

SOUTH AFRICA / JUDGMENT

National Consumer Commission v M. Kleynhans t/a 3 Palms Bed and Breakfast Kuilsriver (NCT/63897/201673(2)(b)) [2016] ZANCT 62 (24 December 2016) [2016] ZANCT 62

COURT

National Consumer Tribunal

BEFORE

F Sibanda, L Best, B Dumisa

CASE / FILE NUMBER

NCT/63897/201673(2)(b)

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case number: NCT/63897/201673(2)(b)

In the matter between:

NATIONAL CONSUMER COMMISSION

APPLICANT

and

M. KLEYNHANS t/a

3 PALMS BED AND BREAKFAST KUILSRIVIER

RESPONDENT

Coram:

Mr F Sibanda -

Presiding member

Ms L Best - Member

Prof B Dumisa - Member (Acting Executive Chairperson of the NCT)

Date of Hearing 13 December 2016

JUDGMENT AND REASONS**APPLICANT**

1. The Applicant in this matter is the NATIONAL CONSUMER COMMISSION (the NCC) (hereinafter referred to as "the Applicant"). The Applicant was represented at the Hearing by Mr Joseph Selolo, their Director of Prosecutions.

RESPONDENT

2. The Respondent is M Kleynhans t/a 3 Palms Bed and Breakfast Kuilsrivier (hereinafter referred to as "the Respondent") At the hearing the Respondent was represented by its co-owner Mr M Kleynhans.

APPLICATION TYPE

3. This is an application in terms of Section 73(2)(b) of the Consumer Protection Act 68 of 2008 ("the CPA").

BACKGROUND

4. The Complainant was Ms Vanessa Pashua, who lodged a complaint with Applicant on 17 October 2013, complaining that the Respondent imposed an unreasonable charge on her for cancelling a reservation for 30 December 2013 to 4 January 2014, which was at least more than two months in advance before what was supposed to have been the date of arrival for the booked vacation.
5. On the strength of the complainant's complaint, the NCC formed a reasonable suspicion that the Respondent is committing contravention/s of the CPA. They thus appointed one of their inspectors I investigators to investigate the complaint.
6. On 9 November 2015, the Respondent was notified about the complaint, and furnished with the Investigation Certificate; and a request was made for the Respondent to furnish the Applicant with their responses on the complaint, including furnishing the Applicant with their (Respondent's) policy on the cancellation of advance bookings.

APPLICANT'S SUBMISSIONS

7. The Complainant made an advance booking as early as February 2013.
8. The booking was for the Complainant and her family to be there for five nights; arriving at the Respondent's B&B on 30 December 2013 and to depart from there on 4 January 2014.
9. The Complainant paid in full for this advanced booking.

10. Nearly eight months later, the Complainant called the Respondent on 14 October 2013, to cancel the advance booking, purportedly because of unforeseen family problems (marital problems).

11. The Complainant alleges that she was never told about any 50 percent cancellation penalty at the time she informed the Respondent about the cancellation:

11.1 She says she was thus surprised to see that only half of her booking fee, R1575, was paid back into her bank account.

11.2 When she enquired why she had only been refunded half of the total amount paid; it is only then that she was told that there is a cancellation clause that entitles the Respondent to retain 50 percent of the booking fees where the confirmed guest cancels 15 days or more prior to the confirmed arrival date.

11.3 The Complainant prays that the balance of her total amount paid in advance, R1575, be paid back; because the two months' cancellation notice she gave was reasonable under the circumstances.

RESPONDENT'S SUBMISSIONS

12. The Respondent maintains that this matter was fully resolved in 2013, when "we immediately paid back the funds as per our cancellation policy which she at that stage accepted".

13. The Respondent listed their Cancellation Policy as follows:

- 0 to 7 days prior to arrival, forfeit 100 percent
- 8 to 14 days prior to arrival, forfeit 75 percent
- 15 days prior to arrival, forfeit 50 percent.

13.1 Kindly note that we have conveniently amended the days used in their Cancellation Policy because of the serious contractual disputes it can lead to when implemented as is where they say: 0 to 7 days prior to arrival, forfeit 100%; 7 to 14 days prior to arrival, forfeit 75%; and 14+ days prior to arrival, forfeit 50%. The amendment was necessary here because the categorisation of a number of days must ensure the categories must be mutually exclusive of each other in order to avoid confusion. For example, as the Cancellation Policy stands now, there is this confusion: is a person who cancels 7 days

prior to arrival subject to either a 100% forfeiture or a 75% forfeiture? The confusion arises because day 7 appears on both the

"0 to 7 days" and on the "7 to 14 days" categories. The same applies to day 14; does a person who cancels on 14 days prior to arrival forfeit 75% or 100%.

13.2 The Respondent insists that their Cancellation Policy is legally binding; and it is the duty of the potential guests to view and familiarise themselves with it during the reservation period.

13.3 The Respondent then took a very tough position in their response to this complaint; this is what they wrote, quoting them verbatim:

- We have sympathy with the lady's predicament; but we may not allow her domestic problems to interfere with our business.
- Do you honestly think that the lady would care if we lose money because she did not turn up, if we did not insist on full payment? Also standard procedure for high season bookings.
- This group fully booked all our rooms for the specific period.
- Why did the lady not get someone else to take up her booking?
- We were fully booked for the December holidays, being high season and everybody has finalized their bookings, what do you think that the possibilities are that we could get a client that would require a single room for these those exact dates; as we were fully booked before and after her dates.
- It is the client's duty to ask for the cancellation policy if she haven't got it (this consumer did not do the booking herself).
- The cancellation policy is standard and used by all accommodation venues.

SUMMARY OF THE INVESTIGATION REPORT BY THE APPLICANT'S INSPECTOR

14. The Inspector established that

14.1 The Respondent agrees with the Complainant's version of the sequence of events and dates given.

14.2 The Respondent categorically made it known that they closed their booking sites, immediately after concluding that their accommodation sites were fully booked.

14.3 The Respondent did not reopen those booking sites, even after the Complainant had already cancelled on 14 October 2013.

14.4 The Respondents concede they did not act diligently to find an alternative consumer to take up the complainant's booking; instead they say the complainant should have found an alternative consumer herself.

15. The Applicant's Investigator concluded, in her FINDINGS, that the Respondent contravened Section 17(3){b} read with Section 17(4) of the CPA, by

15.1 Imposing an unreasonable cancellation charge on the complainant by:

15.1.1 failing to take into account the length of the notice (which was exactly 76 days, or more than two months in this case} provided by the consumer; and

15.1.2 failing to act diligently in an attempt to find an alternative consumer to take the complainant's booking.

15.1.3 The Investigator further concluded that the Respondent's Cancellation Policy contravenes the provisions of the CPA in that it does not require the Respondent to act diligently to attempt to find alternative consumers to take up cancelled bookings.

15.2 The Applicant's Investigator thus made a recommendation that this matter be referred to the National Consumer Tribunal for an appropriate order. Hence, this hearing.

PROVISIONS OF THE CPA

16. Section 17 of the CPA deals with the Consumer's right to cancel advance reservation, booking or order. The relevant provisions we may cite for this case are:

16.1 Subsection 2 reads: Subject to subsections

(3) and (4), a consumer has the right to cancel any advance booking, reservation or order for any goods or services to be supplied.

16.2 Subsection 3 reads: A supplier who makes a commitment to or accepts a reservation to supply goods or services on a later day may-

- (a) require payment of a reasonable deposit in advance; and
- (b) impose a reasonable charge for cancellation of the order or reservation, subject to subsection(5).

16.3 Subsection 4 reads: For the purposes of this section, a charge is unreasonable if it exceeds a fair amount in the circumstance, having regard to -

- (a) the nature of the goods or services that were reserved or booked;
- (b) the length of notice of cancellation provided by the consumer;
- (c) the reasonable potential for the service provider, acting diligently, to find an alternative consumer between the time of receiving the cancellation notice and the time of the cancelled reservation; and
- (d) the general practice of the relevant industry.

16.4 Subsection 5 reads: A supplier may not impose any cancellation fee in respect of a booking, reservation or order if the consumer is unable to honour the booking, reservation or order because of the death or hospitalization of the person for whom, or for whose benefit the booking, reservation, or order was made.

17. It is also important that we also briefly consider both Sections 48 and 49 of the CPA as they do impact on this case.

17.1 Section 48 deals with Unfair, unreasonable or unjust contract terms. Its provisions can be summarised as follows:

17.1.1 A supplier must not offer to supply, supply, or enter into an agreement to supply any goods or services on terms that are unfair, unreasonable or unjust;

17.1.2 A supplier must not require a consumer to waive any rights; assume any obligation; or waive any liability of the supplier, on terms that are unfair, unreasonable or unjust, or impose any such terms as a condition of entering into a transaction.

17.1.3 A term or condition of a transaction or agreement is deemed unfair, unreasonable, or unjust if it is excessively one-sided in favour of any person other than the consumer; or the terms are so adverse to the consumer as to be inequitable.

17.2 Section 49 deals with Notice required for certain terms and conditions. This provision says Any notice to consumers or provision of a consumer agreement that purports to limit in any way the risk or liability of the supplier must be drawn to the attention of the consumer in a manner and form that satisfies the requirements of Section 22 of the Act which guarantees the consumer the Right to information in plain and understandable language.

ASSESSMENT OF EVIDENCE

18. The Respondent did not really challenge any of the assertions by the Complainant about the latter paying for an advance booking as early as ten months before the planned arrival date. The complainant paid in February 2013 for a planned vacation at the end of December 2013.
19. The Respondent simply relied on a standard exclusion clause, in their Cancellation Policy, that there would be a penalty for any kind of cancellation.
20. The Respondent was so reliant on their Cancellation Policy, they did not bother to mitigate their losses when the Complainant cancelled her advance booking at least 76 days in advance.

APPROPRIATE RELIEF

21. The Applicant made the following prayers, that:

21.1 The Respondents' contraventions of Section 17(3) read with Section 17(4) be declared prohibited conduct;

21.2 Directing the Respondent to, within 90 (ninety) days of this order, submit to the Applicant and the Honourable Tribunal a report compiled by an independent auditor, appointed by the Respondent at its own costs,

and which report shall contain the following details:

21.2.1 The details of all consumers, from the 2nd of April 2011 to date of judgement, who have cancelled their advance booking 7 days or more prior to arrival date;

21.2.2 The notice period given by each consumer;

21.2.3 The total amount that the Respondent retained from each consumer;

21.3 Directing the Respondent to refund all consumers mentioned in the report the amounts mentioned therein.

21.4 Any other appropriate order contemplated in section 4{2)(b)(ii).

21.5 It is important that we reproduce some relevant parts of Section 4 of the CPA here, which deals with Realisation of consumer rights:

21.6 Subsection 2 states "In any matter brought before the Tribunal or a court in terms of this Act:

21.6.1 The Tribunal or court, as the case may be, must

21.6.1.1 promote the spirit and purposes of this Act; and

21.6.1.2 make an appropriate order to give effect to the consumer's right of access to redress, including, but not limited to, any order provided for in this Act; and any innovative order that better advances, protects, promotes and assures the realisation by consumers of their rights in terms of this Act.

ANALYSIS

22. The Tribunal finds that the Respondent's decision to impose a Cancellation Charge of 50 percent on the booking fee of R3150 already paid in advance; hence retaining R1575 from the total amount paid is, under the current circumstances, found to have been unreasonable and contrary to the spirit of the Act.

22.1 The Respondent is wrong in asserting that their contract, based on unfair contract terms, remains binding on the Complainant even if it can be proved that the Cancellation Policy constitutes an unfair contract term.

22.2 The 76 days the Complainant gave for cancelling the reservation does, under the current circumstances, constitute a reasonable notice.

22.3 The Respondent did not, under the current circumstances, take any reasonable steps to mitigate their costs, especially against the background that this was high season when there was high demand for low cost accommodation in the hospitality industry.

22.4 The Respondent could not provide any proof that there have been instances, in the past, when they were able to refund their guests in full because they were able to secure an alternative guest to take up the cancelled booking.

22.5 Alternatively, the Respondent failed to provide proof that they did not get alternative guests to book the rooms which had been previously reserved for the guests who later had to cancel their advance bookings.

23 While the Respondent's conduct needs to be measured against the provisions of Section 17 of the CPA; their Cancellation Policy that they relied on is equally found wanting in terms of both Sections 48 and 49 of the CPA.

24 The Respondent did concede that they did not specifically draw to the attention of the Complainant the contentious aspects of their Cancellation Policy, which is in contravention of Section 49 of the Act, read with Section 22 of the Act.

25 While it is clear that the Respondents did not show any remorse for the way in which they unreasonably totally rejected the Complainant's request for all her advance booking money to be refunded, the Tribunal equally acknowledges that to date it cannot be denied that most hospitality entities still apply such unfair, unreasonable, and unjust Cancellation Policy terms as a standard practice.

25.1 The Tribunal will, therefore, have to be very careful in ensuring that while it enforces the consumer's rights in terms of all the relevant legislative provisions cited above, it must also be guided by Section

17(4)(d) that states that the general practice in the relevant industry must also be taken into consideration.

25.2 It will, therefore, be pragmatic to consider the Applicant's prayers in line with Section 4(2)(b) in its entirety.

CONCLUSION

26 Having considered everything above, the Tribunal is satisfied that

26.1 The Respondent did contravene certain provisions of the Act, in terms of Prayer 1.

26.2 While Prayer 2 would have helped the Tribunal in establishing the full extent of the Respondent's contraventions of the CPA, it also needs to be considered that the cost of compliance with the Act, or any other legislation for that matter, should not necessarily lead to the unintended negative effects of pushing first time offenders out of business. It is possible that the total cost of complying with Prayer 2 may just lead to this unintended negative effect.

26.3 If Prayer 2 is not granted, Prayer 3 equally falls away.

26.4 The Tribunal will thus consider any appropriate order that enforces consumer rights, while taking into consideration what is currently acceptable in terms of contractual practices in the hospitality industry.

ORDER

27. Accordingly, the Tribunal makes the following order:

27.1 The Respondent contravened Section 17(3)(b) read with Section 17(4) .

27.2 The Respondent's contraventions of Section 17(3)(b) read with Section 17(4) are found to have constituted prohibited conduct.

27.3 The Respondent's Cancellation Policy and other related policies are subject to the spirit of the CPA, and contractual interpretations in line with Sections 48 and 49 of the CPA read with Section 22 of the

Act.

27.4 The Respondent is ordered to refund the Complainant, Ms Vanessa Pashua, the balance amount of R1575.00, without interest, within thirty (30) days from the date of the Issuing of this Judgement.

27.5 There is no order as to costs.

27.6 The NCC is encouraged to seriously consider having an official Industry-wide Investigation into "The Hospitality Industry Practices that Infringe On the Provisions of the Consumer Protection Act and related Consumer Legislation in South Africa". This may help in reducing the incidence of industry practices that compromise

consumers' rights enshrined in legislation.

DATED ON THIS 24th DAY OF DECEMBER 2016

[signed]

Prof B Dumisa

Judgement Writer & Acting Executive Chairperson of the NCT

Mr F Sibanda (Presiding Member) and Ms L Best (Member) concurring.

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