

SOUTH AFRICA / JUDGMENT

Smartsurv Wireless (Pty) Ltd v National Consumer Commission (NCT/4833/2012/101(1)(P) CPA) [2013] ZANCT 15 (20 June 2013) [2013] ZANCT 15

COURT

National Consumer Tribunal

BEFORE

F Manamela, D Terblanche, X May

CASE / FILE NUMBER

NCT/4833/2012/101(1)(P) CPA

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

IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CAPE TOWN

Case number: NCT/4833/2012/101(1)(P) CPA

DATE:20/06/2013

In the matter between:

SMARTSURV WIRELESS (PTY) LIMITED..... APPLICANT

and

THE NATIONAL CONSUMER COMMISSIONRESPONDENT

Coram:

Adv F Manamela – Presiding member

Ms D Terblanche – Member

Mr X May – Member

Date of Hearing: 7 March 2013

Judgment

and Reasons

APPLICANT

1. The Applicant in this matter is Smartsurv Wireless (Pty) Limited, a company duly registered in terms of the Companies Act with registration number 2002/012252/07 and located in Century City (hereinafter referred to as “the Applicant”).
2. The Applicant’s Founding Affidavit is deposed to by Marlon Shevelew, the Applicant’s attorney of record.
3. Advocate Jansen van Rensburg from the Cape Bar appeared on behalf of the Applicant.

RESPONDENT

4. The Respondent is the National Consumer Commission, an organ of state within the public administration established in terms of Section 85 of the Consumer Protection Act (“the CPA”) (hereinafter referred to as “the Respondent”).

APPLICATION TYPE

5. This is an application in terms of section 101 of the Consumer Protection Act, No 68 of 2008 (hereinafter referred to as “the CPA” or “the Act”) for the review of a compliance notice issued by the Respondent to the Applicant in terms of section 100 of the Act in respect of alleged contraventions of sections 40(1) and (2); 54(1) and (2) of the Act.
6. The application was rendered complete on 8 June 2012 and the Respondent had an opportunity to file an answering affidavit by 27 June 2012.
7. The Respondent failed to file opposing papers and the Applicant applied for a default order in terms of Rule 25(3) on 8 August 2012.

BACKGROUND

8. The Applicant conducts a business which, among other things, provides and installs a device known as “TrackMaster” on customer vehicles, for the purpose of recovering such vehicles in the event of theft.
9. The Complainant is Lindile Deluborn (hereinafter referred to as “the Complainant”). The Complainant appears to have made use of the Applicant’s TrackMaster device, but is aggrieved by the functioning thereof and the services rendered by the Applicant.
10. From the compliance notice the following allegations appear with regards to the complaint: The Complainant lodged the complaint with the Respondent on 4 April 2011, alleging that he signed a contract with the Applicant in conjunction with Motor Land for the cover of a tracker that was supposed to have been installed in his car;

He discovered on 1 March 2011 that the Applicant did not have any of his details in their system;

Applicant had been collecting monthly premiums for a service that they were not providing since the tracking device was never installed;

Applicant failed to render the service in a manner and quality that the consumer was generally entitled to expect.

11. In terms of the founding affidavit, the Complainant purchased a motor vehicle from a dealership on 12 August 2008, at which point a TrackMaster device (hereinafter referred to as “the device”) was already installed in the vehicle. On 08 August 2008, the device was tested by the dealership and found to be properly operational.
12. The dealership, acting on behalf of the Complainant, applied for coverage by the Applicant in respect of the device. This transaction

took place in conjunction with the Complainant’s purchase of the vehicle. The device was installed and for a period of two and a half years no problems with the device were reported to the Applicant.

13. On 28 February 2011, the Complainant contacted the Applicant’s offices and requested that the device be disconnected. The Complainant did not mention any functionality problems with the device. The Complainant repeated the request for disconnection on 1 March 2011. Once again, no mention was made of functionality problems.
14. The Applicant refused to cancel the contract and disconnect the device. The terms of the agreement that relates to cancellation was not made available to the Tribunal.
15. The complaint was forwarded to the Applicant on 13 April 2011 by the Respondent and the Applicant was granted a period of 7 days to respond to the complaint.
16. The Applicant responded to the complaint in writing on 20 April 2011, but the Complainant was not satisfied with the response. The matter was set down for conciliation on 10 February 2012.
17. The Respondent issued a compliance notice dated 30 March 2012.
18. The Applicant received the compliance notice on 15 May 2012 and duly brought its application for review of the compliance notice on 4 June 2012.

APPLICABLE SECTIONS OF THE CPA

19. The Respondent alleges, in the compliance notice, that the conduct of the Applicant amounts to contravention of Schedule 2 Item 8(1); Sections 40(1) and (2); 54(1) and (2) of the CPA which state that:

Continued application of repealed laws

8(1) 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.

8(2) In exercising authority under sub item (1), the Commission must conduct the investigation as if it were proceeding with a complaint in terms of this Act.

Unconscionable conduct

40(1) A supplier or an agent of the supplier must not use physical force against a consumer, coercion, undue influence, pressure, duress or harassment, unfair tactics or any other similar conduct, in connection with any—

- (a) marketing of any goods or services;
 - (b) supply of goods or services to a consumer;
 - (c) negotiation, conclusion, execution or enforcement of an agreement to supply any goods or services to a consumer;
 - (d) demand for, or collection of, payment for goods or services by a consumer; or
 - (e) recovery of goods from a consumer.
- (2) In addition to any conduct contemplated in subsection (1), it is unconscionable for a supplier knowingly to take advantage of the fact that a consumer was substantially unable to protect the consumer's own interests because of physical or mental disability, illiteracy, ignorance, inability to understand the language of an agreement, or any other similar factor.

False, misleading or deceptive representations

41.(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;
- (b) use exaggeration, innuendo or ambiguity as to a material fact, or fail to disclose material fact if that failure amounts to a deception; or
- (c) 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.

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—

- (a) the timely performance and completion of those services, and timely notice of any unavoidable delay in the performance of the services;
 - (b) the performance of the services in a manner and quality that persons are generally entitled to expect;
 - (c) the use, delivery or installation of goods that are free of defects and of a quality that persons are generally entitled to expect, if any such goods are required for performance of the services; and
 - (d) the return of any property or control over any property of the consumer in at least as good a condition as it was when the consumer made it available to the supplier for the purpose of performing such services, having regard to the circumstances of the supply, and any specific criteria or conditions agreed between the supplier and the consumer before or during the performance of the services.
- (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 or goods supplied; or
- (b) refund to the consumer a reasonable portion of the price paid for the services performed and goods supplied, having regard to the extent of the failure.

THE HEARING

- 20. This matter was heard on 7 March 2013 and at the Office of the Consumer Protector, Cape Town.
- 21. The Applicant was present, but the Respondent did not appear on the day.
- 22. This matter was accordingly heard on a default basis.

ISSUES

TO BE DECIDED

- 23. The Tribunal must decide whether the specific sections of the Act that is alleged to have been breached by the Applicant (as set out in the compliance notice) can be applied retrospectively to the transaction.
- 24. Only once the Tribunal have determined that these sections are applicable to the transaction may the Tribunal proceed to determine

whether the Applicant's conduct amounts to breach of these specific sections and whether the Respondent may order the Applicant

to cancel a contract and refund the Complainant.

APPLICANT'S

SUBMISSIONS

25. The Applicant denies the allegations raised in the compliance notice on the following grounds:

25.1 The correct approach to retrospective application of the Act

The Applicant submits that:

The Respondent failed to apply the correct legal test to determine whether the specific provisions of the Act have retrospective applicability;

The Respondent did not have due regard for the following important principles of interpretation:

It is presumed that a statute does not apply retrospectively unless a contrary intention is indicated¹;

The reason for this presumption is the elementary rule of fairness, namely that all parties must be able to know what the law is at any given time and be able to conform the conduct to such standards²;

The Tribunal must first determine whether it enjoys the powers to grant a particular order. The Tribunal cannot do things that it is not authorised to do by statute³

In determining whether a statute can be applied retrospectively, regard must be had to the provisions of the enabling statute – it is only in the clearest of cases that a finding of retrospectivity will be made;

The relevant provisions of the Act are not retrospectively applicable and the complaint should have been dismissed.

25.2 The proper interpretation of Schedule 2, Item 8(1) and Item 8(2) of the CPA

The Respondent's view that Schedule 2, Item 8(1) and 8(2) provide for the retrospective applicability of the Act is seriously flawed.

The plain and unambiguous meaning of this section is that, for three years, starting on 01 April 2011, the Respondent may exercise any power existing under a repealed law to investigate a breach of such repealed law, which breach occurred during the three years prior to 01 April 2011 ;

The Respondent's interpretation that it may exercise powers conferred to it by the Act to investigate a contravention of the Act which occurred during the 3 years before the Act came into force cannot be sustained for the following reasons:

Retrospectivity cannot be assumed but must be clear from the statute;

The title of the specific provision is “Continued application of repealed laws” and not “Retrospective application of the CPA” – it does not intend to give retrospective application to the provisions of the CPA.

25.3 The CPA is generally only prospective, not retrospective

Schedule 2, Item 3(1) of the Act provides that it will generally only be prospective ;

This section provides even stronger support for the abovementioned contention that Schedule 2, Item 8(1) and Item 8(2) does not deal with retrospective application of the Act.

25.4 The sections of the CPA which the Respondent relied upon were not retrospective

The Respondent relies on three incidents in support of the notice issued namely one taking place in August 2008, the next on 28 February 2011 and the final one on 01 March 2011. None of the sections relied upon by the Respondent was retrospectively applicable on these dates;

Section 40(1) is not one of the sections given retrospective applicability in terms of Schedule 2, Item 3 of the Act ;

Section 41(1) is not one of the sections given retrospective applicability in terms of Schedule 2, Item 3 of the Act;

Sections 54(1) and 54(2) will apply retrospectively only “with respect to any goods or services supplied to the consumer in terms of the agreement, on or after the general effective date”. Both dates fall before the general effective date being 01 April 2011.

Consequently the sections relied on by the Respondent was not applicable to the specific transaction

The notice issued by the Respondent did not deal with the unfairness, harsh consequences and potential unconstitutionality of reading the Act so expansively so that suppliers can be held liable for acts and omissions occurring entirely before the effective date.

26. The Applicant concludes that the application raises important issues of principle and law and that the notice issued by the Respondent was plainly unlawful and beyond its jurisdiction. The Applicant therefore requests the Tribunal to set aside the compliance notice.

ANALYSIS

LAW & FACTS

Retrospective application of the Consumer Protection Act

“Schedule 2 Item (8) is an empowering provision which gives the Respondent the power to investigate breaches of certain laws, notwithstanding the fact that those laws have been repealed. As such, it is not possible for the Applicant to contravene this section and the fact that the manner in which schedule 2 item (8) was referred to in the compliance notices was incorrect...”

In the compliance notices, where it was necessary to rely on the transitional provision because the conduct arose before the Act came into operation, the Respondent should have identified which section of which repealed Act it was relying upon. Then in the section headed, nature and extent of the non-compliance, it should have set out the details regarding how the Applicant had contravened the section. ”

28. Schedule 2 provides for the specific retrospective applicability of certain sections of the Act and also states the exact extent to which such sections may be applied retrospectively. The sections relied on by the Respondent in the compliance notice being section 40 and 41 cannot be retrospectively applied to the specific transaction as no provision is made in the said Schedule 2, Item 3 for the retrospective applicability of sections 40 and 41;
29. Section 54 can, in terms of Schedule 2, Item 3, be applied retrospectively “with respect to goods or services supplied to the consumer in terms of the agreement, on or after the general effective date” if there is evidence that goods or services

were supplied and not of the required quality. No such evidence was placed before the Tribunal and accordingly a finding cannot be made that this section was breached.

Order to cancel a contract and refund the complainant

30. The Respondent in the compliance notice ordered the Applicant to cancel a contract and refund the Complainant all money paid by the Complainant (Paragraph 2.1 of the compliance notice).
31. In the case of Volkswagen v The National Consumer Commission⁵ the Tribunal held as follows:

“The enforcement functions of the Commission are set out in section 99 of the CPA. From a plain reading of the word and expansion of that the enforcement function entails it is clear to us that the enforcement function does not include a function to order parties to provide redress to complainants. This power has been reserved to the courts and the Tribunal, albeit in the latter instance to a limited extent.”⁶

“It is accordingly an untenable interpretation of the CPA to read into the powers and functions of the Respondent the power to impose a requirement in the compliance notice which in effect amounts to the imposition of an order for damages, refunds or return of goods. The route to achieve redress for a consumer is through a prosecution either for prohibited conduct or by agreement with the transgressor to pay compensation, either through the Tribunal or the Courts.

Furthermore, Section 150 of the National Credit Act, Act 34 of 2005 (“the NCA”) provides the Tribunal with a mandate to “requiring repayment to the consumer of any excess amount charged, together with interest at the rate set out in the agreement. No similar provision exists that gives the NCC the right to order repayment. It is evident that such a right should be specifically provided in terms of the Act (as it is awarded to the Tribunal) and therefore, that the Respondent, not being specifically mandated to do so, may not be allowed to order repayment.

It would therefore be beyond the powers of the Respondent to include a step in a Compliance Notice that in fact amounts to the award of damages to a Complainant”⁷

32. When the aforesaid decision is taken into account it is clear that the Respondent does not have the mandate to order a refund as was done in this matter.

COSTS

33. The Applicant requested a cost order at the hearing. This request was based on the submissions that the Respondent as a statutory body should not have pursued the complaint any further by issuing a compliance notice. As a result of the Respondent's conduct the Applicant suffered prejudice which should be corrected with an appropriate cost order.
34. The Tribunal has dealt with the issue of costs in review of compliance notice matters before in *Vodacom v NCC8*. The Tribunal found in this matter that:

“... the awarding of costs is governed by section 147 of the National Credit Act, 2005 (NCA). Section 147 provides for the awarding of costs in very limited circumstances where a complainant refers a matter to the Tribunal after having received a notice of non-referral from the National Credit Regulator or the National Consumer Commission. If the circumstances do not fall within this exception the general rule that each party bears its own costs must be observed. This interpretation is unavoidable because section 147 (1) uses the word “must” and not “may” indicating that the Tribunal is not granted a discretion in this circumstances.”

35. It would be contrary to the provisions of the NCA and the purpose of the CPA and furthermore would have a chilling effect on the Respondent's ability to perform its functions in terms of the Act to favourably consider the awarding of costs in challenges of this nature.

FINDINGS

36. We find that:

The provisions relied on by the Respondent in the compliance notice does not form the basis for the issuance of the compliance notice to the Applicant and that the compliance notice should be set aside;

The Respondent is not empowered to include a step in a compliance notice to cancel a contract and order a refund;

There is no basis for an award of costs to the Applicant.

ORDER

37. Based on the above, the Tribunal therefore makes the following order:

37.1 The compliance notice is hereby cancelled; and

37.2 No order as to costs.

Handed down at Johannesburg on 20 June 2013.

[signed]

Adv F Manamela

Presiding Member

Ms D Terblanche and Mr X May concurring.

1 S and Another v Acting Regional Magistrate, Boksburg: Venter and Another 2011 (2) SACR 274 (CC) at para 16

2 President of the RSA and Another v Hugo 1997 (4) SA 1 (CC) at para 102

3 Bhekintsha Business Enterprise CC v ABSA Bank Ltd NCT/61/2009/141(1)(P)

4 NCT/2667/2011/101(1)(P) and NCT/2081/2011/101(1)(P)

5 NCT/3913/2012/101(1)

6 At 5 supra at para 46

7 At 5 supra at para 49 - 51

8 NCT/2793/2011/101 (1)(P)

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/2013/15.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/smartsurv-wireless-pty-ltd-v-national-unknown-topic-anct-2013>

Prepared on 11 October 2026 · Esheria