

SOUTH AFRICA / JUDGMENT

Norris v Velox Auctioneers (Pty) Ltd (NCT/127046/2019/75(1)(b)) [2019] ZANCT 106 (14 July 2019) [2019] ZANCT 106

COURT

National Consumer Tribunal

BEFORE

B Dumisa

CASE / FILE NUMBER

NCT/127046/2019/75(1)(b)

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IN

THE NATIONAL CONSUMER TRIBUNAL

HELD

IN CENTURION

Case

number: NCT/127046/2019/75(1)(b)

In

the matter between:

GAVIN

NORRIS APPLICANT

and

VELOX

AUCTIONEERS (PTY)

LTD RESPONDENT

Coram: Prof
B Dumisa
–
Presiding
member
Date
of Hearing
–
09 July 2019
Date
of Judgement –
14 July 2019

JUDGMENT

AND REASONS

APPLICANT

1. The Applicant in this matter is GAVIN NORRIS, who resides at [...] Street, Somerset West, in the Western Cape Province (“the Applicant”). He represented himself at the hearing.

RESPONDENT

2. The Respondent is VELOX AUCTIONEERS (PTY) LTD, a registered company, with registration number 2015/055138/070, which carries business from 13 Killarney Avenue, Killarney Gardens, Cape Town, in the Western Cape Province (“the Respondent”).

APPLICATION TYPE

3. This is an application in terms of Section 75(1)(b) of the National Credit Act 34 of 2005 (“the NCA”) and the Consumer Protection Act 68 of 2008 (“the CPA”).

BACKGROUND

4. The Applicant entered into an Auction agreement with the Respondent, where the Respondent is alleged not to have fulfilled their side of the deal:

4.1 The Applicant was previously involved in fruit juice production, and used some small fridges in that operation. He later pulled out of that business, and decided to sell 19 of those small fridges via Gumtree.

4.2 The Applicant was then allegedly contacted by an employee of the Respondent who promised that he would be able to sell all the fridge units at a better price than the price the Applicant expected on gumtree.

4.3 The Respondent collected the fridges on 11 June 2018, according to the receipt issued by the Respondent:

4.3.1 There were 19 fridges collected, 14 of which were classified as “good” and 5 classified as “fair”;

4.3.2 The Reserve Price was set at R1100 on the date of collection, and later changed to R950 on 04 July 2018;

4.3.3 “The Auctioneer acts only as the agent between the seller and the buyer and no claims can be made against them in this regard”;

4.3.4 “The Auctioneer reserves the right to charge 10% commission based on the reserve price of any goods not sold”;

4.3.5 The receipt indicated the commission to be paid as 20%, which was hand altered from what appeared to be 10%; and

4.3.6 The receipt indicated that the seller was supposed to be paid by electronic funds transfer (EFT) after 30 working days after successful sale of the goods.

4.4 On 8 August 2018, the Respondent contacted the Applicant, via email, to state that nine fridges had been sold for an average price of R533.33 inclusive of commission and VAT, meaning they were each sold at least at R416.00 less than the agreed revised reserve price of R950.00.

4.5 Two days later, on 10 August 2019, the Applicant contacted the Respondent to express his dissatisfaction about the nine fridges having been sold at prices far lower than the agreed reserve price. The Applicant demanded explanations from the Respondent.

4.6 The Applicant got no explanations from the Respondent about why the nine fridges were sold at such very low prices; but instead the Respondent went on to sell another five fridges at an even lower average price of R500.00 inclusive of commission and VAT, meaning they were each sold at least at R450.00 less than the agreed revised reserve price of R950.00.

4.7 The Applicant said that he, on 16 August 2018, informed the Respondent that he found the prices at which the total fourteen fridges sold by then totally unacceptable; and that he was going to collect the remaining five fridges, as the Applicant apparently had customers who were prepared to pay R900 per unit.

4.8 Despite, the Applicant having told the Respondent on 16 August 2018 that he was going to collect the remaining fridges, the Respondent apparently sold yet another fridge at an undisclosed price the very following day, on 17 August 2018, which is the day when the remaining four fridges were collected by the Applicant from the Respondent.

4.9 The Applicant said that he was never paid for his fridges.

4.10 The Applicant's submissions were that his subsequent efforts to address this matter with the Respondent were totally fruitless, despite the Respondent Jean Pierre Oliver, the owner of the Respondent company, agreeing "on many occasions that selling the items below the reserve was an error on their behalf and has promised to rectify the problem, but nothing has materialised. Lately he and the company are ignoring my emails and telephone calls".

THE INVOLVEMENT OF THE NATIONAL CONSUMER COMMISSION (NCC)

5. On 31 October 2018, the Applicant approached the NCC for redress. The Applicant wanted the Respondent to refund him a total of R10 972.50 plus interest, this being "payment of monies owed from the assets at the agreed upon reserve price and interest accrued from the date of sale".
6. The NCC requested the Applicant to furnish them with the written agreement they had with the Respondent, writing "It is indeed correct that you qualify as consumer subject to additional qualification that (if you are juristic person your annual turn-over must be below R2 million when you entered into the agreement with the auctioneer). With regard to pricing of items (lots) and items they fetched at the auction, Regulation 22 read with Section 65 covered fiduciary responsibilities of the auctioneer towards you as the owner. Regulation 22 prescribes that there must be a written agreement entered into between the owner and the owner outlining terms and conditions of the auction including reserve price and what must follow if bidders fail to reach the reserve price. We would be in a better position to afford you appropriate advice after we have read the written the written agreement, particularly terms of reserve price and compare them with conduct of the auctioneer in carrying out his / her fiduciary responsibilities".
7. The NCC assessed the Applicant's complaint and, on 13 December 2018, decided to issue a notice of non-referral, on grounds that, in this case, the Applicant could not be defined as a consumer in terms of the CPA.

APPLICATION TO THE NATIONAL CONSUMER TRIBUNAL FOR LEAVE TO REFER

8. On 8 February 2019, the Applicant formally lodged a sworn affidavit at the Tribunal, applying for leave to refer. He motivated his application on grounds that:

8.1 The CPA applies to Auctions, hence the CPA protects consumers making use of the services of auctioneers;

8.2 The Applicant felt that the Respondent failed to apply the provisions of the CPA when rendering the auction services to the Applicant; and

8.3 In a tacit acceptance that there exists a possibility that the Tribunal may not have jurisdiction to hear this matter, the Applicant added to his affidavit "Currently there are no legal bodies that regulate the auction industry and this needs correction. I have no further avenue of recourse to seek remedy and would appreciate any order granted to counteract tacit losses incurred because I requested service from the respondent as advertised".

HEARING IN DEFAULT

9. The Respondent did not oppose the application, and the Tribunal got correspondence to the effect that:

9.1 The Respondent's business has been liquidated;

9.2 The administrator of that liquidated business said they will not oppose the application;

9.3 They were going to accept whatever decision the Tribunal was going to reach on this matter; but

9.4 The Applicant had to understand, upfront, that should the Tribunal rule in favour of the Applicant, the latter would be treated like all the other normal creditors of the Respondent, and join the queue like everyone else to receive whatever is available, if any.

10. The Applicant did not file an application for a default order in terms of Rule 25(2).

11. The Registrar however set the matter down for hearing on a default basis due to the pleadings being closed.

12. Rule 13(5) 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"

13. Therefore, in the absence of any answering affidavit filed by the Respondent, the Applicant's application and all of the allegations contained therein would be deemed to be admitted.

14. The Tribunal was satisfied that the application was adequately served on the Respondent. The matter therefore proceeded on a default basis.

APPLICANT'S

SUBMISSIONS

15. The Respondent repeated all the points as dealt with under BACKGROUND above.

16. In motivating why he must be accepted as complying with the definition of consumer here, the Applicant made submissions that his submissions had to be considered in the spirit of Section 44 and Section 45(4) of the CPA.

NO RESPONDENT'S SUBMISSIONS

17. There were no written or oral submissions by the Respondent.

18. The Respondent did not attend the Hearing on 9 July 2019.

ASSESSMENT OF THE EVIDENCE

19. This was not a straight forward case, even under Section 45 of the CPA, as it does not involve a consumer who bought from the auctioneer, but rather someone who had his goods sold by the auctioneer.
20. The Applicant's submissions were that he was a consumer because he procured the services of the auctioneer who:
 - 20.1 Failed to comply with the provisions of the CPA when rendering the services procured by the Applicant; and
 - 20.2 The Respondents had committed some other breaches of the CPA, including but not confined to misleading advertising.

THE PROVISIONS OF THE NCA

21. Section 1 of the CPA, Definitions, defines the consumer thus:

'consumer', in respect of any particular goods or services, means

 - (a) "a person to whom those particular goods or services are marketed in the ordinary course of the supplier's business;
 - (b) a person who has entered into a transaction with a supplier in the ordinary course of the supplier's business, unless the transaction is exempt from the application of this Act by section 5(2) or in terms of section 5(3);
 - (c) if the context so requires or permits, the user of those particular goods or a recipient or beneficiary of those services, irrespective of whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those particular goods or services; and
 - (d) a franchisee in terms of a franchise agreement, to the extent applicable in terms of Section 5(6)(b) to (e)

Regulation 22 of the CPA deals with "Auctioneer and auction house to hold and account for consumer's property". The relevant most applicable provisions here are:

- (1) An auctioneer and auction house must at all times strictly comply with section 65(2) of the Act;
- (2) Unless the auctioneer is also the owner or rightful holder of (who has the right to sell) of the goods to be auctioned, no auctioneer may sell goods on auction until he or she has first entered into a written agreement with the owner or rightful holder (who has the right to sell) of such goods to be sold, whether for a specific auction or auctions on general, which agreement contains the terms and conditions upon which that auctioneer accepts the goods for sale;
- (3) An agreement contemplated in sub-regulation
- (2) must as a minimum contain –

- (a) the name and physical address of owner of the goods to be sold or the owner's agent or the rightful holder (who has the right to sell) thereof;
- (b) if the goods are to be sold at a specific auction, the date of the auction or if the goods are to be sold at a number of auctions, a termination date of the agreement;
- (c) the address of the premises where the auction is to held;
- (d) the rules of action;
- (e) a description of all of the fees to be charged by the auctioneer or the auction house, which must include commissions, storage, advertising and labour, or a method by which such fees will be determined;
- (f) an explanation of the settlement of the auction that includes the disbursements of interest money, if applicable;
- (g) a statement indicating whether the auction is an auction without reserve or not;
- (h) a brief description of the goods being sold;
- (i) if the sale of goods at auction without reserve, a statement affirming that the seller of the goods has a bona fide intention to transfer ownership of the property to the highest bidder;
- (j) an exact copy of section 65(2) of the Act; and
- (k) an exact copy of subsections (1) and (5) of sections 45 of the Act.

Section 65(2) of the CPA states:

When a supplier has possession of any prepayment, deposit, membership fee, or other money, or any other property belonging to or ordinarily under the control of a consumer, the consumer:

- (a) must not treat that property as being the property of the supplier;
- (b) in the handling, safeguarding and utilisation of that property, must exercise the degree of care, diligence, and skill that can reasonably be expected of a person responsible for managing any property belonging to another person; and
- (c) is liable to the owner of the property for any loss resulting from a failure to comply with paragraph (a) or (b).

Sections 45 of the CPA deals with Auctions, Subsections 45(1) – 45(5) state that:

- (1) In this section, 'auction' includes a sale in execution of or pursuant to a court order, to the extent that the order contemplates that the sale is to be conducted by the auction.
- (2) When goods are put up for sale by auction in lots, each lot is, unless there is evidence to the contrary, regarded to be the subject of a separate transaction.

- (3) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in any customary manner, and until that announcement is made, a bid may be retracted.
- (4) Notice must be given in advance that a sale by auction is subject to –
 - (a) a reserved or upset price; or
 - (b) a right to bid by or on
- 22. When applying the above provisions of the NCA to the evidence presented it becomes very difficult to decide at this particular time whether the NCC may have been justified in concluding that the Applicant is not a consumer, as per the CPA definition of the consumer.

APPROPRIATE RELIEF

- 23. The Applicant asked the Tribunal to order the Respondent to refund the amount of R10972.50 plus interest since expected payment date of 17 September 2018.

CONCLUSION

- 24. It is clear from the submissions made by the Applicant that he has been the highly short-changed and taken an advantage of by the Respondent who:
 - 24.1 sold the Applicant's fridges at average prices far below the agreed upon reserve price of R950.00; and
 - 24.2 has not paid the Applicant at all for the fridges sold.
- 25. The question though is whether the Applicant's remedy and redress is available under the CPA. The answer is NO, for the following

reasons:

25.1 The documents that the Applicant signed with the Respondent described the Applicant as the Seller;

25.2 The document provided the NCC and the NCT does not fit the definition of a valid Auction Agreement / Contract under Regulation 22.

25.2.1 The document did not clearly spell out the rules of auction, as per Regulation 22(3)(d);

25.2.2 The document did not clearly spell out a description of all the fees to be charged by the auctioneers or the auction house, which must include commissions, commissions, storage, advertising and labour, or a method which such fees will be determined, in line with Regulation 22(3)(e); and

25.2.3 The document was not clear on what must specifically happen where the reserve price was not reached, as to the rights of interested parties, in line with Regulations 22(3)(e) – (i) and Regulations 22(5).

25.3 The Applicant's submissions that he had to be treated as a consumer on grounds that he was procuring auctioneering services from the Respondent were not convincing that his transactions with the Respondent definitely fell under the CPA:

25.3.1 A careful reading of the CPA, inclusive of Section 45 which specifically deals with Auctions, makes it clear, in both spirit and text, that this legislation was aimed at protecting the interests of end-users as consumers;

25.3.2 The very nature of the dispute between the Applicant and the Respondent is about how the Respondent failed to sell at the price agreed upon by the parties, and absolutely nothing to do with the interests of the end-user;

25.3.3 Section 45 of the CPA does not in any way deal with the business-to-business conduct; and

25.3.4 It is absolutely not clear how and why the Applicant did make any reference to Section 44 of the CPA, because that section has absolutely no reference to the case in hand.

ORDER

26. Accordingly, the Tribunal makes the following order:

26.1 The Application for leave to refer is dismissed, on grounds that the Applicant does not satisfy the definition of a consumer under the CPA; and

26.2 There is no order as to costs.

DATED ON THIS 14th DAY OF JULY 2019

Prof B Dumisa

Presiding Member

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