

SOUTH AFRICA / JUDGMENT

National Consumer Commission v Nu Menu (Pty) Ltd t/a Nu Menu Solutions (NCT/225188/2022/73(2)(b)) [2022] ZANCT 41 (19 July 2022)

[2022] ZANCT 41

COURT

National Consumer Tribunal

BEFORE

D Terblanche, B Dumisa, A Potwana

CASE / FILE NUMBER

NCT/225188/2022/73(2)(b)

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Policy
IN
THE NATIONAL CONSUMER TRIBUNAL
HELD
VIA THE MICROSOFT TEAMS VIDEO AND AUDIO CONFERENCE APPLICATION
CASE
NUMBER: NCT/225188/2022/73(2)(b)
IN

THE MATTER BETWEEN:

THE
NATIONAL CONSUMER COMMISSION
APPLICANT
And
NU
MENU (PTY) LTD T/A NU MENU SOLUTIONS
RESPONDENT
Hearing

Panel: Ms
D Terblanche – Presiding Tribunal Member
Prof
B Dumisa - Tribunal Member
Mr
A Potwana - Tribunal Member
Date

of Hearing: 20
June 2022 via Microsoft teams application

JUDGMENT

AND REASONS

PARTIES

1. The Applicant is the National Consumer Commission (the APPLICANT or the NCC), a regulatory body established by the Consumer Protection Act, 68 of 2008 (the CPA).
2. At the hearing the NCC was represented by Mr L Biyana, a senior legal advisor in the employ of the NCC.
3. The Respondent is NU MENU (PTY) LTD T/A NU MENU SOLUTIONS (the Respondent or Nu Menu).
4. The Respondent did not appear and was not represented at the hearing.

APPLICATION TYPE

5. This is an application in terms of section 73 (2)(b) of the CPA. The NCC alleges that a consumer complained to it. Subsequently, it conducted an investigation and referred the complaint to the Tribunal.

THE CONTRAVENTIONS THE APPLICANT ALLEGES

6. The Applicant alleges that the Respondent contravened the following provisions of the CPA, namely:
 - 6.1. Section 20(2)(d).
 - 6.2. Section 29(a) and (d). The Applicant applied for an amendment to correct the section reference from section 29(d) to section 29(b).
 - 6.3. Section 41(1) (a); 3(b)(i) and (ii).
 - 6.4. Section 41(2)(a) and (3)(a).
 - 6.5. Section 55(2)(a) to (d) and 55(3).

6.6. Section 56(2) (a) and (b).

THE RELIEF THE APPLICANT SEEKS

7. The Applicant applied to the Tribunal for the following orders, namely -

7.1. Declaring the Respondent's contravention of the sections of the CPA in paragraph 6 above prohibited conduct.

7.2. Interdicting the Respondent from engaging in the conduct fully detailed below in contravention of the provisions of the CPA stated in paragraph 6 above.

7.3. Directing the Respondent to refund the consumer the Purchase Price of the Water Desalination System (the system) paid by the consumer in the sum of R 39 900, 00. This amount must be paid with interest in accordance with the Prescribed Rate of Interest Act No. 55 of 1975, from the date on which it was paid to the Respondent to the date of final payment.

7.4. Directing the Respondent to pay the amount mentioned in paragraph 7.3 above within 15 days of the date of

Judgment.

7.5. Directing the Respondent to pay an administrative penalty in the amount of R 1 000 000 (One Million Rands).

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

BRIEF BACKGROUND

8. The consumer's complaint relates to a water desalination system he bought from NuMenu on 28 February 2018 to convert borehole water to his house into drinking water. The system never worked. The consumer produced laboratory reports indicating that the water, purified by the Respondent's water desalination system, was not fit for human consumption.
9. The consumer requested Nu-Menu to take back the faulty system and refund him the purchase price, alternatively to repair the system.
10. The supplier offered to repair the system by 13 April 2018, and if not, to refund the consumer.
11. After noticing that the supplier was not forthcoming in repairing the faulty system or refunding him the purchase price, the consumer approached the Western Cape Consumer Affairs Office for assistance.
12. The Western Cape Consumer Affairs Office attempted to mediate the consumer's complaint. The complaint was, however, not resolved as the Respondent did not honour the undertaking its sole director, Gary Ernstzen (Ernstzen), made on its behalf on 11 October 2018.

13. Following the failed mediation, the consumer complained to the Applicant with the same demands, i.e., that the Respondent collects its faulty system and refunds him the purchase price.
14. The Applicant investigated the consumer's complaint and referred this application to the Tribunal for adjudication.

HEARING OF THE APPLICATION ON A DEFAULT BASIS

15. The Applicant served its application on the Respondent on 3 March 2022. The date by which the Respondent had to file its answering affidavit opposing the application expired on 25 March 2022. The Respondent failed to deliver a response by the due date. The Applicant applied for a default order against the Respondent on 5 May 2022 under Rule 25(2)[1] of the Tribunal Rules.
16. Rule 25(3) of the Tribunal Rules provides that:
“(3) The Tribunal may make a default order-
 - (a) after it has considered or heard any necessary evidence; and
 - (b) if it is satisfied that the application documents were adequately served.”
17. Based on the information provided, the Tribunal is satisfied that the application documents and the notice of set down were adequately served. The matter, therefore, proceeded on a default basis in the absence of the Respondent.

APPLICANT'S SUBMISSIONS IN RESPECT OF THE ALLEGED CONTRAVENTIONS

18. According to the investigation report attached to the Applicant's founding affidavit:
 - 18.1. There is no dispute that the consumer purchased AP300 brackish water system from the supplier on 21 February 2018. The consumer provided copies of the proof of payments.
 - 18.2. The test results of the samples taken from the consumer's premises indicated that the water was not fit for human consumption.
 - 18.3. The supplier initially undertook to resolve the matter or take back the unit and refund the complainant.
 - 18.4. On 11 October 2018, Ernstzen undertook to rectify the fault by repairing the dysfunctional unit within 30 days. That was not done.
 - 18.5. The supplier changed his attitude, disputed the test results, refused to take back the unit, and refund the consumer the Purchase price paid thereof.
 - 18.6. In its proposal to the consumer, the supplier made the following representations:
 - 18.6.1. They are the manufacturers of the unit;

18.6.2. It was very clear from the beginning of the engagement between the supplier and the consumer before the purchase of the product under investigation that the consumer informed the supplier about the nature of the water to be treated. Therefore, it cannot be correct when the system was no longer performing the way it was marketed, and the supplier is blaming the consumer for not indicating whether the water was salty or not.

18.6.3. The device/unit is not SABS-approved.

CONTRAVENTION OF SECTION 20(2)(d)

19. Section 20(2)(d) provides as follows:

“(2) Subject to subsections (3) to (6), the consumer may return goods to the supplier and receive a full refund of any consideration paid for those goods if the supplier has delivered— (a)

(b)

(c)

(d) goods intended to satisfy a particular purpose communicated to the supplier as contemplated in section 55(3), and within 10 business days after delivery to the consumer, the goods have been found to be unsuitable for that particular purpose.

20. As is fully detailed in the Investigation report, the system was marketed as purifying 1900 litres of brackish water per day into drinkable water.

21. The consumer informed the supplier that he needs 750 litres of purified water per day.

22. As is more fully detailed in the Investigation report and within 10 days of installation thereof, the complainant realized that the system was failing to convert borehole/brackish water into drinkable water. According to the consumer, the product was installed on 04 April 2018, and, as of 13 April 2018, there was already an issue with

the product because:

22.1. The system failed to satisfy the purpose for which it was purchased.

22.2. The laboratory reports indicated that the water, after having been purified by the same system, was not fit for human consumption.

22.3. Despite the complainant advising the Respondent of the failure of the system, the supplier refused to remove and fetch the system.

23. This is a contravention of Section 20(2)(d) of the CPA.

CONTRAVENTION OF SECTION 29(a) and (b)

24. Section 29(a) and (b) provides as follows:

“A producer, importer, distributor, retailer or service provider must not market any goods or services—

- (a) in a manner that is reasonably likely to imply a false or misleading representation concerning those goods or services, as contemplated in section 41; or
- (b) in a manner that is misleading, fraudulent or deceptive in any way, including in respect of—
 - (i) the nature, properties, advantages or uses of the goods or services; ...”
- 25. As is fully detailed in the Investigation report, the Respondent marketed the system as converting borehole/brackish water into drinkable water.
- 26. The system failed to convert borehole/ brackish water into drinkable water.
- 27. In this respect, the Respondent’s marketing is misleading, fraudulent and deceptive in respect of the nature and use of the system.
- 28. This is a contravention of Section 29(a) and (b) of the CPA.

CONTRAVENTIONS OF SECTION 41(1) (a) and (b); 41(2)(a); and 41(3) (a), (b) (i) & (ii)

29. Section 41(1) to 41(3)(b) provide as follows:

“(1) In relation to the marketing of any goods or services, the supplier must not, by words or conduct—

- (a) directly or indirectly express or imply a false, misleading, or deceptive representation concerning a material fact to a consumer; use exaggeration, innuendo or ambiguity as to a material fact, or fail to disclose a material fact if that failure amounts to a deception; or
 - (b) fail to correct an apparent misapprehension on the part of a consumer, amounting to a false, misleading, or deceptive representation, or permit or require any other person to do so on behalf of the supplier.
- (2) A person acting on behalf of a supplier of any goods or services must not—
- (a) falsely represent that the person has any sponsorship, approval, or affiliation; or
 - (b) engage in any conduct that the supplier is prohibited from engaging in under subsection (1).
- (3) Without limiting the generality of subsections (1) and (2), it is a false, misleading or deceptive representation to falsely state or imply, or fail to correct an apparent misapprehension on the part of a consumer to the effect, that— (a) the supplier of any goods or services has any particular status, affiliation, connection, sponsorship or approval that they do not have;
- (b) any goods or services—
 - (i) have ingredients, performance characteristics, accessories, uses, benefits, qualities, sponsorship or approval that they do not have;
 - (ii) are of a particular standard, quality, grade, style or model; ...”

30. As is more fully detailed in the Investigation report, the Respondent falsely implied that they are the manufacturers of the system. This is a contravention of Section 41(2)(a) and (3)(a) of the CPA.

31. The supplier admitted during the Investigation that they are not the manufacturers of the product and that when a client places an order, they will purchase directly from their supplier.

32. The Respondent expressed a false, misleading, and deceptive representation that led the consumer to believe that the system will purify brackish water into drinkable water.

33. This is a contravention of Section 41(1) (a); 41(3) (b) (i) and (ii) of the CPA.

CONTRAVENTIONS OF SECTION 55(2)(a) to (d); and 55(3)

34. Section 55(2)(a) to (d) and (3)(a) and (b) provide as follows:

“(2) Except to the extent contemplated in subsection (6), every consumer has a right to receive goods that—

- (a) are reasonably suitable for the purposes for which they are generally intended;
 - (b) are of good quality, in good working order, and free of any defects; (c) will be useable and durable for a reasonable period of time, having regard to the use to which they would normally be put and to all the surrounding circumstances of their supply; and
 - (d) comply with any applicable standards set under the Standards Act, 1993 (Act No. 29 of 1993), or any other public regulation.
- (3) In addition to the right set out in subsection (2)(a), if a consumer has specifically informed the supplier of the particular purpose for which the consumer wishes to acquire any goods, or the use to which the consumer intends to apply those goods and the supplier —
- (a) ordinarily offers to supply such goods; or
 - (b) acts in a manner consistent with being knowledgeable about the use of those goods, the consumer has a right to expect that the goods are reasonably suitable for the specific purpose that the consumer has indicated.”

35. As is fully detailed in the Investigation report, within six months after the delivery of any goods to the consumer the system failed to satisfy the requirements and standards contemplated in section 55 because:

35.1. The product was Purchased for the sole purpose of converting 750 litres of Borehole Water per day into drinking water.

35.2. As is clear from the report from Integral Solutions, the product produced water that falls outside of specifications and required limits as reflected by both the current South African Potable Water Legislation - SNS 241 and was not fit for human consumption.

36. By supplying the consumer with the system that failed to meet the requirements and standards contemplated in Section 55 of the CPA, the Respondent is in contravention of Section 55(2)(a) to (d) and 55 (3) of the CPA.

CONTRAVENTION OF SECTION 56 (2)

37. Section 56(2) provides as follows:

“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 section 55, and the supplier must, at the direction of the consumer, either—

- (a) Repair or replace the failed, unsafe or defective goods; or
- (b) Refund to the consumer the price paid by the consumer, for the goods.”

38. As fully detailed in the investigation report, and despite the consumer’s direction and undertaking by the respondent, the Respondent failed to repair and/or refund the consumer the purchase price paid by the latter for the system.

39. In this regard, the Respondent has contravened Section 56 (2) (a) and
- (b) of the CPA.

SECTION 116

40. Section 116 of the CPA provides:

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

- (a) the act or omission that is the cause of the complaint; or
- (b) in the case of a course of conduct or continuing practice, the date that the conduct or practice ceased.

(2) A complaint in terms of this Act may not be referred to the Tribunal or to a consumer court in terms of this Act, against any person that is, or has been, a respondent in proceedings under another section of this Act relating substantially to the same conduct.”

41. The supplier refused to collect the product from the consumer’s premises and to refund the consumer the purchase price paid.
42. The refusal to refund by the supplier constitutes continuing conduct that continues.

43. In the email dated 05 June 2019 to the Inspector, the supplier insists that the product works as intended.
44. As of 05 June 2019, the supplier continued to express a false, misleading or deceptive representation concerning the performance characteristics of the product.

CONSIDERATION OF THE EVIDENCE

45. The Respondent did not file an answering affidavit to the application.
46. Rule 13(5) of the Tribunal Rules provides as follows:

“Any fact or allegation in the application or referral not specifically denied or admitted in the answering affidavit, will be deemed to have been admitted.”
47. In the absence of an answering affidavit filed by the Respondent, the Applicant’s application and the allegations contained therein are deemed to be admitted.
48. This is not the end of the enquiry by the Tribunal. The Tribunal must satisfy itself that the evidence the Applicant placed before the Tribunal supports a finding that the Respondent contravened the provisions of the CPA as alleged by the Applicant.
49. The evidence before the Tribunal consists of the founding affidavit by the Applicant, the investigation report by the investigator, various WhatsApp messages, and the laboratory reports.
50. After considering the evidence the Tribunal concludes that:
 - 50.1. The consumer purchased an AP300 brackish water system from the supplier on 21 February 2018, according to the copies of the proof of the payments the consumer provided to the Investigator.
 - 50.2. The laboratory test results of the sample of the water taken from the consumer’s premises indicated that the water was fit for human consumption.
 - 50.3. The supplier undertook on two occasions to take back the unit and refund the complainant the purchase price. On 11 October 2018, the Respondent’s sole Director undertook to rectify the fault by repairing the dysfunctional unit within 30 days. The Respondent honoured neither undertaking. The issue was never resolved. However, the supplier changed his attitude, disputed the test results, refused to take back the unit, and refund the consumer the purchase price paid thereof.
 - 50.4. The proposal by the supplier for the Brackish Borehole Solution makes the following representations:
 - 50.4.1. They are the manufacturers of the unit.

50.4.2. It was very clear from the beginning of the engagement between the supplier and the consumer prior to the purchase of the product under investigation, that the consumer informed the supplier about the nature of the water to be treated. Therefore, it cannot be correct when the system was no longer performing the way it was marketed and the supplier is putting a blame on the consumer for not indicating whether the water was salty or not.

50.4.3. The device/unit is not SABS-approved.

PRESCRIPTION

51. The consumer purchased the system on 28 February 2018. The Applicant filed this application with the Tribunal on 19 April 2022, more than three (3) years after the purchase date. It is evident to the Tribunal that the Respondent's conduct, namely its refusal to repair the defective desalination system, alternatively, to take back the faulty system and refund the consumer with the purchase price, continues to this day. The consumer's complaint thus resorts to section 116(1)(b) of the CPA. It provides that:

- (1) A complaint in terms of this Act may not be referred or made to the Tribunal or to a Consumer Court more than three years after—
- (b) in the case of a course of conduct or continuing practice, the date that the conduct or practice ceased.”

(Emphasis added)

CONCLUSION REGARDING CONTRAVENTIONS OF THE CPA

52. After having considered the evidence before it, the Tribunal finds that the Respondent contravened the sections of the CPA as alleged by the Applicant and detailed in paragraph 6 above. The contraventions constitute prohibited conduct.

CONSIDERATION OF AN APPROPRIATE ORDER

53. The NCC has requested that the Tribunal impose an order on the Respondent, including the imposition of an administrative fine of R1m (one million Rands). The NCC has submitted argument on the factors listed in section 112(3) of the CPA that the Tribunal must consider. These are set out immediately below.

THE NATURE, DURATION, GRAVITY, AND EXTENT OF CONTRAVENTIONS

- 54. The Respondent's conduct not only contravenes the CPA but is deliberately designed to circumvent the provisions of and defeat the purpose of the CPA which, inter-alia, is to promote and advance the social and economic welfare of consumers in South Africa and to promote fair business practices.
- 55. The Respondent's conduct denies consumers their rights to choose, fair and responsible marketing, fair and honest dealing, fair value, good quality, and safety.

THE LOSS SUFFERED BY CONSUMERS

56. The Complainant in this matter purchased the product for R 39 900,00 and the product never worked for a single day.
57. The Respondent, at some stage, agreed to refund the consumer if the product did not work. However, the Respondent changed its attitude and refused to effect the refund, despite the evidence that the product produced water that is not fit for human consumption.

BEHAVIOR OF THE RESPONDENT

58. This is a case where the Respondent intentionally and knowingly contravened the law.

The Respondent's degree of blameworthiness is commensurate with the devastating effects of its actions.

59. The Respondent does not want to acknowledge any responsibility imposed in terms of the CPA. The Respondent's conduct constitutes a wanton disregard for the CPA and the rights of consumers.

MARKET CIRCUMSTANCES

60. The contraventions occurred and continue to occur at a time when the CPA was and still is in operation. The CPA seeks to promote and advance the social and economic welfare of consumers in South Africa by promoting fair business practices and protecting consumers from unconscionable, unfair, unreasonable, unjust or otherwise improper

trade practices, deceptive, misleading, unfair or fraudulent conduct.

THE LEVEL OF PROFIT THE RESPONDENT DERIVED

61. It is not known what the Respondent's profit for the sale of the product was.

CO-OPERATION BY RESPONDENT

62. Whilst the Respondent initially co-operated with the Inspector during the investigation, the Respondent later refused to co-operate.

PREVIOUS FINDING

63. The Respondent has not been found in contravention of the CPA prior to this matter.

CONCLUSION

64. In the light of the lengths to which the consumer had to go to get redress against the Respondent for the Respondent's unlawful actions, the harm the consumer suffered and the seriousness of the Respondent's contraventions, the Tribunal regards the imposition of an administrative fine as appropriate and justified.

65. The only mitigating factor is that the Respondent is a first offender. However, the seriousness of the contraventions and the manner with which they were carried out outweighs this fact.
66. An administrative fine of R 50 000,00 (Fifty thousand Rands) is appropriate under the circumstances.

ORDER

67. The Tribunal makes the following order, namely:

67.1. Declaring the Respondent's contravention of the following sections as prohibited conduct:

67.1.1. Section 20(2)(d);

67.1.2. Section 29(a) and (b);

67.1.3. Section 41 (1) (a); 41(3)(b) (i) and (ii); 41(2)(a) and 41 (3)(a);

67.1.4. 55(2)(a) to (d)

67.1.5. Section 55 (3); and

67.1.6. Section 56 (2) (a) and (b).

67.2. Interdicts the Respondent from engaging in prohibited conduct.

67.3. Directing the Respondent to refund the consumer the purchase price paid by the consumer for the purchase of the product in the sum of R 39 900,00 and together with interest at the prescribed rate of interest from 20 February 2018 to the date of payment;

67.4. Directing the Respondent to pay the amounts mentioned in paragraph 67.3 above within 15 (fifteen) days of the date of the issuing of this Judgment and Order.

67.5. Directing the Respondent to pay an administrative fine in the sum of R 50 000,00 (fifty thousand Rands) as contemplated in section 112(2) of the CPA into the National Revenue Fund referred to in section 213 of the Constitution of the Republic of South Africa, 1996, within 60 days of the issue of this judgment. The National Revenue Fund Bank account details are:

Bank:

Standard Bank of South Africa

Account name:

Department of Trade and Industry

Account number:

[...]

Account type:

Business current account

Branch code:

010645 (Sunnyside)

Branch code

for electronic payments: 051001

Reference:

NCT/225188/2022/73(2)(b)

(Name of depositor); and

Dated on 19th day of July 2022.

Ms D Terblanche

Presiding Tribunal Member

Mr Potwana (Tribunal Member) and Prof Dumisa (Tribunal Member) concur.

- [1] “An Applicant may make application by way of form TL.r25(2) for purposes of obtaining a default order, if no response to the application was filed within the time stated in the application.”

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