

SOUTH AFRICA / JUDGMENT

Papier v Buildmart Trading

(NCT/38312/2016/75(1)(b) CPA)

[2016] ZANCT 13 (31 May 2016)

[2016] ZANCT 13

COURT

National Consumer Tribunal

BEFORE

JM Maseko, FK Manamela, F Sibanda

CASE / FILE NUMBER

NCT/38312/2016/75(1)(b) CPA

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

Source record

IN

THE NATIONAL CONSUMER TRIBUNAL

HELD

IN CENTURION

Case

number: NCT/38312/2016/75(1)(b) CPA

DATE:

31 MAY 2016

In

the matter between:

ANDENLIEN

PAPIER.....APPLICANT

and

BUILDMART

TRADING.....RESPONDENT

Coram:

Prof

JM Maseko - Presiding Member

Adv.

FK Manamela -Member

Mr

F Sibanda - Member

Date

of Hearing – 13 May 2016

JUDGMENT**AND REASONS****APPLICANT**

1. The Applicant in this matter is Andenlien Papier, a major female residing at Eersterus, Pretoria, Gauteng ("the Applicant").

RESPONDENT

2. The Respondent is Buildmart Trading (Pty) Ltd, a company duly registered in terms of the relevant company laws of the Republic of South Africa, ("the Respondent").

APPLICATION TYPE

3. This is an application in terms of section 75(1) (b) of the Consumer Protection Act 68 of 2008 ("the Act"), for leave to apply directly to the Tribunal on the grounds that the National Consumer Commission ("NCC") issued a notice of non-referral in response to a complaint by the Applicant, stating that the complaint does not allege any facts, which, if true, would constitute grounds for a remedy under the Consumer Protection Act, 2008.
4. At the hearing of this application the Applicant represented herself and was assisted by her husband, Mr Colin Papier. The Respondent was not available at the hearing.
5. The Tribunal has jurisdiction to hear this Application in terms of section 101(1) of the Consumer Protection Act.

BRIEF**BACKGROUND**

7. In May 2008, the Applicant, ("Papier") entered into a sale agreement with the Respondent ("Buildmart") in terms whereof the Applicant tendered an amount of R15000.00 (Fifteen Thousand Rand) to the Respondent and a further amount of R260.00 (Two Hundred and Sixty Rand) in June of the same year, towards the purchase of bricks. In total the Applicant paid the amount of R15260.00 (Fifteen Thousand Two Hundred and Sixty Rand). According to the Applicant, the Respondent, notwithstanding repeated demands for the delivery of the bricks or a refund of the purchase price, has to this day, failed and/or refused to deliver the bricks or refund the purchase price. The Applicant allegedly made numerous visits to the Respondent's store and also had several telephone conversations with the Respondent's Financial Manager, one Muhammed Cassim ("Cassim") and the store manager known as Ariff. Cassim, according to the Applicant, claimed that delivery was effected under reference number 5564, allegedly an invoice number issued in respect of the initial payment of R15000.00.

8. The Applicant approached the National Consumer Commission (NCC) to lodge a complaint. The NCC, in response to the Applicant's complaint, issued a notice of non-referral in a correspondence dated 27 January 2016 stating that the transaction complained of occurred before the general effective date of the CPA, being 1 April 2011, thereby ousting the NCC's jurisdiction to deal with the matter.
9. The Applicant alleges that the Respondent has breached the terms of the sale agreement and the Tribunal has jurisdiction to hear this matter, should leave be granted.

ISSUES

TO BE CONSIDERED BY THE TRIBUNAL

Preliminary

issues

10. The Tribunal, mero motu raised the following issues to gain more insight into the Applicant's application:
 - 10.1 whether or not the application for leave to approach the Tribunal directly should be granted, notwithstanding the fact that the NCC has issued a notice of non-referral;
 - 10.2 whether or not the provisions of the CPA are applicable to this matter in view of the fact that the agreement was concluded on 25 May 2008, before the general effective date of the CPA, being 1 April 2011; and
 - 10.3 to this extent, whether or not the Tribunal has jurisdiction to hear this matter

The Applicant's response to the issues raised

11. The Applicant referred the Tribunal to the agreement signed in 2008 and submitted that the Respondent breached the contract.
12. That she approached the Respondent's head office, Kitkat, the NCC and ultimately the Tribunal for assistance.
13. The Applicant further conceded that the issue of the non-applicability of the CPA was raised by the NCC, but that she felt disappointed and helpless by such a decision while unscrupulous and dishonest business operators like the Respondent go unpunished.
14. Further that the Tribunal, according to the Applicant, is competent to hear this matter, specifically on the basis of the breach by the Respondent, and that the NCC has referred her to the Tribunal.

The Applicability of the CPA

15. The general effective date upon which the CPA came into operation is 1 April 2011.

The contract which forms the basis of this complaint was concluded in May

2008. The

issue raised by the Applicant in this matter relate to the conclusion of the contract which was entered into before the general effective date of the CPA.

16. Item 3 of Schedule 2 of the CPA determines the extent to which the CPA applies to “pre-existing transactions and agreements.” The CPA does not apply to any transaction concluded, or agreement entered into, before the general effective date of the CPA being 1 April 2011.
17. Section 53 and 58 of the CPA apply to pre-existing transactions: “only with respect to goods and services supplied to the consumer in terms of the agreement, on or after the effective date.
18. Accordingly, the CPA does not apply retrospectively in this matter. On this point alone the Tribunal finds that the Application before the Tribunal should not succeed. However, for the sake of completeness the Tribunal will deal with the legal requirements of the notice of non-referral and referral of matters in general.

Referral of Matters and The Notice of Non Referral

19. In terms of Section 69)(a) of the Act, a person may seek to enforce any right in terms of the Act or in terms of an agreement, by referring the matter directly to the Tribunal in the case of that particular dispute, if such a direct referral is permitted by this Act
20. Sections 70, 72 and 73 make reference to alternative dispute resolution, other than the National Consumer Commission-Section 70 specifically provides the following:

“A consumer may seek to resolve any dispute in respect of a transaction or agreement with a supplier by referring the matter to an

alternative dispute resolution agent who may be-

- (a) An ombud with jurisdiction, if the supplier is subject to the jurisdiction of any such ombud;
 - (b) And industry ombud accredited in terms of section 82(6), if the supplier is subject to the jurisdiction of any such ombud;
 - (c) A person or entity providing conciliation, mediation or arbitration services to assist in the resolution of consumer disputes, other than an ombud with jurisdiction, or an accredited industry ombud, or
 - (d) Applying to the consumer court of the province with jurisdiction over the matter, if there is such a consumer court, subject to the law establishing or governing that consumer court (underlining is my emphasis).”
21. Section 72 deals with the issuing of a Notice of Non Referral and provides as follows:

-
- (1) Upon initiating or receiving a complaint in terms of this Act, the Commission may-
- (a) issue a notice of non-referral to the complainant in the prescribed form, if the complaint-
 - (i).....
 - (ii) does not allege any facts which, if true, would constitute grounds for remedy under this Act, or
 - (iii)....
 - (b) refer the complaint to an alternative dispute resolution agent, a provincial consumer protection authority or a consumer court for the purposes of assisting the parties to resolve the dispute in terms of section 70, (my emphasis), unless the parties have previously and unsuccessfully attempted to resolve the dispute in this manner;
 - (c) refer the complaint to another regulatory authority with jurisdiction over the matter for investigation, or
 - (d)
22. Section 73 provides for circumstances under which the NCC may issue a notice of non-referral, the resultant referral to certain institutions, and states the following:
- (1) After concluding an investigation into a complaint, the Commission may-
 - (a) issue a notice of non-referral to the complainant in the prescribed form;
 - (b)
 - (c)
 - (2) In the circumstances contemplated in subsection(1)(c)(iii), the Commission may refer the matter-
 - (a) to the consumer court of the province in which the supplier has its principal place of business in the Republic, if-
 - (i) there is a consumer court in that province; and
 - (ii) the Commission believes that the issues raised by the complainant can be dealt with expeditiously and fully by such a referral, (my emphasis) or
 - (b) to the Tribunal
 - (3)....
 - (4)....
 - (5)....
 - (6).....

23. The NCC issued a Notice of Non-referral to the Applicant on 27 January 2016, as provided for in Section 72(1) of the Act. The specific notice of non-referral states that the NCC held the view that the NCC does not have jurisdiction to provide the complainant with redress as the complaint does not allege facts constituting grounds for a remedy under the Consumer Protection Act. Section 75(1) (b) of the Act stipulates that the complainant concerned may (in the event of the issuing of a notice of non-referral by the NCC), refer the matter directly to the Tribunal, with leave of the Tribunal (own emphasis). The Tribunal's view, (and the point it wishes to make) is that the "referral to the Tribunal" as restrictively expressed in the NCC's notice of non-referral, is not the only referral point. There are other alternative dispute resolution agents, including a consumer authority of a province, which the Applicant may solicit assistance from as provided for under sections 70, 72 and 73. The Applicant (Complainants) must be afforded the most convenient and expeditious

route to resolve a consumer dispute and find redress especially in circumstances where the jurisdiction of the NCC and the Tribunal is in question. The provincial consumer protection authorities, and ombuds schemes are at the coal face of attending to consumer disputes.

24. In the matter of Westinghouse Brake and Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd[1], the following was held: "It is a general rule in the construction of statutes that a deliberate change of expression is prima facie taken to import a change of intention".[2] The specific provisions of Section 75(1) (b) of the Act and the requirement of the granting of leave to refer contained therein is such a "deliberate change of expression".

By including this requirement the legislature expressed its intention of a separate requirement namely that a Section 75(1) (b) referral cannot be adjudicated on without the Applicant in a specific matter first having obtained leave from the Tribunal to make such a referral.

25. When determining whether the Applicant should be granted leave to refer the matter to the Tribunal, the Tribunal must consider the requirements for the granting of "leave". A similar application can be found in the High Court practice, where an Applicant applies for leave to appeal a judgment. It was held in the Westinghouse Brake and Equipment (Pty) Ltd – matter, as cited above, that "in applications for leave to appeal properly brought before the appropriate court in terms of the old sec 20, read with sec 21 as it then was, the only relevant criteria were whether the Applicant had reasonable prospects of success on appeal and whether or not the case was of substantial importance to the applicant or to both him and the Respondent."
26. The Tribunal will therefore, when considering whether or not to grant the Applicant leave to refer, use the same test as applied in the High Court for applications for "leave" and will therefore consider:

24.1 The Applicant's reasonable prospects of success with the referral;

24.2 Whether the matter is of substantial importance to the Applicant or Respondent.

27. The Applicant's prospects of success with the referral depends on whether the Tribunal is of the view that the issue at hand falls within the ambit of a contractual dispute related to goods and services, or whether the Applicant may be assisted with a certificate in terms of Section 115(2) of the Act, following a declaration of prohibited conduct.
28. The matter is evidently of substantial importance to the Applicant, considering the amount paid by the Applicant to the Respondent, for goods allegedly not delivered. The Applicant feels aggrieved by the Respondent's conduct, who didn't even bother to make an appearance at the hearing. It remains a moot point whether or not the matter is of substantial importance to the Respondent. However, the reasonable prospect of success based on the current application before the Tribunal is non-existent, in view of the fact that the transaction preceded the general effective date of the implementation of the CPA, being 1 April 2011, as aforesaid.
29. The CPA does not apply retrospectively to the agreements/ transactions concluded before the general effective date of 1 April 2011
30. Further, in adjudicating matters, the Tribunal being a creature of statute, can only make orders provided for in the Act, and in terms of the powers conferred upon it under the National Credit Act. By virtue of the afore-going, the Tribunal has no jurisdiction to hear the main matter, for which leave is sought in this application.

ORDER

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

29

30

31

32

33

34

35

36

37

38

39

40

41

42

43

44

45

46

47

48

49

50

51

52

53

54

55

31. Accordingly, the Tribunal makes the following order-

29.1 the application for leave to refer is refused.

29.2 there is no order as to costs.

Dated at CENTURION on this 31st Day of May 2016

[Signed]

Adv FK Manamela

Prof JM Maseko (Presiding Member) and F Sibanda (Member), concurring

[1] 1986

(2) SA 555 (A) at par 15.

[2] See Barrett, N .0. v Macquet, 1947

(2) SA 1001 (AD) at p 1012; Port Elizabeth Municipal Council v Port Elizabeth Electric Tramway Co Ltd 1947

(2) SA 1269 (AD) at p 1279

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/2016/13.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/papier-v-buildmart-unknown-topic-anct-2016>

Prepared on 25 October 2026 · Esheria