March 2016, where the Applicant applied for postponement of the case, on the basis that there was a condonation application pending before the Tribunal and also that the Respondent was given short notice of the hearing and the legal counsel was not available to represent the Respondent.
18. After hearing both parties the Tribunal postponed the matter sine die and indicated that reasons for granting the postponement would follow. However, on 7 July 2016 the Tribunal issued a judgement making a finding on the merits of the case.
19. The Respondent approached the High Court to review and set aside the Tribunal's judgement. By mutual agreement of the parties the High Court on the 9th of November 2016, Per Du Plessis J.; set the Tribunal judgment aside and remitted the matter to the Tribunal to be heard by a new panel.
20. The matter was then set down for 13 March 2017. And this judgment is a direct outcome of the hearing by this newly constituted panel.

THE HEARING

21. At the hearing of the 13th of March 2017 there were two issues that the Tribunal needed to dispense with -
 1. First the Tribunal had to decide on the condonation application filed by the Respondent.
 2. Second, the Respondent raised two points in limine.

CONDONATION APPLICATION

22. On 16 November 2015 the Respondent received a 'Notice of Complete Filing' together with an affidavit by the Applicant. In terms of the Rules of the Tribunal, the Respondent had to file an answer to the Applicant's founding affidavit within 15 days of receipt thereof. However, the Respondent discovered that the Applicant's affidavit was incomplete, making it difficult to file an answering affidavit.
23. The Respondent contacted the office of the Tribunal and the missing annexures were sent on 12 January 2016. Within 15 days of receipt of the missing annexures the Respondent filed its answering affidavit.
24. However, the Respondent was advised to file a condonation application for the late filing of its answering affidavit which the Respondent did.
25. The Applicant did not oppose the Respondent's answering affidavit.
26. The Tribunal considered the matter and decided that a condonation application was not necessary under the circumstances. Moreover the Applicant did not oppose the application. On this basis, the Tribunal was comfortable to continue to hear the matter.

POINTS IN LIMINE

27. The Tribunal proceeded to hear the Respondent on the points in limine raised.

FIRST POINT IN LIMINE

28. The Respondent argues that, as admitted by the Applicant, a Mancini three piece genuine leather upper lounge suite was purchased from the Respondent on 31 January 2011, which is before the general effective date of the CPA of 1 April 2011.
29. In terms of Schedule 2, Item 3 of the CPA:
"Except to the extent expressly set out in this item, this Act does not apply to:
 1. the marketing of any goods or services before the general effective date;
 2. any transaction concluded, or agreement entered into before the general effective date; or
 3. any goods supplied, or services provided, to a consumer before the general effective date"
30. The Respondent submits that the transaction between the Applicant and the Respondent was concluded, before the general effective date of 1 April 2011. Furthermore, the goods were delivered before the general effective date.
31. Furthermore, the NCC issued a notice of non-referral on the very basis on which the Respondent argues its point in limine.

32. In light of the above, the Respondent submits that the sale transaction concluded and the goods delivered by the Respondent to the Applicant are not governed by the Act and therefore the Tribunal does not have Jurisdiction to adjudicate this matter in terms of the Act.

SECOND POINT IN LIMINE

33. The Respondent further points out that according the Applicant, the cause of his complaint arose within a year of purchasing the lounge suite on 31 January 2011.

34. The Applicant only approached the Tribunal for the first time on 30 September 2015.

35. In terms of Section 116(1) of the CPA:

“A complaint in terms of the Act may not be referred or made to the Tribunal or to a consumer court more than three years after -

1. the act or omission that is the cause of the complaint; or
 2. in the case of a course of conduct or continuing practice, the date that the conduct or practice ceased.”
36. The Respondent submits that a period of more than three (3) years lapsed before the Applicant referred the complaint to the Tribunal or a consumer court.
37. Accordingly, the Applicant is not entitled to approach the Tribunal in terms of Section 116 of the Act and therefore, the Applicant’s claim should be dismissed on this basis.

APPLICATION FOR LEAVE TO REFER

38. In terms of section 75(1)(B) of the CPA, the Applicant may only refer the matter directly to the Tribunal with leave of the Tribunal¹.
39. In determining whether the Applicant should be granted leave to refer the matter directly to the Tribunal, the Tribunal must consider the requirements for the granting of “leave”.
40. In *Westinghouse Brake and Equipment (Pty) Ltd* it was held 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.”

41. The Tribunal will therefore, when considering whether to grant the Applicant leave to refer the matter or not, use the same test as applied in the High Court for applications for “leave” and will consider:
1. the Applicant’s reasonable prospects of success with the referral; and
 2. whether the matter is of substantial importance to the Applicant, the Respondent or both.

APPLICANT'S REASONABLE PROSPECTS OF SUCCESS

41. The Tribunal as a creature of statute can only operate within the ambit of the law it administers, in this case the CPA.
42. As argued by the Respondent, the CPA came into effect on 1 April 2011 and Schedule 2, Item 3 thereof stipulates that the Act does not apply to the marketing of goods or services, any transaction or agreement or the supply of goods or services to a consumer that occurred before 1 April 2011.
43. Secondly, section 116 of the CPA places a three-year time limitation, within which cases may be brought before the Tribunal for adjudication, since the act which is the cause of the complaint arose.
44. In this case, the Applicant first became aware of the alleged problem with the lounge suite by the latest in January 2012, but only approached the Tribunal in September 2015, after the 3 years referred to in section 116 of the CPA.
45. The Tribunal considered whether the referral of the matter to the NCC could have suspended the operation of the time referred to in section 116. However, as seen from the NCC complaint form, the referral to the NCC was made in June 2015, which was already after the said three-year period.
46. Based on the above, the Applicant does not have any prospects of success in this matter.

IMPORTANCE OF THE MATTER

47. This case is of substantial importance to both parties. However, this factor becomes moot when considering that the Applicant has no prospects of success.

WHETHER TRIBUNAL CAN ORDER THE RELIEF PRAYED FOR

48. Whilst the Tribunal has extensive powers to make various orders in terms of the CPA, this factor also becomes irrelevant where the Applicant's prospects of success are non-existent.

CONCLUSION

49. For the sake of completeness the Tribunal decided to hear both parties on the merits of the case. And the merit consideration was merely and strictly for purposes of determining the prospects of success on the part of the Applicant.
50. However, having considered the points in limine and the fact that the Applicant has no prospects of success in this matter the Tribunal finds it unnecessary to grant the leave to refer the matter to the Tribunal for the merits to be considered in full.

51. This case brings to the fore the importance of properly advising consumers by all institutions involved in dispute resolution, including ombuds, industry bodies and regulators, among others. For instance, the Applicant could have been referred to a consumer court with jurisdiction that may not have the same limitations placed on it as with the effective date of the CPA. This remark is rather made “obiter.”

ORDER

52. On the conspectus of the evidence presented regarding the application for leave to refer the matter directly to the Tribunal, the Tribunal makes the following order:

1. The application for leave to refer the matter directly to the Tribunal is refused.
2. There is no order as to costs.

DATED AT CENTURION THIS 13th DAY OF APRIL 2017

[signed]

Mr FK Sibanda

(Member)

Prof J Maseko (Presiding Member) and Adv J Simpson (Member), concurring.

1 Own emphasis

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