

SOUTH AFRICA / JUDGMENT

Verwey v Sunrose GP (Pty) Ltd t/a Sunrose Online (GCC/07/2019) [2019] ZACONAF 4 (3 December 2019) [2019] ZACONAF 4

COURT

Consumer Affairs Court

BEFORE

M. Phukubje, M. A. Du Plessis, I. Opperman

CASE / FILE NUMBER

GCC/07/2019

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IN THE CONSUMER AFFAIRS

COURT FOR THE PROVINCE OF GAUTENG

(HELD AT JOHANNESBURG)

CASE NO.: GCC/07/2019

In the matter between:

TOBIAS

VERWEY

Plaintiff

and

SUNROSE GP (PTY) LTD

Defendant

t/a SUNROSE ONLINE

JUDGMENT

1. This is an action in terms of which the Plaintiff seeks a refund from the Defendant in the amount of R17 798.00 (seventeen thousand seven hundred and ninety-eight rands) with interest thereon at the prescribed rate *a tempore morae*, according to the particulars of claim.
2. At the hearing of this matter, the Chairperson of the Consumer Court inquired from the Defendant, represented by Mr Hussain Phillip, as to whether he requires legal representation and the Consumer Court adjourned for a while, to give the Defendant's representative an opportunity to consult with his superiors regarding the matter of legal representation in the proceedings. The Consumer Court duly reconvened and the Defendant's employee indicated that he had been instructed to proceed with the matter, as the company wanted it to be settled on the day. The Defendant's employee was guided by members of the Consumer Court whenever necessary, in order to ensure smooth proceedings and fairness. The Plaintiff was represented by the Consumer Protector.

The facts

3. The common cause facts which are not in dispute may be set out as follows below. Sometime during 2018, the Plaintiff saw a brochure online, containing details of a food mixer referred to as a "B40, 40-litre food mixer. He made further inquiries telephonically and details of the food mixer were sent to him on behalf of the Respondent by email. The Plaintiff thereafter attended at the Respondent's business premises and inspected the food mixer in person.
4. The Plaintiff was satisfied that the food mixer was the right size, with a capacity of 40 litres as indicated in the brochure provided to him and on the labelling attached to it. He determined that it would meet his business requirements, since his 40-litre mixer had broken down and he needed a replacement food mixer in order to maintain his production at the required levels.
5. The Plaintiff then attended at the Defendant's business premises with the intention to purchase the food mixer. Prior to concluding the purchase, he inspected the food mixer and he noticed that the plate attached to the food mixer, which contained data relating to the food mixer, stated "B40" and he understood it to mean that the mixing bowl of the food mixer had the capacity of 40 litres. He then paid for the food mixer and took delivery thereof to his business premises.
6. The following day he and his employees loaded the mixing bowl with the same quantity of ingredients they used to load on their old 40-litre mixing bowl. Upon completion, they realised that the ingredients did not fit into the mixing bowl, leaving a surplus of ingredients which could not be put into the mixing bowl.

7. The Plaintiff immediately called the Defendant telephonically and informed him of the problem. He explained to the Defendant that the new mixing bowl could only take about 31 litres of contents, whereas the old one which he was replacing, was capable of taking 40 litres of ingredients without any problem. The Defendant did not believe him initially.
8. The Plaintiff recorded a video clip of one of his employees who had the old 40-litre mixing bowl filled with water, which was being emptied into the new mixing bowl. The new mixing bowl filled up while the old mixing bowl still had some water remaining, and it was able to take only about 31 litres of water, leaving a deficit of 9 litres. The Plaintiff sent the video clip to the Defendant who also viewed it.
9. At the hearing of the matter, the video clip was admitted into evidence and played for the Members of the Consumer Court and the Defendant. Its contents were not in dispute and the Defendant agreed that he had received it and viewed it on a previous occasion, as alleged by the Plaintiff.
10. The Plaintiff made payment for the food mixer by way of a bank card and received only a pro forma invoice, despite many requests for a proper tax invoice recording the sale to be sent to him. It is not in dispute that the Plaintiff made payment and the Defendant received such payment, which is the amount claimed by the Plaintiff for a refund under this action.
11. Several meetings, as well as telephonic and written correspondence ensued between the parties, in terms of which various attempts were made to resolve the matter. The Plaintiff requested a refund from the Defendant and the Defendant offered to replace the mixing bowl with a 40-litre one. The Defendant never got around to replacing the 31-litre mixing bowl with a 40-litre mixing bowl nor did it refund the Plaintiff for the purchase price paid for the food mixer. In the meantime, the Plaintiff had returned the food mixer to the Defendant, who has since kept it in his custody.
12. The Plaintiff approached his attorneys who wrote a letter to the Defendant, demanding payment of the purchase price but no payment was received. In frustration, the Plaintiff approached the office of Consumer Affairs for assistance and an investigation was conducted,

culminating in the current proceedings.

The applicable legal principles

13. At the commencement of the hearing, the Consumer Protector, on behalf of the Plaintiff, requested to make an amendment to the names of the Plaintiff as cited in the papers before the Consumer Court. She submitted that the names which appear in the papers reflect the Plaintiff as "Tobias Verney" and that the correct names are "Tobias Verwey". Her request for an amendment was granted, and the names of the Plaintiff as cited in the papers before the Consumer Court were duly changed. The Defendant raised no objection to this request.

14. However, at the commencement of presentation of his case the Defendant raised a point in limine by complaining that the proceedings were irregular, since the names of the Plaintiff as reflected in the papers before the Consumer Court were incorrect. Secondly, the Defendant objected to the proceedings since, according to him, he did not know whether the summons served on his business was a simple or combined summons.
15. The Consumer Court adjourned for a short while and considered the points in limine raised by the Defendant. It dismissed both points in limine by ruling that the Consumer Protector had made an application to change the names of the Plaintiff at the outset of the proceedings and such application had been granted. With regard to the issue of whether the summons served on the Defendant was a simple or a combined summons, the Consumer Court explained to the Defendant that the summons was a combined summons, as it had particulars of claim attached to it.
16. The Constitutional Court in the matter of Affordable Medicines Trust and Others v Minister of Health and Another^[1] stated (per Ngcobo J) the following, with regard to amendment of court papers:

"[9] The principles governing the granting or refusal of an amendment have been set out in a number of cases. There is a useful collection of these cases and the governing principles in Commercial Union Assurance Co Ltd v Waymark NO. The practical rule that emerges from these cases is that amendments will always be allowed unless the amendment is mala fide (made in bad faith) or unless the amendment will cause an injustice to the other side which cannot be cured by an appropriate order for cost, or 'unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed.' These principles apply equally to a Notice of Motion. The question in each case therefore is: what do the interests of justice demand." (Footnotes omitted, own emphasis)
17. It is this Consumer Court's view that the application by the Consumer Protector to amend the papers was not made in bad faith, the Defendant will not suffer any prejudice and it is in the interests of justice that the incorrect citation of the Plaintiff be amended. Such an amendment will also be in the interests of administration of justice when implementing the Consumer Court's order. The amendment is therefore made competently.
18. With regard to the form of summons issued, this Consumer Court finds that the summons complies in all material terms with the requirements of Regulation 14 of the Regulations published in terms of the Consumer Affairs (Unfair Business Practices) Regulations issued under Notice Number 6717 of 1999 and dated 01 October 1999.

Regulation 14 thereof provides as follows:

"14. Form of summons Initiating proceedings against person allegedly responsible for unfair business practice.

- (1) Proceedings before the court against a person alleged to be responsible for an unfair business practice must be initiated, as contemplated in section 18(1) of the Act, by a summons complying substantially with Form 5 in Annexure A
- (2) The summons must-
 - (a) Contain the substance of the allegations regarding the unfair business practice in question;
 - (b) Specify a date, which will not be less than 10 working days and place on which the person summoned is required to appear before court. "
19. This Consumer Court finds that the summons issued and served on the Defendant in these proceedings complied substantially with the requirements of 14 of the Regulations and that there is no merit in the Defendant objection to the nature and validity of the summons.
20. It is common cause that the parties concluded a contract (partly written and partly oral) for the sale and purchase of a food mixer for which the Plaintiff made payment and thereafter took delivery to commence using it at his business premises. The brochure sent by the Defendant to the Plaintiff contains the following relevant specifications for the food mixer which is the subject-matter of this hearing, which may be best quoted in the extract of the table below:

(please refer to pdf for table)

21. The Plaintiffs case is that he seeks a refund of the purchase price for the mixing bowl which he purchased from the Defendant because it cannot be used for the intended purpose and that is due to the fact that the specifications referred to in the brochure are not the same as those which the food mixer has. As is apparent from the extract of the brochure above, the food mixer's bowl capacity is stated to be 40L (forty litres), but the Plaintiffs physical verification of this aspect revealed that the bowl fell short of 40L (as per the video clip which is common cause). It therefore did not meet its stated specifications outlined on the brochure, represented to the Plaintiff (and the public at large) to be 40L.
22. Section 20 of the CPA provides as follows:

Consumer's right to return goods

20.

- (1) This section is in addition to and not in substitution for:-
 - (a) the right to return unsafe or defective goods, contemplated in section 56;or
 - (b) any other right in law between a supplier and consumer to return goods and receive a fund.
- (2) Subject to subsections (3) to (6), the consumer may return goods to the supplier, and receive a full refund of any consideration paid for those goods, if the supplier has delivered—

- (a) goods to the consumer in terms of an agreement arising out of direct marketing, and the consumer has rescinded that agreement during the cooling off period, in accordance with section 16;
- (b) goods that the consumer did not have an opportunity to examine before delivery, and the consumer has rejected delivery of those goods for any of the reasons contemplated in section 19(5);
- (c) a mixture of goods, and the consumer has refused delivery of any of those goods, as contemplated in section 19(8); or
- (d) goods intended to satisfy a particular purpose communicated to the supplier a contemplated in section 55(3), and business days after delivery to the consumer. the goods have been found to be unsuitable for that particular purpose. " (own emphasis)

23. Section 55(2) of the Consumer Protection 68 of 2008 (the "CPA") provides as follows, with regard to the rights of consumers who purchase products from a supplier:

"(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, n 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 ate 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 off 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 intend 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. "

24. Section 55(2)(a) of the CPA provides that a consumer is entitled to receive goods that are reasonably suitable for the purposes for which they are generally intended. A food mixer purchased by the Plaintiff is generally expected to be capable of use as described in its specifications (per the brochure quoted above). The Plaintiff intended to utilise it in his baking business for purposes of handling larger quantities of cake mixes, in accordance with the capacity which it was represented as being capable of handling. This capacity is reflected in the specifications contained in the brochure sent to the Plaintiff by the Defendant, the relevant

terms of which have been quoted above.

25. The courts have also held that the "common' or ordinary" use of the goods is an important consideration in determining the purpose for which specific goods are generally bought. In *Sarembock v Medical Leasing Services Pt Ltd and Another*[2] the court stated the following:

"The nature and effect of the defect required to be proved in such a case is thus described in *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co. Ltd* 1977(3) S.A. 670 (AD) 683 H- 684A:

"Broadly speaking in this context a defect may be described as an abnormal quality or attribute which destroys or substantially impairs the utility or effectiveness of the res vendita, for the purpose for which it has been sold or for which it is commonly used (see *Dibley furter*, 1951 (4} S.A. 73 (C) at pp. 80-2, and the authorities there cited; also *Knight v. Trollip*, 1948(3) S.A. 1009 (D) at pp. 1012-13; *Curtaincrafts (Pty,) Ltd*.

v. *Wilson*, 1969 (4) S.A. 221 (E) at p. 222; *De Wet and Yeats*, *Kontraktere*q, 3M ed., p. 236; *Mackeurtan*, *Sale of Goods* 4th ed., p.246; *Wessels*, *Contract* 2nd ed., para. 4677)."

The passage in *Knight v Trollip* cited reads as follows:

"As I understand It, a contract of sale under the common law normally Imports, in the absence of variation by express agreement or necessary intendment, that the seller undertakes to the purchaser that the "res vendita" Is, at the time of contracting, free from any undisclosed defect which tenders the "res" unfitted in whole or to a substantial extent for the purposes for which such a thing is normally used, and/or for any special, even though unusual, purpose which the purchaser has, prior to the making of the contract, made known to the seller. "

26. The provisions of section 55(4) of the CPA enumerates the factors which may be taken into account when determining what the ordinary factors which may be taken into account when determining what the ordinary purpose of the goods may be. These factors include the manner in which the goods were marketed and displayed as well as the use of trade descriptions or warnings which accompanied the goods. In the matter before this Consumer Court, a brochure containing technical information on the specifications of the food mixer was sent to the Plaintiff by the Defendant. The Plaintiff had no reason to doubt the veracity of the information outlined in the brochure and in fact placed great reliance on that information when he purchased the food mixer. The food mixer itself had labels which described its specifications which not correct.
27. Unfortunately for the Plaintiff, the capacity of the bowl of the food mixer fell below the stated 40L in the brochure. The Plaintiff testified that he required the food mixer as a replacement of his old 40L food mixer which had broken down. He had no reason to doubt that the 40L mixer which he was purchasing from the Defendant would only be capable of handling 40L What therefore emerges from this is that the food mixer described in the brochure and which was purchased by the Plaintiff is not of the same specifications as the one which the Plaintiff ultimately took delivery of.
28. The Defendant, in his defence, submitted that the food mixer had been used by the Plaintiff and that the Plaintiff is not entitled to a full refund. At best for the Plaintiff, so the Defendant argued, he should take back the food mixer and receive a reduction in the purchase price. The Defendant also offered the Plaintiff delivery of the food mixer, and claimed that it had fitted a 40L bowl. Such an offer was only made in the hearing of the matter and it is puzzling why it was not emended prior to the hearing. In any event, it is a late offer made conveniently but belatedly when the Defendant finds itself having to explain its actions in open proceedings.
29. The Defendant's assertion that the Plaintiff used the food mixer and that it therefore became a "used* item is inconsistent with e-mail and WhatsApp messages exchanged between the parties, in which the Defendant authorized the Plaintiff to continue using the existing mixer whilst awaiting arrival of a 40L bowl. This was done by way of a WhatsApp message sent by the Defendant to the Plaintiff on [...].
30. It is therefore bizarre for the Defendant to plead that the food mixer is "used, and therefore second hand" when it expressly authorized the Plaintiff to use it whilst the Defendant was attempting to source a 40L bowl.

31. The Defendant testified that it was not getting the right specifications of products from its suppliers who are based in China and who are usually not helpful when it comes to insisting on specifications. It appears that the Defendant was pleading innocence and, as it were, passing the buck onto its suppliers. In response to questions by members of the Consumer Court, the Defendant however acknowledged that it had its own agents based at their supplier in China who inspect the products purchased prior to packaging and sending to their premises in South Africa.
32. One other issue deserves mention, which is of concern to this Consumer Court. Uncontested evidence was led before this Consumer Court, indicating that the Plaintiff was branded as an undesirable person by the Defendant and banned from entering the premises of the Defendant after he had attended at those premises on a number of occasions to inquire about the food mixer. This amounts to a violation of Plaintiffs right to dignity as guaranteed in the Constitution. This kind of behavior is condemned in the strongest terms and the Defendant must desist from any such behavior in the future.
33. A reading of the provisions of the CPA is clear with respect to a consumer's right to return purchased goods, if the requirements listed in section 20 are met. In the present matter, it is common cause that the Plaintiff informed the Defendant within one day of purchasing the food mixer that its bowl did not meet his business requirements, and offered to return it. It took slightly more than a year before the matter could be heard by this Consumer Court, with the Plaintiff still not having been granted the relief he was seeking.
34. It is worth noting that the remedies provided for in section 20 of the CPA are in addition to, and not in substitution of other rights which a consumer may be entitled to in terms of the law. Accordingly, the Plaintiff is, in addition to the rights he has in terms of section 20 of the CPA, protected by the provisions of section 55 of the CPA. In terms of section 56(1) of the CPA "there is an implied provision that the ... retailer ... warrant[s] that the goods comply with the standards contemplated in section 55

..."

Section 56(2) of the CPA provides as follows:

Implied warranty of quality

- (2) within six months after the delivery of any goods to a consumer the consumer may return the goods to the supplier risk and expense if the goods fail to satisfy the requirement 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 the consumer the price paid by the consumer, for the goods.

(emphasis added)

35. Section 1 of the CPA defines a "provincial consumer protection authority*" as a body established within the provincial sphere of government, and designated by the responsible Member of the Executive Council of a province to have authority to deal with consumer protection matters in that province. In the province of Gauteng, the designated authority regarding consumer matters vests in the Office of Consumer Affairs.
36. The Consumer Affairs (Unfair Business Practices) Act No.7 of 1996 (the "Consumer Affairs Act") provides for applicable legislation within the province to which it applies.

Section 1 of the Consumer Affairs Act provides that:

"unfair business practice" means any business practice which, directly or indirectly, has or is likely to have the effect of unfairly affecting the consumer. "

The Consumer Protection Act defines "prohibited conduct as an act or omission in contravention of the CPA.

37. The conduct of the Defendant in supplying goods which are described differently or which bear specifications which are different to those it has put forward amounts to both an unfair business practice in terms of the Consumer Affairs Act and prohibited conduct in terms of the CPA, and the Defendant must desist from such conduct forthwith.
38. In the circumstances, I make the following

orders:

38.1 the Defendant is ordered to pay the Plaintiff an amount of R17 798.00 (seventeen thousand seven hundred and ninety-eight Rands); and

38.2 interest on the amount in paragraph 38.1 above at the prescribed rate from the date of this order.

Advocate M. Phukubje

Member

Prof. M. A. Du Plessis

(Chairperson of Consumer Court)

Ms. I. Opperman

Date: 03 December 2019

[1] 2005 [ZACC] 3, at paragraph 9.

[2] 1991

(1) SA344 (A) at 375F.

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