

SOUTH AFRICA / JUDGMENT

National Consumer Commission v Louw Roets Design (Pty) Ltd (NCT/287774/2023/73(2)(b)) [2023] ZANCT 54 (1 December 2023)

[2023] ZANCT 54

COURT

National Consumer Tribunal

BEFORE

S Hockey, M Peenze, Z Ntuli

CASE / FILE NUMBER

NCT/287774/2023/73(2)(b)

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IN THE NATIONAL CONSUMER
TRIBUNAL HELD IN CENTURION

Case

number: NCT/287774/2023/73(2)(b)

In

the matter between:

NATIONAL
CONSUMER COMMISSION
APPLICANT
and
LOUW
ROETS DESIGN (PTY) LTD
RESPONDENT

Coram: Mr
S Hockey
- Presiding Tribunal member
Dr
M Peenze
- Tribunal member
Ms
Z Ntuli
- Tribunal
member
Date
of hearing - 28
November 2023
Date
of ruling -
01 December 2023

JUDGMENT

AND REASONS

THE PARTIES

1. The applicant in this matter is the National Consumer Commission (the NCC), an organ of state and a juristic person duly established in terms of section 85 of the Consumer Protection Act, 2008 (the CPA)[1]. At the hearing of this matter, the NCC was represented by its legal advisor, Ms Ntsako Ngobeni.
2. The respondent is Louw Roets Design (Pty) Ltd, a company duly incorporated in terms of the company laws of the Republic of South Africa and a supplier as defined in section 1 of the CPA. At the hearing of the matter, there was no appearance by or on behalf of the respondent.
3. This is an application that the NCC referred to the National Consumer Tribunal (the Tribunal) in terms of section 73(2)(b) of the CPA. This section allows the NCC to refer a matter to the Tribunal after it investigated a complaint received by it and if it believes that the person against whom the complaint was lodged engaged in prohibited conduct under the CPA.
4. The NCC received a complaint against the respondent from a consumer, Ms Jana Jonker (the consumer), on 26 January 2022. The complaint was investigated, and it was alleged in the investigation report that the respondent contravened provisions of the CPA, as will be discussed below.

CONSIDERATION OF THE EVIDENCE ON AN UNOPPOSED BASIS

5. The applicant caused the founding papers of this application to be served by the relevant sheriff on the respondent on 13 September
2023. The sheriff's return indicates that the founding papers were delivered to the respondent's business address and that the respondent's receptionist received them.
6. The application papers included Form TI.73(2)(b) which informed the respondent that it could oppose the application by serving an answer on the applicant within 15 business days of receipt of the notice.
7. On 20 September 2023, the registry of the Tribunal issued a notice of complete filing, which was served on the applicant and the respondent, both per registered post and by email. The respondent was again informed in this notice that it could oppose the application by serving an answer within 15 business days from receipt of the application.
8. The respondent failed to file an answering affidavit, and the matter was accordingly set down on an unopposed basis for hearing on 28 November 2023.
9. At the onset of the hearing on 28 November 2023, Ms Ngobeni informed the Tribunal that the respondent contacted her that morning to advise that it wished to oppose the matter, but it could not join the hearing due to load shedding.
10. As there was no communication with the Tribunal or its registry by the respondent, no formal request for a postponement, nor any filing of an answering affidavit despite sufficient time to do so, the Tribunal ruled for the matter to proceed on an unopposed basis.
11. In terms of rule 13(5) of the Tribunal's rules,[2] 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.

BACKGROUND

12. On 19 April 2021, the consumer bought a custom-made table from the respondent for R37 697.00. The table was delivered to the consumer's holiday home in the Eastern Cape for a delivery cost of R2 100.00 on 3 May 2021.
13. When the consumer arrived at her holiday home on 31 May 2021, she noticed the table was damaged. She sent photographs of the damaged table to the respondent. Her subsequent enquiries to the respondent were ignored.
14. The consumer returned the table to the respondent at her own cost.
15. The respondent offered to repair the table at the consumer's cost.
16. Not happy with the above, the consumer referred a complaint to the Western Cape Consumer Protector (the WCCP), which is an alternative dispute resolution entity accredited for that purpose under the CPA.

17. The respondent failed to cooperate with the WCCP, who, as a result, could not facilitate a negotiated outcome between the consumer and the respondent.
18. On 15 October 2021, the consumer informed the respondent that she no longer wanted the table and requested a refund. To date, the respondent failed or refused to refund the consumer the purchase price she paid for the table.

THE RELEVANT LEGAL PROVISIONS

19. In terms of section 55(2) of the CPA, every consumer has a right to receive goods that (a) are reasonably suitable for the purpose for which they are generally intended; (b) are of good quality, in good working order and free of any defects;
(c) will be usable and durable for a reasonable period of time, having regard to the use to which they would normally be put and all the surrounding circumstances of the supply; (d) comply with any applicable standards set under the Standards Act, 1993 (No. 29 of 1993), or any other public regulation.
20. Section 56(2) provides that, within six months after the delivery of any goods to a consumer, the consumer may return the goods to the supplier without penalty and at the supplier's risk and expense if the goods fail to satisfy the requirements and standards contemplated in sections 55. The supplier must then, at the direction of the consumer, either repair or replace the failed, unsafe, or defective goods or refund the consumer the price paid by the consumer for the goods.

EVALUATION

21. The evidence that the table purchased by the applicant from the respondent was delivered to the former in a damaged state is uncontroverted. The respondent conceded this in correspondence wherein it offered to repair the damaged table at the consumer's expense. The table, therefore, did not meet the requirements and standards contemplated in section 55(2).

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22. The election that the consumer opted for was to return the table to the respondent and demand a refund. The respondent's failure or refusal to refund the consumer is a contravention of sections 56(2)(b) and is, in consequence, declared to be prohibited conduct.
23. In terms of sections 56(2)(b), the consumer is entitled to a refund in the circumstances, and the Tribunal is of the view that an order to this effect is appropriate.
24. In addition to a refund of the purchase price of the table, the applicant also asks for an order for the respondent to pay the costs

for the delivery of the table to the consumer[3] and the delivery costs paid by the consumer for returning the table to the respondent[4].

25. Section 150 of the National Credit Act, 2005 (Act 34 of 2005) (the NCA) sets out the orders the Tribunal may make. Subsection (i) states that the Tribunal may make any appropriate order required to give effect to a right, as contemplated in the NCA or the CPA. One such right of a consumer resides in section 56(2)(b), read with the provisions of section 55, namely that a consumer may return damaged or defective goods to the supplier at the supplier's cost for either repair or a refund.
26. To give effect to the right discussed in the preceding paragraph, the Tribunal has jurisdiction to order that the respondent must pay the transportation costs incurred by the consumer for the return of the table to the respondent. As already stated, such costs must be at the supplier's risk and expense in terms of section 56(2).
27. As a creature of statute, the Tribunal has no power to order a refund of the transportation cost for delivery of the table from the respondent to the consumer's holiday home in the Eastern Cape. Neither does the Tribunal have jurisdiction to order interest on the refunds as requested by the NCC.
28. The NCC requested relief in the form of an interdict against the respondent from engaging in the prohibited conduct, which it asked the Tribunal to order. The NCC did not deal with the requirements for granting an interdict, and in any event, the Tribunal is of the view that an interdict, as requested, is not appropriate in the circumstances of this matter.
29. Lastly, the NCC asks that an administrative fine be imposed on the respondent. The fact that the respondent had little regard for the rights of the consumer and required the consumer to pay for the repairs to the damaged table, together with the fact that the respondent ignored attempts by the WCCP to engage with it, are, in the Tribunal's view, justification for the imposition of an administrative fine in this matter.
30. In terms of section 151(1) of the NCA, an administrative fine may be imposed in respect of prohibited or required conduct in terms of the CPA. 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[5].

31. Section 151(3) sets out the factors that the Tribunal must consider when determining an appropriate fine. The Tribunal shall deal with each of these factors under the sub-headings below.

31.1. The nature, duration, gravity and extent of the contravention

As mentioned above, the respondent disregarded the consumer's rights in this matter, and the Tribunal agrees that the contraventions discussed above are serious.

31.2. Any loss or damage suffered as a result of the contravention

As a result of the respondent's action, the consumer has been out of pocket for the purchase price it paid for the table since April 2021. In addition, the consumer also had to pay for the table to be delivered to her holiday home in the Eastern Cape, as well as the costs for the return of the table to the respondent.

31.3. The behaviour of the respondent

The respondent refused to cooperate with the WCCP and ignored the present application and the subsequent notices sent to it. In addition, the respondent acknowledged that the table was damaged but required the consumer to pay for the repairs to the damaged table.

31.4. The market circumstances in which the contravention took place

Consumers in the South African market are generally vulnerable about suppliers, which is why protection has been afforded to consumers under the CPA.

31.5. The level of profit derived from the contravention

This is a once-off incident, and the profit derived from the sale of the table cannot be out of the ordinary.

31.6. The degree to which the respondent cooperated with the NCC

The respondent cooperated with the investigation but denied any liability and ignored notices sent to it thereafter.

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

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

32. Considering the above factors, the Tribunal finds that an administrative fine of R5 000.00 (five thousand Rand) is appropriate.

THE ORDER

33. Accordingly, the Tribunal makes the following order:

33.1. The respondent has contravened sections 55(2) and 56(2)(b) of the CPA.

33.2. The above contraventions are declared to be prohibited conduct.

33.3. The respondent shall refund the consumer the purchase price paid for the table, in the sum of R37 697.00, as well as the delivery cost for the return of the table, in the sum of R2 400.00

33.4. The payments referred to in 33.3 above shall be made within 15 business days from the issuance of this order. The payment shall be made into a banking account elected by the consumer.

33.5. The respondent shall, within 30 business days of the issuance of the order, pay an administrative fine of R5 000.00 into the bank account of the National Revenue Fund, the details of which are as follows:

Bank: The Standard Bank of South Africa

Account holder: Department of Trade and Industry Branch name: Sunnyside

Branch code: 010645

Account number 3[...]

Reference NCT/287774/2023/73(2)(b), with the respondent's name used as a reference.

33.6. There is no order as to costs.

S Hockey (Presiding Tribunal member)

Tribunal members Dr M Peenze and Ms Z Ntuli concur.

- [1] A reference to a section in this judgment shall be a reference to the CPA.
- [2] Regulations for matters relating to the functions of the Tribunal and Rules for the conduct of matters before the National Consumer Tribunal, 2007, published under GN 789 GG 30225 of 28 August 2007.
- [3] Contained in Part D of the referral form (TI,73(2)(b)), paragraph 4, record page 5.
- [4] Ibid, paragraph 5.
- [5] Section 151(2).

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