

SOUTH AFRICA / JUDGMENT

Vorster and Another v Panorama Estate (NCT/38617/2016/75(1)(b)) [2017] ZANCT 109 (9 October 2017) [2017] ZANCT 109

COURT

National Consumer Tribunal

BEFORE

T Woker, FK Manamela, X May

CASE / FILE NUMBER

NCT/38617/2016/75(1)(b)

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IN

THE NATIONAL CONSUMER TRIBUNAL

HELD

IN CENTURION

Case

number: NCT/38617/2016/75(1)(b)

In

the matter between:

MICHIEL
DANIEL
VORSTER FIRST
APPLICANT
SUSARA
ISABELLA SOPHIA VORSTER SECOND
APPLICANT
and
PANORAMA
ESTATE
RESPONDENT

Coram: Prof.
T Woker -
Presiding member
Adv
FK Manamela - Member
Mr
X May -
Member
Date
of Hearing - 8
June 2017

JUDGMENT

AND REASONS

APPLICANTS

1. The Applicants in this matter are Michiel Daniel Vorster and Susara Isabella Sophia Vorster, an elderly couple residing at Panorama Estate in Krugersdorp, Gauteng (hereinafter referred to as "the Applicants"). Applicants are owners of a sectional title unit within the said complex.
2. At the hearing, the Applicants were represented by Martin Hennig Attorneys of Bryanston, Johannesburg

RESPONDENT

3. The Respondent is Panorama Estate, a body corporate established in terms of the Sectional Title Act No 95 of 1986; and incorporated as a not-for-profit company in terms of the Company Laws of the Republic of South Africa, having its principal place of business in Rangeview, Krugersdorp, Gauteng (hereinafter referred to as "the Respondent")
4. The Respondent was represented by Louw & Heyl Attorneys of Roodepoort, Gauteng.

APPLICATION TYPE

5. This is an application in terms of Section 75(1) (b) of the Consumer Protection Act 68 of 2008, for leave to refer the complaint directly to the Tribunal. The Applicants completed and filed a Form Tl.73 (3) & 75 (1) (b) & (2) CPA and one of them deposed to an affidavit in support of that application.

RELIEF SOUGHT BY THE APPLICANT

6. The Applicants seek an order:
6.1 declaring that the Tribunal has jurisdiction to adjudicate this matter;

6.2 declaring that the invoices rendered for compulsory meals not wanted or specifically agreed to by the Applicants was unlawful;

6.3 compelling the Respondent to pay the Applicants' cost incurred in prosecuting their claim;

6.4 interdicting the Respondent from including these costs in the Applicants' monthly levy account; and

6.5 further and/or alternative relief.

BRIEF BACKGROUND OF THE MATTER

7. Applicants are owners of a sectional title unit in terms of the registered sectional title dated 5 July 2005. The unit forms part of the sectional title scheme or residential complex within Panorama Estate. The Home Owners Association comprises owners of individual units, and is responsible to administer and manage the scheme. The Association amended its Management Rules in August 2007 and November 2013.
8. One of its Rules was the charging of a kitchen levy for all the residents living in the complex, including the Applicants who opposed the rule change. The Applicants refused to pay the levy.
9. The Respondent appointed a Service Contract (Brian's Supermarket) in June 2015 to provide the meals, and then raised monthly invoices to the Applicants demanding payment for compulsory meals the Applicants allegedly never took or used. Accordingly, the Respondent undertook to raise levies against each unit and collect these levies on a monthly basis for four meals per resident.
10. Applicants addressed letters to the manager of the Respondent, (who referred the matter to the Respondent's Board of Directors), complaining about the invoices being raised for unwanted meals which they never requested. The Respondent, according to the Applicants, continues to bill them on a monthly basis for meals they never requested or solicited from the Respondent.
11. Applicants referred the complaint to the National Consumer Commission ('The Commission') in August 2015 in terms of section 71 (1) of the CPA read with section 69(c)(iv).
12. On 23 September 2015 the Commission issued a notice of non-referral based on the view that the complaint would be best dealt with by the Estate Agency Affairs Board and, and that the Applicants do not allege any facts which, if true, would constitute grounds for remedy under the Consumer Protection Act 2008.
13. It is against this background that the Applicants subsequently lodged the application with the Tribunal in terms of Section 75(1) of the CPA, asking the Tribunal to grant leave for the matter to be referred directly to the Tribunal for a hearing.

APPLICANT'S SUBMISSION

14. According to the Applicants, the Commissioner's issuing of a notice of non-referral is based on the unfounded view that this complaint would be best dealt with by the Estate Agency Affairs Board. In doing so, the Commissioner failed to apply his mind, for had he done so and considered the Applicants' complaint, he would have concluded that the National Consumer Commission had jurisdiction to deal with the complaint. The Applicants submit, the Tribunal ought to hear this complaint because:

14.1 the complaint pertains to a transaction for the supply of four compulsory meals entered into within South Africa, which transaction

is not exempted (Sec5 (1)(a) of CPA) read with definition of "transaction", in terms of section 1);

1.25cm; margin-bottom: 0cm; line-height: 200%"> 14.2 this transaction was entered into by the Respondent in the ordinary course of business, flowing from its obligation to provide meals as service to residents (the Applicants) in the ordinary course of its business as administrator of the estate[1];

14.3 apart from the obligation the Respondent agreed to in the Service Contract, the monthly invoices raised by the Respondent to the Applicants substantiate the fact that the Respondent has done this in the normal course of its business;

14.4 the respondent cannot escape the fact that it is part of an "arrangement" to supply meals ("services") to the Applicants (as residents) according to the Respondent's own version, the Applicants being members of the Company;

14.5 the Applicants are consumers (as defined in section 1 of the Act), to whom the services are marketed or to whom the services are to be supplied, which services are not exempted by the CPA (Sec 5(2) or (3). Furthermore, the Applicants are the intended recipients or intended beneficiaries of the services even though they were not party to the transaction;[2]

14.6 the Respondent, is a "supplier" as intended in terms of Section 1 of the CPA who not only markets the services of the restaurant, but is contractually obligated to do so. It may be correct that the Respondent does not directly supply the services, but it does so through its appointed service provider. At the very least, the Applicants argue, this action of the Respondent must be construed, if not inferred, as the Respondent engaging in conduct in the ordinary course of its business; and

14.7 the definitions given to "supply" and "supplier" in the CPA are intended to be wide in order to affect a very wide range of suppliers of goods and services, and sufficiently wide enough to include the Respondent as a "supplier."

RESPONDENT'S SUBMISSION

15. The Respondent argues that the Tribunal does not have jurisdiction to hear this application based on the reasons:

15.1 that the relationship between the Applicant and the Respondent is a contractual one, not to be adjudicated upon in terms of the Consumer Protection Act, but by the civil courts. The Respondent cannot be regarded as a service provider as envisaged in the CPA;

15.2 that the Respondent derives its mandate from its members who live in the estate, such mandate having been set out in the Memorandum or Incorporation and the House and Management Rules passed by the residents of the estate/residential complex at every annual general

meeting or special meetings;

15.3 that the Respondent is responsible for the implementation, maintenance and enforcement of the rules for the benefit of (all) the members of the estate

15.4 that the Applicants are part of the Respondent (community of the estate/complex) and are bound by the rules of the complex (i.e the Memorandum of Incorporation; House Rules and Management Rules); and

15.5 that the Respondent executes its mandate solely on behalf of the residents of the estate; and cannot be regarded as rendering or supplying these services in the ordinary course of its business (as defined in the CPA).

THE HEARING

16. At the hearing of this application, the Tribunal received heads of argument filed by the parties.
17. A referral in terms of Section 75 of the Act is a referral of the complaint that the Applicants lodged with the Commission, and in respect of which it elected to issue a notice of non-referral.
18. The Tribunal would therefore consider whether or not leave should be granted to hear the matter.

CONSIDERATION OF THE APPLICATION FOR LEAVE (PROCEDURAL ISSUES)

19. In accordance with the NCT Rules, the Applicant has to file the section 75(1) (b) application within 20 business days of the date of the Notice of non-referral or within a longer time as permitted by the Tribunal. The date of the NCC's Notice of Non-referral is 10 October 2015. The Applicant therefore was out of time as its application is dated 5 February 2016; and the date of receipt by the NCT Registrar's office and the Respondent is reflected as 15 February
2016. The Applicant then obtained condonation from the Tribunal for the late filing of the documents, in terms of Rule 34;
20. Accordingly, the application is properly before this Tribunal;

21. Section 75(1) of the Act requires that the National Consumer Commission (NCC) issues a notice of non-referral in response to a complaint as a pre-requisite for a referral in terms of that section to the Tribunal. It provides that:

"If the Commission issues a notice of non-referral in response to a complaint, other than on the grounds contemplated in section 116, the complainant concerned may refer the matter directly to

- (a) the consumer court,.....
- (b) the Tribunal, with leave of the Tribunal" (own emphasis).

22. The Applicant attached the Notice of non-referral from the NCC to this application.[3]

23. Sections 72(1)(a) and 73(1)(a) of the Act states that the Notice of non-referral shall be in the prescribed form. The prescribed forms are contained in the CPA regulations as Annexure F - Regulation 36 and Annexure G- Regulation 37 respectively.

24. In the matter of Coertze and Burger v Young[4] the Tribunal considered the factors which must be evaluated regarding leave. The Tribunal held that the following two factors should be considered:

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

24.2 whether the matter is of substantial importance to the Applicant or the Respondent

25. There is no dispute regarding the substantial importance of this matter to the parties (both the Applicants and the Respondent). The Applicants' 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.

26. When determining whether the Applicant should be granted leave to refer the matter directly 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[5] 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."

27. 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”.
28. In considering the reasonable prospects of success and the relief the Applicant is seeking, the Tribunal makes the following

conclusion:

28.1 the Tribunal cannot bestow upon itself powers except those prescribed by the legislation creating it, the National Credit Act, read with the Consumer Protection Act. The Tribunal therefore, does not have inherent jurisdiction to hear any other matter unless authorised to do so by the enabling statute(s), for the simple reason that the Tribunal as aforesaid, is a creature of statute;

28.2 the Tribunal cannot order the body corporate/the Board of Directors of the Home Owners Association not to implement, maintain and enforce the rules of the body corporate I association when it is being mandated to do so by the residents of the estate in their meetings;[6]]

28.3 a body corporate is a sui generis entity which is established especially to deal with the rules for those living in communal living establishments. Their primary function is to establish certain rules for everyone who lives in the community. It is "impossible" to get 100% approval of all the rules and so, it is reasonable to expect that the wishes of the majority will prevail. This particular issue goes beyond deciding whether or not the Applicants should pay for the meals, it goes to the role of the Tribunal when it comes to overriding the wishes of the majority who reside in a gated community.

28.4 the legislature has introduced the Sectional Titles Scheme Management Act of 2016 and established a Community Schemes Ombud Services[7] to deal with these disputes. Had the legislature intended that a body corporate would be regarded as a supplier under the CPA legislation, the Tribunal is of the view that it would have specifically provided for this in the Consumer Protection Act or in the Sectional Titles Schemes Management Act> or the Community Schemes Ombud Services Act. The Tribunal is of the view that disputes regarding the rules of Home Owners Associations must be dealt with by the Community Schemes Ombud;

28.5 the Tribunal is of the view that a body corporate which is acting in the course and scope of its mandate, enforcing the rules decided by the majority in a community such as the Respondent, is not a supplier under the CPA; and

28.6 further, the Tribunal is satisfied that the Applicant has not laid a foundation for a complaint in terms of the CPA which the Tribunal has powers to adjudicate upon in the main application.

29. In the result. the application for leave to refer the matter directly to the Tribunal is refused.
30. There is no order as to costs.

Dated at Centurion on this 9th Day of October 2017

[Signed]

FK Manamela (Member)

Prof T Woker (Presiding member) and Mr X May (member), concurring.

- [1] See definition of 'consideration' in section 1 of CPA
- [2] Service Contract "AV3", page 225 of indexed papers
- [3] The Notices in accordance with the form required by Regulation 36 and states: ·/ regret to inform you that the Commission will not refer your complaint, as the complaint does not allege any fact if true would constitute grounds for a remedy under the Consumer Protection Act, 2008.·
- [4] NCT/7142/2012/73(3)&75(1)(b)&(2)CPA. In this matter the Tribunal followed the principle applied in the High Court practice and took the approach found in the Westinghouse Brake and Equipment (Pty) Ltd v Bilger Engineering(Pty)Ltd

judgment.

The Tribunal granted leave to refer matter directly to the Tribunal after considering reasonable prospects of success, and whether or not the case was of substantial importance to the Applicant, him and the Respondent.

- [5] 1986(2) SA 555(A)Tat para 15; see also Coertze and Burger v Young supra
- [6] See Sectional Titles Scheme Management Act 54 of 2016 (published in Government Gazette number 40334 of 7 October 2016) and the Community Schemes Ombud Act
- [6] See Sectional Titles Scheme Management Act 54 of 2016 (published in Government Gazette number 40334 of 7 October

2016) and the Community Schemes Ombud Act

- [7] Infra

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