

SOUTH AFRICA / JUDGMENT

Wicam Accounting Services CC v Mobile Phone Choice CC t/a Epirus (NCT/31174/2015/75(1))

[2016] ZANCT 21 (20 July 2016)

[2016] ZANCT 21

COURT

National Consumer Tribunal

BEFORE

D Terblanche, J Simpson, X May

CASE / FILE NUMBER

NCT/31174/2015/75(1)

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IN

THE NATIONAL CONSUMER TRIBUNAL

HELD

IN GEORGE

Case

number: NCT/31174/2015/75(1)

In

the matter between:

Wicam

Accounting Services

CC.....APPLICANT

And

Mobile

Phone Choice CC t/a

Epirus.....RESPONDENT

Coram:

Ms

D Terblanche – Presiding member

Adv

J Simpson – Member

Mr

X May – Member

Date

of Hearing – 20 July 2016

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

1. The Applicant is Wicam Accounting Services CC (hereinafter referred to as “the Applicant”). The Applicant carries on business in George. The Applicant has authorised and is represented by its sole member, Mrs Maree, an adult female residing in George. Mrs Maree attended the hearing and was assisted by Mr. Maree.

RESPONDENT

2. The Respondent is Mobile Phone Choice CC (hereinafter referred to as “the Respondent”) carrying on business as Epirus in George. Based on correspondence between the parties, the Respondent was represented at all relevant times by Mr. Miles Dunbar. The Respondent did not oppose the application and was not present at the hearing.

APPLICATION TYPE

3. This is an application for leave to refer a matter directly to the National Consumer Tribunal (hereinafter referred to as “the Tribunal” or “the NCT”) after it had been non-referred by the National Consumer Commission (hereinafter referred to as “the NCC” or “the Commission”).
4. The application has been made terms of Section 75(1)(b) of the Consumer Protection Act, Act 68 of 2008 (hereinafter referred to as “the CPA”).

LEAVE TO REFER DIRECTLY TO THE TRIBUNAL

5. In an application of this nature the Tribunal initially considers whether it could grant the Applicant leave to refer the matter directly to the Tribunal, before it considers and makes a determination on the merits.
6. Section 75(1) of the CPA requires that the NCC issue a notice of non-referral in response to a complaint as a pre-requisite for a direct referral by the Applicant / Complainant to the Tribunal.
7. The Applicant attached the notice of non-referral (“notice”) issued by the NCC dated 2 July 2015.
8. The NCC states in the notice in relevant part that “In this regard your submission that the printer only made plus or minus 650 pages is not a defect ...” and “in your email you made a point of claiming for damages that you have suffered and the Commission does not have the jurisdiction to deal with a matter where a person is claiming damages.”
9. From the aforesaid it appears that the NCC’s rationale for the non-referral is that:

9.1 The Applicant's complaint that the high toner usage of the printer does not constitute a defect in terms of the CPA; and

9.2 The NCC does not have jurisdiction to deal with a matter where a person is claiming for damages.

10. In the matter of *Coertze and Burger v Young*[1] the Tribunal considered the factors to be evaluated to determine whether it could grant leave to refer a matter directly to the

Tribunal after it had been non-referred by the Commission. The Tribunal held that the following two factors should be considered:

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

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

11. In considering the reasonable prospects of success the Tribunal is satisfied that the Applicant has laid a solid foundation for a complaint in terms of the CPA which the Respondents must answer to. Her complaint and her claim for a refund of the purchase price paid fall square within the provisions of sections 55 and 56 of the CPA.

12. It is further very clear that the matter is of substantial importance to the Applicant specifically and to consumers generally. Firstly, it is important that suppliers do not misrepresent their products to induce consumers to buy and the products then not serving their intended purpose. Secondly, Applicant has gone to great lengths and invested substantial time (almost three years) and engaged various entities, including the NCC and finally brought the matter before the Tribunal, to obtain final resolution and redress.

13. The Tribunal therefore granted leave for the matter to be referred directly to the Tribunal to be heard.

DEFAULT

JUDGMENT

14. As the Respondent did not oppose the application and was not present at the hearing this matter had been dealt with on a default judgment basis.

15. Rule 13[2] of the Rules of the Tribunal allows that if a party does not dispute allegations made in an application those allegations may be deemed as admitted.

16. In accordance with Rule 25(3) the Tribunal is satisfied that the Respondent was properly served with the Application and advised of the hearing date.

17. In coming to a final determination however the Tribunal carefully interrogates the allegations and the evidence put forward by the Applicant to come to a determination whether a case had been made out by the Applicant on the balance of probabilities that prohibited conduct was committed by the Respondent.

APPLICANT'S CASE

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18. Applicant gave evidence under oath to the effect that:

18.1 On 5 November 2013, the Applicant bought a Xerox 3010 printer from Respondent for R1399,95.

18.2 She explained to the Respondent that her then current printer, a Samsung, was old and could no longer handle the volumes of printing done in her business. This was not the first dealing the Applicant had with the Respondent as the Applicant had been buying all their printing and computer requirements from Epirus in the past.

18.3 Respondent was fully aware of the requirements for the new printer ie high volume, cost effective printer that can accommodate approximately 5000 sheets per month in a cost effective manner of approximately 5 cents per page. Also to be used on the Applicant's network.

18.4 Respondent suggested the Xerox 3010 printer and promised it is the right printer for Applicant's requirements.

18.5 Initially Applicant could not connect the printer to their network and the Respondent sent his employee on 12 November 2013 to attempt to install it. That was unsuccessful and Applicant retained the services of Juandre, an outside technician to do the installation.

18.6 On 13 November 2013, after plus minus 650 copies, the toner had to be replaced.

18.7 On 19 November 2013 the toner had to be replaced again.

18.8 This usage was contrary to what Applicant explicitly required and believed what they were provided with.

18.9 Further the costs of the genuine toner was approximately R700 per cartridge which was much higher than they expected to pay for what they believed is cost effective over and above the fact that the printer produced much fewer pages per cartridge than promised.

18.10 To pay less for toner Respondent recommended to Applicant to use a generic instead of the original at a cost of plus minus R300 rather than R700 to lower the printing costs and render the printer cost effective.

18.11 Upon this advice from the Respondent, the Applicant bought the generic toner from Jeandre. After a few days the printing was “ghosting” and in January 2014 the paper feeder jammed.

18.12 When Applicant returned the printer to the Respondent to assist with fixing the jamming and told him about the ghosting he attributed it to the use of the generic toner, the very generic toner he recommended to them to use.

18.13 As the printer clearly did not meet their requirements and the promises made by the Respondent during the sale thereof, Applicant returned the printer to Respondent on 20 January 2014 and demanded repayment of the purchase price.

18.14 Respondent made a refund offer of R800 via email to the Applicant, substantially less than the purchase price paid two months prior.

18.15 The printer has been in the possession of Epirus since 20 January 2014.

18.16 It appears that the printer was never sent to Xerox for inspection and repairs.

18.17 Xerox informed Applicant that Respondent is not an accredited agent for Xerox.

THE PROVISIONS OF THE CPA

19. Part H of the CPA sets out a consumer’s right to fair value, good quality and safety.
20. Section 55 of the CPA sets out the consumer’s rights to goods which are reasonably suitable for the purpose intended and are free of any defects:

Consumer’s rights to safe, good quality goods

“55. (1) This section does not apply to goods bought at an auction, as contemplated in section 45.

- (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.

(4) In determining whether any particular goods satisfied the requirements of subsection (2) or (3), all of the circumstances of

the supply of those goods must be considered, including but not limited to—

(a) the manner in which, and the purposes for which, the goods were marketed, packaged and displayed, the use of any trade description or mark, any instructions for, or warnings with respect to the use of the goods;

(b) the range of things that might reasonably be anticipated to be done with or in relation to the goods; and

(c) the time when the goods were produced and supplied.

(5) For greater certainty in applying subsection (4)—

(a) it is irrelevant whether a product failure or defect was latent or patent, or whether it could have been detected by a consumer before taking delivery of the goods; and

(b) a product failure or defect may not be inferred in respect of particular goods solely on the grounds that better goods have

subsequently become available from the same or any other producer or supplier.

(6) Subsection (2)(a) and (b) do not apply to a transaction if the consumer—

(a) has been expressly informed that particular goods were offered in a specific condition; and

(b) has expressly agreed to accept the goods in that condition, or knowingly acted in a manner consistent with accepting the goods in that condition.

21. Based on the evidence presented under oath by the Applicant at the hearing, the Applicant and the Respondent entered into an agreement based on the Applicant's very specific requirements for a printer that is cost effective in its operation more specifically in respect of the amount of toner that will be consumed in printing out a certain quantity of pages per month and not costing more than approximately three (3) to five (5) cents per page. This falls squarely within the provisions of Sec 55(3) of the CPA.

22. Applicant placed clear, convincing and undisputed evidence before the Tribunal that the cost per page was much higher and in fact amounted to approximately fifteen (15) cents per page.

23. The provisions of Section 56 of the CPA provide for a six month time period within which the goods can be repaired, replaced or returned for a refund.

Implied warranty of quality

“56.(1) In any transaction or agreement pertaining to the supply of goods to a consumer there is an implied provision that the producer or importer, the distributor and the retailer each warrant that the goods comply with the requirements and standards contemplated in section 55, except to the extent that those goods have been altered contrary to the instructions, or after leaving the control, of the producer or importer, a distributor or the retailer, as the case may be.

- (2) 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 (emphasis added).
- (3)
- (4) The implied warranty imposed by subsection (1), and the right to return goods set out in subsection (2), are each in addition to—
- (a) any other implied warranty or condition imposed by the common law, this Act or any other public regulation; and
- (b) any express warranty or condition stipulated by the producer or importer, distributor or retailer, as the case may be.”
24. The Applicant returned the printer to the Respondent in and during January 2014, which was within the six month time period required by Section 56.
25. Respondent refused to refund the Applicant the purchase price of the printer despite their requests and insistence.
26. When applying the provisions of the CPA to the facts accepted by the Tribunal it is clear that the Applicant did not receive goods that were reasonably suited for the specific purpose the consumer indicated (Section 55(3). Namely Applicant’s specific requirements, that the printer should be costs effective; she was brought under the impression by the Respondent that in fact the printer he was selling her will meet those requirements, in which it failed.
27. The Applicant therefore has recourse under Section 56 of the CPA.

APPROPRIATE RELIEF

28. In accordance with Section 56 of the CPA the Applicant has a choice to elect for a repair, replacement or refund for the defective goods supplied.

29. The Applicant asked the Tribunal to order the Respondent to refund the purchase price.
30. Based on the invoice from Respondent the Applicant paid R1339,99 for the printer.

CONCLUSION

31. The Tribunal finds that the Respondent did not supply a printer that was suited to the Applicant's requirements.
32. The Applicant is entitled to a refund of the purchase price paid for the printer.

ORDER

33. Accordingly, the Tribunal makes the following order:

33.1 The Applicant's application for leave to refer the matter directly to the Tribunal is granted.

33.2 The Respondent is to pay the amount of R1399,95 to the Applicant within 30 business days of the date of this order.

33.3 There is no order as to costs.

DATED ON THIS 20th DAY OF JULY 2016

[signed]

Ms D Terblanche

Presiding member

Adv J Simpson (member) and Mr X May (member) concurring

[1] NCT/7142/2012/75(1)(b)&(2).

[2] GN 789 of 28 August 2007: Regulations for matters relating to the functions of the Tribunal and Rules for the conduct of matters

before the National Consumer Tribunal, 2007 (Government Gazette No. 30225)

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