

SOUTH AFRICA / JUDGMENT

National Home Builders Registration Council v National Consumer Commission (NCT/3923/2012/101(1))P)CPA) [2013] ZANCT 8 (15 April 2013)

[2013] ZANCT 8

COURT

National Consumer Tribunal

BEFORE

B Dumisa, T Woker, P Beck

CASE / FILE NUMBER

NCT/3923/2012/101(1))P)CPA

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE NATIONAL CONSUMER TRIBUNAL

HELD AT CENTURION

Case No: NCT/3923/2012/101(1))P)CPA

DATE:15/04/2013

In the matter between:

NATIONAL HOME BUILDERS REGISTRATION COUNCIL.....Applicant

and

THE NATIONAL CONSUMER COMMISSION.....Respondent

CORAM:

PROF B DUMISA (PRESIDING)

PROF T WOKER (MEMBER)

MS P BECK (MEMBER)

Date of hearing: 22 February 2013

JUDGMENT AND

REASONS

INTRODUCTION

The Applicant is National Home Builders Registration Council (“the Applicant”) a juristic person established in terms of section 2 of the Housing Consumer Protection Measures Act, 95 of 1988 (the HCPMA).

The Respondent is the National Consumer Commission (“the Respondent”), an organ of state within the public administration established in terms of Section 85 of the Consumer Protection Act 68 of 2008, (“CPA” or “the Act”).

The Applicant brought an application to the National Consumer Tribunal (“the Tribunal”) to have a compliance notice issued against it by the Respondent, reviewed and cancelled in terms of section 101(1) of the CPA. The Tribunal has jurisdiction to hear this matter in terms of section 101(1) of the CPA. This section provides that a person issued with a compliance notice in terms of section 100 may apply to the Tribunal in the prescribed manner and form for its review. This judgment is based on written submissions of the parties.

BACKGROUND

The primary mandate of the Applicant is to regulate the home building industry by providing warranty protection against defects in new homes to protect the interests of housing consumers.

It fulfils its mandate through the registration of home builders, enrolment of homes, inspection during construction, requiring the home builder to rectify certain defects, alternatively pay for rectification of such defects from the warranty fund of the Applicant.

Section 10 of the HCPMA requires a home builder to register with the Applicant before carrying on the business of a home builder. In addition, Section 14 of the HCPMA requires the enrolment of a home with the Applicant by the home builder prior to the commencement of the construction thereof.

The Applicant also has a duty to appoint inspectors in terms of Section 6 read with Section 19(1) of the HCPMA in order to ensure that home builders comply with the Applicant’s technical requirements as provided for in Section 12(1) of the HCPMA. If such inspection reveals non-compliance with the technical requirements, the Applicant is required to issue a notice of non-compliance against the home builder and instruct such home builder to rectify the non-compliance within a set period.

The relevant property was enrolled with the Applicant by Fezekisa Construction (Pty) Ltd (“the Home Builder”) and was being constructed by the same builder during site inspections.

The Complainant, Mr. B.A. Polmaritis (“the Complainant”) states that he contracted another home builder, N2H, to rectify certain defects to the property and that this builder was registered with the Applicant. The Applicant however submits that it does not have any knowledge of such a second home builder and that it was not notified of such details as is required by Section 14(7) of the HCPMA.

THE FACTS

The Complainant registered as a member of the Applicant in order to insure any risk relating to structural defects that may arise during the completion of his property. A fee of R21 000.00 was paid by the Complainant to the Applicant in order to secure such registration.

During the building process, N2H became insolvent and as a result was unable to complete the Complainant’s house. The Complainant avers (in the compliance notice) that the Applicant was made aware of the structural defects but that unfortunately, due to the insolvency and subsequent liquidation of N2H, the Complainant could only approach the Applicant for compensation because N2H failed to rectify structural defects to his house and to complete the construction.

On or about April 2011, the Complainant summonsed the Applicant Inspector to the construction site to inspect what the Complainant considered to be a structural defect. The Applicant’s inspector however found that even though a certain concrete beam was built in the wrong position, it was not a structural defect as the beam was nonetheless constructed correctly. The Applicant accordingly did not issue a notice of non-compliance.

The Complainant subsequently lodged a complaint with the Respondent, and, according to the compliance notice, such complaint was forwarded to the Applicant on 16 May 2011. The Applicant was granted a period of 7 days to respond to the complaint but failed to do so.

The matter was set down for conciliation on the 22nd of August 2011 and the conciliation was attended by the Applicant, but the matter was not resolved at the conciliation. The Respondent accordingly proceeded to issue a compliance notice dated 30 January 2012, which was delivered to the Applicant on 13 February 2012.

CONDONATION

The application in terms of Section 101(1) of the CPA was filed with the Tribunal on 08 March 2012, therefore outside the 15 day period allowed in terms of the CPA.

The Applicant applied for condonation for the late filing. Such an application may be brought for an order to:

Condone the late filing of a document or application;

Extend or reduce the time allowed for filing or serving;

Condone the non-payment of a fee; or

Condone any other departure from the rules or procedures¹

In accordance with the Rules of the Tribunal (“the Rules”)² a party may apply for condonation of the late filing of an application, papers or any other document or non-compliance with the

Rules of the Tribunal (“the Rules”)³.

The Tribunal may grant such an order on good cause shown.

It is submitted that the Applicant has provided the Tribunal with a proper explanation for the delay in filing the application. Furthermore, the delay is not excessive and accordingly the application is granted.

ISSUE TO BE DECIDED

The issue which the Tribunal must decide is whether the compliance notice was issued in accordance with law.

In doing so the Tribunal must decide whether it is competent for one regulator to issue a compliance notice to another regulator acting in accordance with its own enabling provisions of its founding parliamentary legislation.

ALLEGED CONTRAVENTIONS BY THE APPLICANT

The Respondent alleges that the conduct of the Applicant amounts to contravention of Schedule 2 Item 8(1), Section 54(1)(b) and 54(2)(a) of the Consumer Protection Act, 68 of 2008 which states that;

Schedule 2 item (8) provides that;

Despite the repeal of the repealed laws, for a period of three years after the general effective date the Commission may exercise any power in terms of any such repealed law to investigate any breach of that law that occurred during the period of three years immediately before the general effective date. In exercising authority under subitem (1), the Commission must conduct an investigation as if it were proceeding with a complaint in terms of the Act.

Consumer’s rights to demand quality service

54. (1) When a supplier undertakes to perform any services for or on behalf of a consumer, the consumer has a right to—
 - (b) the performance of the services in a manner and quality that persons are generally entitled to expect;
- (2) If a supplier fails to perform a service to the standards contemplated in subsection (1), the consumer may require the supplier to either—
 - (a) remedy any defect in the quality of the services performed

APPLICANT’S GROUNDS FOR REVIEW

The Applicant, a Regulator, submitted to the Tribunal that it acted in accordance with its own founding legislation. The Applicant sets out the relevant sections of its founding legislation, the HCPMA, and explains that it acted in accordance with such provisions. It relies specifically on the following provisions of the HCPMA:

Section 10 dealing with the registration of Home Builders

Section 14 dealing with the enrolment of homes, enrolment fees and the cancellation or suspension of enrolment

Section 6 read with Section 19(1) dealing with the duty to appoint inspectors

Section 13 dealing with the duty of home builders Section 17 dealing with structural defects to be rectified by the Applicant

The Applicant submits that the Complainant's complaint does not fall within the provisions of Section 13(2)(b) of the HCPMA as it did not occur and or manifest after the occupation date.

The Applicant submits that it is not an insurer and did not receive any premiums.

The Applicant submits that, in light of the facts and the prescripts to the HCPMA, the Applicant is under no obligation to refund enrolment fees to any person and that the compliance notice places the Applicant in an impossible position contrary to the Applicant's powers or authority in terms of its legislative framework

APPLICATION OF THE LAW TO THE FACTS

The central issue the Tribunal must decide is whether the compliance notice was issued in accordance with law.

Section 100 of the CPA provides that after concluding an investigation into a complaint, the Respondent may issue a compliance notice in the prescribed form to a person or association of persons whom it on reasonable grounds believes has engaged in prohibited conduct.

In the compliance notice the Respondent merely lists the provisions of the Act it alleges were not complied with by the Applicant for instance the provisions of schedule 2 item (8) which is an empowering provision giving the Respondent the power to investigate breaches of certain laws, notwithstanding the fact that those laws have been repealed.

It was not necessary to rely on a transitional provision because the complaint relates to conduct that arose as a result of decision made by the Applicant in terms of legislative provision that is still binding on the Applicant. What is blatantly apparent is that there was an

oversight on the part of the Respondent in that it did not take into consideration the provisions of any other legislation or the by-laws which may impact on the practice.⁴

The Respondent should have identified which section of which repealed Act it was relying upon and set out the details regarding how the Applicant had contravened the provisions of that section. In the case in casu it was not possible for the Applicant to contravene this section since it was acting in terms of a current binding legislation. Therefore there was no illegality on the conduct of the Applicant as alleged by the Respondent since it acted in terms of its enabling legislation.

It stands to reason then that the allegation of prohibited conduct on the part of the Applicant is illogical as there was no basis for the Respondent to issue a compliance notice. The CPA specifically makes provision for situations where the Act and other legislation govern a particular practice. Section 2 (9) provides that if there is any inconsistency between any provision of this Act and a provision of any other Act, the provisions of both Acts apply concurrently to the extent that it is possible for both Acts to apply. Where it is not possible for both Acts to apply, then the provision which extends the greater protection to a consumer prevails.

Further, section 97 of the CPA provides for the following instances where other regulatory authorities are involved that;

The Commission may—

(1) (a) liaise with any provincial consumer protection authority or other regulatory authority on matters of common interest and, without limiting the generality of this power, may monitor, require necessary information from, exchange information with, and receive information from, any such authority pertaining to—

(i) matters of common interest; or

(ii) a specific complaint or investigation;

(b) negotiate agreements with any regulatory authority—

to co-ordinate and harmonise the exercise of jurisdiction over consumer matters within the relevant industry sector; and

(ii) to ensure the consistent application of the principles of this Act;

(c) participate in the proceedings of any regulatory authority; and

(d) advise, or receive advice from, any regulatory authority.

(2) A regulatory authority that, in terms of any public regulation, exercises jurisdiction over consumer matters within a particular

industry or sector may—

(a) negotiate agreements with the Commission, as anticipated in subsection (1)(b); and

(b) exercise its jurisdiction by way of such an agreement in respect of a particular matter within its jurisdiction.

It would appear that the Respondent never liaised with the Applicant nor took into consideration the fact that, it was issuing a compliance notice to a regulator established in terms of the HCPMA. It is trite law as it has also been established in numerous courts and applied in Tribunal cases⁵ that the actions of the Respondent qualifies as administrative action and as such whenever the Respondent serves a compliance

notice their conduct must be lawful, reasonable and procedurally fair.

In the Supreme Court of Appeal decision of *DA v EThekweni Municipality*⁶ the Court held (at 160D) that, “a fundamental principal derived from the rule of law itself, is that the exercise of all public power, be it legislative, executive or administrative is only legitimate when it is lawful. This tenet of constitutional law which admits no exception has become known as the principle of legality” (Per Brand JA). The principle of legality requires that decisions must satisfy all legal requirements and procedures and should not be arbitrary or irrational”.

Therefore it stands to be reason that the Applicant acted ultra vires in issuing a notice to a regulator who acted in terms of its own founding legislation and the mandate derived from it. It follows that it stands to be reasoned that there was no illegality (prohibited conduct) on the part of the Applicant, a regulator acting in terms of an enabling provision of its founding parliamentary legislation and therefore the compliance notice must be set aside.

The establishment of the Commission is set out in section 85 of the CPA as follows:

“85 Establishment of National Consumer Commission

- (1) The National Consumer Commission is hereby established as an organ of state within the public administration, but as an institution outside the public service.
- (2) The Commission –
 - (a) has jurisdiction throughout the Republic;
 - (b) is a juristic person;
 - (c) must exercise the functions assigned to it in terms of this Act or any other law, or by the Minister, in-
 - (i) the most cost-efficient and effective manner; and
 - (ii) in accordance with the values and principles mentioned in section 195 of the Constitution.”

Section 92 of the CPA contains general provisions concerning the National Consumer Commissions functions as follows:

92 General provisions concerning Commission functions

- (1) The Commission is responsible to carry out the functions and exercise the powers assigned to it by or in terms of this Act or any other national legislation.

- (2) In carrying out its functions, the Commission may-
 - (a) have regard to international developments in the field of consumer protection; or
 - (b) consult any person, organisation or institution with regard to any matter relating to consumer protection.
- (3) In respect to a particular matter within its jurisdiction or responsibility, the Commission may exercise its responsibility by way of an agreement contemplated in section 97 (1) (b).
- (4) The Minister must prescribe at least two official language to be used by the Commission in any documents it is required to deliver in terms of this Act, for all or any part of the Republic, to give maximum effect to the requirements set out in section 6 (3) and (4) of the Constitution.”

The enforcement functions of the Respondent are contained in section 99 of the CPA:

“99 Enforcement functions of the Commission

The Commission is responsible to enforce this Act by-

- (a) Promoting informal resolution of any dispute arising in terms of this Act between a consumer and a supplier, but is not responsible to intervene in or directly adjudicate any such dispute;
- (b) Receiving complaints concerning alleged prohibited conduct or offences, and dealing with those complaints in accordance with Part B of Chapter 3 ;
- (c) monitoring-
 - (i) The consumer market to ensure that prohibited conduct and offences are prevented, or detected and prosecuted; and
 - (ii) The effectiveness of accredited consumer groups, industry codes and alternative dispute resolution schemes, service delivery to consumers by organs of state, and any regulatory authority exercising jurisdiction over consumer matters within a particular industry or sector;
- (d) Investigating and evaluating alleged prohibited conduct and offences;
- (e) Issuing and enforcing compliance notices;
- (f) Negotiating and concluding undertakings and consent orders contemplated in section 74;
- (g) Referring to the Competition Commission any concerns regarding market share, anti-competitive behaviour or conduct that may be prohibited in terms of the Competition Act, 1998 (Act 89 of 1998);
- (h) Referring matters to the Tribunal, and appearing before the Tribunal, as permitted or required by this Act; and

- (i) Referring alleged offences in terms of this Act to the National Prosecuting Authority.”

In terms of section 92(1) the Respondent is responsible to carry out the functions and exercise the powers assigned to it by or in terms of the CPA (or any other national legislation). Thus the Respondent is only empowered to act in terms of the provisions of the CPA or other specific legislation. In terms of Section 99 (b), the Respondent is responsible to enforce the CPA by receiving complaints concerning alleged prohibited conduct or offences and then dealing with these complaints in accordance with Part B of Chapter 3.

The CPA defines prohibited conduct in Section 1 as “an act or omission in contravention with this Act”.

It is therefore clear that the Respondent is tasked with investigating complaints relating to contraventions of the CPA. The Respondent may not proceed outside the boundaries laid down in the CPA, as this will result in ultra vires action.

The term ultra vires means “beyond the power”. This phrase is used for acts which purport to be done by virtue of a certain authority, but which are really in excess of such authority, or for acts which are otherwise unauthorised.

The ultra vires-doctrine is tied to constitutional fundamentals associated with the Westminster system: the separation of powers, parliamentary

sovereignty and the rule of law. Its essence is that the legislature, in conferring powers (vires) on administrators, sets

statutory boundaries for the exercise of those powers. The legislature is the supreme law-maker, while the function of the courts is to apply the law made by it. The courts are thus required to see that the intention of the legislature is carried out, and

that administrators act intra vires – that they remain within the boundaries of the powers granted to them.⁷

Innes CJ⁸ described this common-law review power as follows:

“Whenever a public body has a duty imposed on it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of this duty, this Court may be asked to review the proceedings complained of and set aside or correct them. This is no special machinery created by the Legislature; it is a right inherent in the court”

In *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa*⁹, where near-legislative action was in issue, it demanded that the exercise of public power should not be arbitrary or irrational.

Chaskalson P said:

“It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.”

For all of reasons set out above the Tribunal concludes that:

The Respondent did not have a reasonable belief that the applicant was engaged in prohibited conduct;

The compliance notice was issued to the incorrect party;

The compliance notice was issued for a reason not authorised in terms of the Act;

The Applicant is a Regulatory Authority which acted in accordance with its legislative mandate and accordingly did not engage in any prohibited conduct and

The issuing of the compliance notice was not lawful, reasonable or procedurally fair.

ORDER

The Compliance notice issued against the Applicant is cancelled.

No order as to costs is made.

DATED ON THIS 15TH DAY OF APRIL 2013.

[signed]

P A BECK

MEMBER

Prof T Woker (Member) and Prof B Dumisa (Presiding Member) concurring

1 Rule 34(1) of the Rules

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 GN789 in GG30225 of 28 August 2007 as amended by GenN428 in GG34405 OF 29 June 2011

3 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 GN789 in GG30225 of 28 August 2007 as amended by GenN428 in GG34405 OF 29 June 2011

4Section 2 of the Housing Consumers Protection Measures Act, 95 of 1998

5 DA v Ethekwini Municipality 2012

(2) SA 151 (SCA); City of Johannesburg vs National Consumer Commission NCT/2667/2011/101(1) (P) and NCT/2081/2011/101(1)(P).

6 2012

(2) SA 151 (SCA).

7 Administrative Law in South Africa, Cora Hoexter, Juta 2007 at 111

8 In Johannesburg Consolidated Investment Co v Johannesburg Town Council 1903 TS 111 at 116

9

[2000] ZACC 1; 2000

(2) SA 674 (CC)

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZANCT/2013/8.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/national-home-builders-registration-council-v-national-unknown-topic-anct-2013>

Prepared on 12 October 2026 · Esheria