

SOUTH AFRICA / JUDGMENT

National Consumer Commission v Braai Block (Pty) Ltd (NCT/341406/2024/73(2)(b))

[2024] ZANCT 66 (10 December 2024)

[2024] ZANCT 66

COURT

National Consumer Tribunal

BEFORE

A Potwana, Z Ntuli, S Hockey

CASE / FILE NUMBER

NCT/341406/2024/73(2)(b)

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case Number: NCT/341406/2024/73(2)(b)

In the matter between: NATIONAL CONSUMER COMMISSION APPLICANT and BRAAI BLOCK (PTY) LTD RESPONDENT

Coram:

Dr A Potwana - Presiding Tribunal member Ms Z Ntuli - Tribunal member

Mr S Hockey - Tribunal member Date of hearing: 10 December 2024

JUDGMENT AND REASONS

APPLICANT

1. The applicant is the National Consumer Commission, a juristic person established by section 85 of the Consumer Protection Act, 68 of 2008 (CPA). During the hearing, the applicant was represented by its legal advisor, Ms Imran Magoro.

RESPONDENT

2. The respondent is Braai Block (Pty) Ltd, a supplier as defined under section 1 of the CPA. During the hearing, the applicant was represented by Mr Thabo Feke-Myeko (Mr Feke-Myeko), an attorney from Feke-Myeko Attorneys.

APPLICATION TYPE AND JURISDICTION

3. This is an application under section 73(2) of the CPA. The applicant alleges that the respondent committed prohibited conduct.
4. In terms of section 27(a)(ii) of the National Credit Act, 34 of 2005 (NCA), the Tribunal has jurisdiction to consider this matter.

INTRODUCTION

5. On 31 July 2024, the applicant referred a complaint to the Tribunal in terms of section 73(2) (b) of the CPA using Form T1.73(2)(b)CPA. The application documents were served on the respondent by hand. In “Part C: Order sought from the Tribunal” of the prescribed form for referring complaints to the Tribunal, Form T1.73(2)(b)CPA, the applicant stated that it was applying for an order in the following terms:

5.1. declaring that the respondent’s contravention of the following sections of the CPA is declared prohibited conduct:

5.1.1. 23(6)(a); and

5.1.2. 26(2) to (3)(b).

5.2. interdicting the respondent from engaging in conduct detailed in 5.1 above;

5.3. directing the respondent to pay an administrative penalty of R1 000 000,00 (One Million Rands) and

5.4. any appropriate order contemplated in section 4(2)(b)(ii) of the CPA.

FACTS

6. The applicant’s case is detailed in the affidavit of its Deputy Commissioner, Ms Thezi Mabuza (Ms Mabuza). Ms Mabuza averred that the applicant received a tip-off from a consumer alerting it to possible violations of various provisions of the CPA by the respondent. As per the tip-off, the alleged prohibited conduct was that the respondent did not include the location of its trading address in its tax invoices. Secondly, the respondent charges a service fee on each transaction. This amount depends on the cost of each meal and varies from one transaction to another.
7. Based on the above, the applicant suspected that the respondent was committing prohibited conduct and directed two inspectors to investigate the complaint. On 9 February 2024, the applicant notified the respondent about the investigation and sent it a Notice of Investigation, a copy of the Investigation Certificate, and an Investigation Questionnaire by email. On 29 February 2024, the

applicant’s inspectors visited one of the respondent’s business premises at 6374 Seedcracker Street, Celtisdal, Centurion,

to investigate and gather evidence. They were welcomed by the manager, Ms Nompumelelo Khithifa (Ms Khithifa). The investigation

confirmed the following:

7.1. the respondent's sales records or receipts did not reflect the address at which the respondent supplied its goods or services,

7.2. the respondent charged a service fee which varies from one transaction to another, depending on the price of a consumer's meal and

7.3. the advertised cost of goods on the respondent's menu did not include applicable fees or charges.

8. On 4 March 2024, one of the applicant's inspectors, Mr Tebogo Motseta (Mr Motseta), alerted the respondent's head office situated at 95 Robert Sobukhwe Street, Sunnyside, Pretoria, about the investigation. On 8 March 2024, the respondent's office manager, Ms Chiedza Muchimwe, furnished Mr Motseta with a substantive response to the applicant's questionnaire. She stated that the respondent started to operate in November 2020 and has 16 branches across the Gauteng Province, with the Sunnyside branch being its head office. It advertises or displays its products on a menu displayed in all 16 branches. The respondent defines a service charge as a fee charged for its services to ensure the best service to the consumer. It asserts that "it is a transparent general practice to disclose cost structures rather than hide behind an exorbitant price model." The service charge came into effect in 2022 and is applied throughout the respondent's 16 branches. The respondent believed that it was not in contravention of the CPA in any way, that it was fully compliant with the provisions of the CPA, and that there was no need for it to undertake any corrective measures.

9. On the day of the hearing, 10 December 2024, the presiding Tribunal member placed the matter on record and invited Ms Magoro to argue the applicant's case. Shortly thereafter, Mr Feke-Myeko raised his hand and noted his appearance on behalf of the respondent. From the outset, he recorded that he was admitted to the hearing three minutes after it started. The import of Mr Feke-Myeko's statement is lost to the Tribunal as it was evident that he was present from the beginning of the hearing and heard every argument that Ms Magoro had started to make. Given Mr Feke-Myeko's statement, it is apt to record that the matter was set down as unopposed and the respondent was not properly before the Tribunal as it had failed to file an answering affidavit despite having been served the referral documents by hand on 31 July 2024. On 9 September 2024, the Registrar issued a Notice of Set Down for the

hearing to take place unopposed on 8 October 2024. On this day, the respondent's director, Malikhanye Mabena, attended the hearing and requested a postponement without having filed a formal application because the respondent wanted to oppose the application.

The applicant objected. In the interests of justice, the Tribunal granted the respondent's request. In the postponement ruling,

the Tribunal ordered the respondent to file its answering affidavit and condonation application on or before 29 October 2024. It did not do so. On 22 November 2024, the Registrar issued a Notice of Set Down for the hearing to proceed unopposed on 10 December 2024.

10. Despite the respondent's failure to file an answering affidavit within the prescribed time limits and to comply with the Tribunal's order to file a condonation application for the late filing of its answering affidavit, Mr Feke-Myeko insisted that the respondent's answering affidavit was available and should be admitted because the rules of natural justice and the Constitution entitle the respondent to a right to be heard. The presiding Tribunal member pointed out that neither the rules of natural justice nor the Constitution prescribe that the right to be heard can be exercised in a manner that violates the Tribunal Rules and that to permit the respondent to file its answering affidavit in a procedurally irregular manner would deprive the applicant of the opportunity to reply to the respondent's answering affidavit. In the interests of justice, the Presiding Tribunal member permitted Mr Feke-Myeko to participate in the proceedings and make submissions in response to the applicant's arguments from the bar. The presiding Tribunal member informed Mr Feke-Myeko that the Tribunal would decide on the weight to attach to such submissions.
11. According to Mr Feke-Myeko, the respondent admits it committed prohibited conduct. Although it owns the brand and prescribes the menu and pricing used in all 16 branches, it is not a franchisor and does not own all 16 branches. It only owns the Celtisdal branch. Independent entities own all the other outlets. When asked for the names of the owners of the different branches or outlets, he could not furnish the Tribunal with any despite the Tribunal standing the matter down for approximately forty minutes to allow him to consult with his client. He submitted that the respondent has since stopped the conduct and will request all the other branches to follow suit.

THE LAW

12. Section 23(6) of the CPA states, "Subject to subsections (7) to (10), a supplier must not require a consumer to pay a price for any goods or services higher than the displayed price for those goods or services."
13. Section 26(2) of the CPA states, "A supplier of goods or services must provide a written record of each transaction to the consumer to whom any goods or services are supplied."
14. Section 26(3)(b) of the CPA states, "The record contemplated in subsection (2) must include at least the following information: the address of the premises at which, or from which, the goods or services were supplied."

CONSIDERATION OF THE MERITS

15. The respondent did not file an answering affidavit. Rule 13(5) of the Tribunal Rules states, “Any fact or allegation in the application or referral not specifically denied or admitted in an answering affidavit will be deemed to have been admitted.” During the hearing, Mr Feke-Myeko submitted that the respondent admitted that it committed the prohibited conduct alleged by the applicant.
16. Based on the above and the evidence before us, we are satisfied that the respondent contravened sections 23(6)(a) and 26(3)(b) of the CPA. No evidence before us proves that the respondent contravened section 26(2) of the CPA.

FINDING

17. The respondent contravened sections 23(6)(a) and 26(3)(b) of the CPA. The respondent’s contravention of sections 23(6)(a) and 26(3)(b) of the CPA is prohibited conduct.
18. Concerning the interdict sought by the applicant, the applicant has failed to lay a basis for this Tribunal to grant an interdict. In any event, the prayer for an interdict is misguided. In *Shoprite Investment Limited v The National Credit Regulator*[1], the full bench of the High Court of South Africa (Gauteng Division, Pretoria) supported a concession by the National Credit Regulator’s

legal counsel that a restraining order would serve no purpose as the legislation, the NCA, already proscribed the granting of reckless

credit. Similarly, in the present matter, an interdict will not serve any purpose as the CPA already prohibits the conduct the applicant wants to interdict.

19. We will now turn to consider the appropriate administrative fine.

CONSIDERATION OF AN APPROPRIATE ADMINISTRATIVE FINE

20. In terms of section 112(1) of the CPA, the Tribunal may impose an administrative fine regarding prohibited or required conduct. Such a fine may not exceed the greater of 10% of the respondent’s annual turnover during the preceding financial year or R1 000 000.00.[2] The applicant did not present the respondent’s annual turnover during the preceding financial year. It prays for an administrative

fine of R1 000 000.00 to be imposed on the respondent. Section 112(3) of the CPA enjoins the Tribunal to consider the factors specified

when determining an appropriate administrative fine. The respondent has pleaded for mercy but has not made any submissions regarding

these factors. The applicant’s submissions regarding the factors listed under section 112(3) of the CPA are discussed under

the sub-headings below.

The nature, duration, gravity and extent of the contravention

21. The applicant submits that the respondent's conduct disregards various provisions of the CPA. The contraventions perpetrated by the respondent are serious. The respondent is "ripping off" consumers of their hard-earned monies by upholding the

same principle of charging consumers a service fee across all 16 branches. This principle is preposterous because consumers only

realise later that they must pay more than what was advertised or displayed in the store. Regardless of the applicant's engagement and advice, the respondent has shown a blatant disregard for the provisions of the CPA in that it denied that it was contravening the CPA.

22. Given the evidence submitted by the applicant and in the absence of an answering affidavit opposing the applicant's submissions, we are satisfied that the respondent's conduct is serious. With regard to section 23(6) of the CPA, Stoop explained that "[E]nabling consumers to make informed choices means that consumers can compare products and the prices they are willing to pay, which makes markets more efficient (disclosure can drive down prices by allowing consumers to shop around and compare prices)."[3] We concur with the learned author. The respondent used deceptive means to make consumers pay more than the advertised prices. This conduct deprived consumers of the opportunity to compare prices and make informed choices. It surreptitiously took money out of the pockets of the very consumers who financially supported it.
23. With regards to section 26(3)(b) of the CPA, Stoop explained that "[T]he disclosure of aspects such as contact, and registration details enable consumers to identify and clarify or rectify issues (accountability). Another purpose served by sales records relates to consumers having necessary information about the supplier and the sale when seeking to redress defects in quality."[4] We agree. If the transaction record does not include the address where goods were supplied, vulnerable consumers could find it difficult to institute legal proceedings and enforce their rights.
24. We note that the respondent perpetrated the prohibited conduct in 16 branches or outlets and has been ongoing for approximately two years.

Any loss or damage suffered as a result of the contravention

25. Notwithstanding the applicant not making any submissions in this regard, the evidence presented indicates that consumers were deprived of their money and rights to make informed decisions.

The behaviour of the respondent

26. The applicant alleges that throughout the history of this matter, the respondent showed no regard for

consumers' rights as enshrined in the CPA. It asserts that the respondent is avaricious.

27. We note further that the respondent delayed the finalisation of this matter ostensibly to file an answering affidavit but subsequently failed to file a condonation application to file the answering affidavit in violation of the Tribunal's order. Section 160(1) of the NCA states, "A person commits an offence who contravenes or fails to comply with an order of the Tribunal." By contravening or failing to comply with the order of the Tribunal, the respondent is liable to be prosecuted.

The level of profit derived from the contravention

28. The applicant submits that the respondent benefited from the service charge paid by consumers.

The degree to which the respondent co-operated with the applicant

29. The applicant states that whilst the respondent formally co-operated with the applicant, it did not do anything to try to resolve the matter.

Whether the respondent has previously been found in contravention of the CPA

30. There is no evidence that the respondent previously contravened the provisions of the CPA.

CONCLUSION

31. The respondent acted deceitfully towards its customers and contravened the CPA's significant provisions. It acted contemptuously towards the very consumers who supported it. The evidence does not support Mr Feke-Myeko's submission that the respondent owns one branch. The applicant's uncontroverted evidence is that the respondent's office manager, Ms Chiedza Muchimwe, informed the applicant that the respondent has 16 branches across the Gauteng Province, and it advertises or displays its products on a menu displayed in all the 16 branches. Thus, it is evident that the respondent instigated and perpetrated the prohibited conduct in all 16 branches or outlets. Having analysed the respondent's conduct, the Tribunal considers it appropriate to impose an administrative fine that will deter it and other suppliers from preying on unwitting consumers for selfish financial gains.
32. Based on a conspectus of all the evidence presented to us and having considered the parties' submissions on all the factors prescribed in section 151(3) of the CPA, the Tribunal finds that an administrative fine of R1 000 000,00 (One Million Rands), is appropriate.

ORDER

33. The Tribunal makes the following order:

33.1. The respondent contravened sections 23(6)(a) and 26(3)(b) of the CPA.

33.2. The respondent's contravention of sections 23(6)(a) and 26(3)(b) of the CPA is declared prohibited conduct.

33.3. The respondent must pay an administrative fine of R1000 000.00 (One Million Rands) within 90 ordinary days from the date of the issuance of this order into the bank account of the National Revenue Fund, the details of which are as follows:

Bank:

Nedbank

Account Holder: Department of Trade, Industry and Competition

Account type: Current Account

Branch Name: Telcoms and Fiscal

Branch code: 198765

Account number: 1[...]

Reference: NCT/341406/2024/73(2)(b)

Thus, done and dated 11 December 2024.

[Signed]

.....

Dr A Potwana

Presiding Tribunal Member

Tribunal members Ms Z Ntuli and Mr S Hockey concur.

[1] [2019] ZAGPPHC 956 (18 December 2019) at para 48.

[2] Section 112(2) of the CPA.

[3] P Stoop 'Protection of consumer rights and consumer's voice' in T Naudè & S Eiselen (eds) Commentary on the Consumer Protection Act

(2017) Revision Service 2, at p 23-3.

[4] P Stoop 'Protection of consumer rights and consumer's voice' in T Naudè & S Eiselen (eds) Commentary on the Consumer Protection Act (2017) Revision Service 2, at p 26-2.

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