

IN THE NATIONAL CONSUMER TRIBUNAL
HELD AT CENTURION

Case No: NCT/3592/2011/101(1)(P) CPA

In the matter between:

HYGINIQUE TOILET HIRE & SALES

Applicant

and

JOE CHAUKE

1st Respondent

and

THE NATIONAL CONSUMER COMMISSION

2nd Respondent

CORAM:

- (a) MASEKO J.M. (PROF.) (PRESIDING)
- (b) WOKER TANYA (PROF.) (MEMBER)
- (c) XOLELA MAY (MR) (MEMBER)

Date of Hearing: 25 June 2012

Date of Judgment: 29 June 2012

JUDGMENT AND REASONS

1. The Applicant

- 1.1. The Applicant, Hyginique Toilet Hire and Sales CC (Applicant) is a Close Corporation and registered as such in accordance with the laws of the Republic of South Africa under

registration number CK 2001/012888/28 with its principal place of business at 1438A, Lovedale Street, Mabopane.

- 1.2. Applicant hires out portable toilets to the general public from their Mabopane address.
- 1.3. At the hearing, the Applicant was represented by its owner, in the name of Mr. R.C. Rabalao.

2. The 1st Respondent

- 2.1. The 1st Respondent is Mr. Joe Chauke of E125, Block XX, Soshanguve East, 0152.
- 2.2. On the 9th May 2011, the 1st Respondent approached the 2nd Respondent and laid a complaint against the Applicant.
- 2.3. The 1st Respondent did not attend the hearing and also did not file any answering papers to the Application of the Applicant for both:
 - 2.3.1. The condonation application; and
 - 2.3.2. The merits of the case.

3. The 2nd Respondent

- 3.1. The 2nd Respondent is the National Consumer Commission (“NCC”); a public entity, established by section 85 of the Consumer Protection Act No. 68 of 2008 (“CPA”). The Respondent is located at Berkley Office Park, 08 Bauhinia Street, Highveld Technopark, Centurion.
- 3.2. The 2nd Respondent is mandated to perform functions in terms of the CPA more specifically those set out in sections 92 to 98 of the Act.
- 3.3. The 2nd Respondent also neither attended the hearing nor filed any answering affidavits to:

3.3.1. The application for condonation for referring the matter late; and

3.3.2. The substantive and procedural issues raised in the application.

4. Jurisdiction

4.1. This National Consumer Tribunal (Tribunal) has jurisdiction to hear this matter in terms of section 101 of the CPA.

4.2. This section (101) empowers the Tribunal, to confirm, modify or cancel all or part of a compliance notice.

5. Issue to be Decided

Apart from the condonation application addressed at paragraph 7 below, and in terms of the application in this case, the issue to be decided by the Tribunal is whether the Compliance Notice issued by the 2nd Respondent on 13 May 2011, stands to be reviewed and set aside or not.

6. Background

6.1. The hearing is consequent to the Applicant objecting, in terms of section 101(1) of the CPA, to the compliance notice issued by the Respondent against it on the 8th November 2011 in terms of section 100 (1) of the CPA. The matter was set down for a full hearing on all the grounds of objection raised to the compliance notice.

6.2. Part of the issues to be decided was an application for condonation for late referral of the matter to the Tribunal by the Applicant. The Tribunal dealt with this matter first at the hearing, and disposed of it before dealing with the substantive and procedural issues of the case.

7. The Condonation Application

7.1. In support of the application for condonation for late referral of the matter, the Applicant deposed by affidavit and averred in submissions, in summary, that:

7.1.1. After receiving the Compliance Notice under review on Friday 11 November 2011, Applicant had on Monday 14 November 2011 started searching for the process of objecting to the Compliance Notice.

7.1.2. While the cover letter accompanying the Compliance Notice, had made reference to an objection form that the Applicant was advised by the second Respondent to lodge his objection, such a form had not been attached to the letter – page 31 of case file.

7.1.3. Applicant further called the 2nd Respondent asking for the said form from several people without any success. And at that point, he had been telephonically advised that all the relevant people who could assist him had been attending a three day workshop away from the office of the NCC.

7.1.4. On 17 November 2011, Applicant had received a call from one, Nonhlanhla, at the NCC, (2nd Respondent), enquiring about the nature of Applicant's enquiry. The Applicant reiterated the request for the objection form in question.

7.1.5. At that point, Nonhlanhla reportedly informed the applicant that she knew nothing about such a form.

7.1.6. After a long absence of calls from the NCC, the Applicant then received a call on 29 November 2011, from one, Mphago of the NCC. Mphago told Applicant that the period for lodging an objection had expired.

7.1.7. When Applicant told Mphago that he (Applicant) was still awaiting assistance with the objection form, Mphago told Applicant that such a form was not provided to people like the Applicant and that it is only availed to attorneys.

- 7.1.8. Mphago also told Applicant to approach the High Court to obtain the elusive form. This exchange continued and reached a point where Mphago eventually supplied the Applicant with the telephone number of this Tribunal. Only then did Applicant make contact with the Tribunal and was assisted with the relevant forms and the procedure was properly explained to him.
- 7.2. Applicant further submitted that he had physically visited the NCC at “Mantjies Building”¹, and that he was advised on arrival that the NCC had moved to another address. With all the above, the applicant further submitted that:
- 7.2.1. On 23 November 2011, he (Applicant) had written to the NCC still chasing the issue of the objection form – page 27 of case File;
- 7.2.2. The delay in submitting the objection was not a flagrant disregard of the rules of the Tribunal or the provisions of the Act. The explanations that he had advanced in this application were reasonable in the circumstances.
- 7.3. After a brief adjournment and consideration of the condonation application by the Applicant, this Tribunal **noted**, inter alia:
- 7.3.1. The fact that the letterhead of the NCC to the Applicant did not carry any details on the postal or physical addresses of the NCC. This contributed to the delay in his locating them and being directed to the Tribunal;
- 7.3.2. The effort exerted by the Applicant since the time he had received the Compliance Notice. Such effort does not indicate a person who deliberately or negligently omitted to act in accordance with his conviction- namely to lodge an objection against the Compliance Notice;

¹ The Tribunal took judicial notice of the fact that the NCC used to occupy the DTI Building at Meintjies Street in Pretoria. This is expected to be what the Applicant was referring to.

- 7.3.3. The various times the NCC had dealt with him and the quality of the treatment he received in that time;
- 7.3.4. The application for condonation had in any event not been opposed by either the first or the second Respondents;
- 7.3.5. The condonation issue had to be determined before a decision could be made whether to even entertain the procedural and substantive issues in the matter.
- 7.4. For the foregoing **reasons**, the Tribunal then returned an **ex tempore** ruling granting the condonation for referring the matter late to the Tribunal. The hearing thence proceeded into the merits of the case.

8. Grounds for Challenging the Compliance Notice

- 8.1. Regarding the grounds for setting aside the Compliance Notice in question, the Applicant submitted, in summary that:
- 8.1.1. The NCC was not honest in any of their allegations contained in the body of the Compliance Notice and in other respects even contradicted themselves.
- 8.1.2. While the NCC claims in paragraph 1.3.2 of its Compliance Notice, that the Applicant had been given 7 days in which to respond and that he had failed, this was not true. To support this denial, the Applicant:
- 8.1.2.1. Submitted the letter dated 23 May 2011 (page 25 of Case file) which was a response to the NCC; about three days before the deadline of 26 May stipulated by the NCC²; and

² Letter of the NCC to Applicant dated 13 May 2011 at Pages 19-20 of case file
Page **6** of **11**

- 8.1.2.2. Submitted proof of a transmission report showing that the foregoing letter was sent via facsimile on 24 May 2011 – page 26 of case file.
- 8.1.3. While the NCC is correct in paragraph 1.3.3 of its Compliance Notice when it claims that the matter was set down for conciliation for the 1st July 2011, and that Applicant was available telephonically, the NCC goes on to contradict itself at paragraph 1.3.2. This is the paragraph in which the NCC claims that the Applicant had failed to respond.
- 8.1.4. While the NCC at paragraph 1.3.4 of its Compliance Notice, correctly states, in part, that the Complainant was willing to pay a cancellation penalty of at least 10% of the monies paid, at paragraph 2.1 of the Compliance Notice, the NCC orders the Applicant to refund 100% of the amount paid (of R6650.00). This order is not justifiable or reasonable and stands to be set aside.
- 8.1.5. While paragraph 1.4 of the Compliance Notice, alleges that the Applicant has contravened section 20(5) of the CPA, section 20(5) deals with a supplier refunding a consumer the price paid for goods. The defect on this Compliance Notice is that the Applicant does not and did not sell goods to the 1st Respondent. Instead what had indeed occurred was the Applicant renting out portable toilets of disabled persons to the Applicant. And on these bases alone, the Compliance Notice, in its entirety, stands to be reviewed and set aside.
- 8.1.6. While at paragraph 2.1 of the Compliance Notice, the NCC orders the Applicant to pay the amount of R6650.00 to the 1st Respondent, by the 11th November 2012, the Applicant was expected to do so and comply with this Compliance Notice despite the fact that he received it on the 11th November 2011 at 17h30. This part alone contains a degree of impossibility of performance. Also it was not clear whether the NCC is competent to order payment in a Compliance Notice.
- 8.1.7. While at paragraph 3.2 of the Compliance Notice, the NCC claims that the Applicant never responded to the complaint forwarded to him on 13th May 2011, they are deliberately misrepresenting the facts, as the NCC in the same Notice acknowledges

the sessions in which the parties had exchanged on the matter in telephone conciliations as well as written communications (Op cit).

8.1.8. While at Paragraph 3.3.4, of its Compliance Notice, the NCC alleges that the Applicant had not been forthcoming and nor displayed any effort to address the issue presented to it, this claim is not borne by the facts already alluded to above:

8.1.8.1. The telephone exchanges;

8.1.8.2. The common cause conciliations referred to in the same Notice; and

8.1.8.3. All the written exchanges between the parties also alluded to above.

8.2. The main issue in this case is that on 4 May 2011, the 1st Respondent approached the Applicant for a quotation to supply portable toilets and VIP toilets for a mayoral function.

8.3. The total amount involved in the transaction was R6,650.00.

8.4. Prior to issuing the quotation in respect of the mobile toilets, the Applicant had informed the 1st Respondent that toilets for the disabled were not available. The last client to rent those out had just phoned in to extend their rental for a further agreed period.

8.5. The 1st Respondent had, however pleaded with Applicant to avail these mobile toilets for disabled persons as the executive Mayor of Tshwane was going to be at the function in Winterveld to handover RDP (Reconstruction and Development Programme) houses. Some of the recipients were going to be persons living with disabilities.

8.6. Applicant then phoned the other client to cancel the renewal of the mobile toilets, to assist the 1st Respondent and the mayoral function he represented.

- 8.7. The parties then concluded the transaction with the payment of the amount of R6650.00 in cash with a hand written stipulation on the receipt, indicating that there would be no refund under any circumstances – page 18 of Case file.
- 8.8. A few hours after this transaction and agreement, the 1st respondent had returned to the Applicant requesting a refund and claiming that the mayoral function had been cancelled. And the Applicant had refused to refund the Applicant on the grounds that:
- 8.8.1. There had just been concluded a **“no refund”** clause during the payment;
- 8.8.2. The opportunity cost to Applicant as a result of the cancellation with the earlier client who had requested the extension of his rental of the mobile toilets;
- 8.8.3. On enquiry, the Applicant had been told by the Mayor’s Office that the function was still on; and
- 8.8.4. The Applicant had also attended the function later and found that it actually was taking place. An article with pictures on the function was carried by the Daily Sun on Thursday 19 May 2011 – page 30 of Case file.
- 8.9. Applicant further submitted that despite the **“no refund clause”**, Applicant does make exceptions in extreme circumstances, such as a real cancellation or a death of the person who had needed to rent out the products. In such situations, Applicant would be willing to refund the client with certain cancellations fees. But this case did not qualify as the function had not really been cancelled as alluded to above.

9. Analyses of the Evidence and Arguments

- 9.1. In arriving at its finding on the merits of the Compliance Notice, the Tribunal has since the hearing considered the submissions of the Applicant. And in so doing, the Tribunal:

- 9.1.1. Noted the above-mentioned self contradictions contained in the Compliance Notice, and that these invalidate the same Compliance Notice which thence stands it to be reviewed and set aside.
- 9.1.2. Concurs with the view lamented by Applicant where the NCC orders him to refund 100% of an amount that the NCC itself states in the same order that the 1st Respondent was willing to pay at least 10% cancellation fee. This Compliance Notice is indeed unreasonable and is also not justifiable.
- 9.1.3. Further concurs with the arguments of Applicant that the reference of the NCC to section 20(5) of the CPA is not correct. And since the whole Compliance Notice stands on this assertion alone in its allegation of a statutory contravention, then this Compliance Notice may be reviewed and set aside on this ground alone. The NCC made an error of law.
- 9.1.4. Further concurs with the argument of the Applicant that it was impossible for it to comply with the Compliance Notice, even if it had wanted to, as the deadline for such order was on the same day on which the Compliance notice was delivered to the Applicant.
- 9.1.5. Notes that the “**no refund**” clause is subject to statutory law (CPA), it cannot be seen as an unassailable contractual issue not subject to Consumer law. However, even with this in mind, the issue to be decided is whether the Compliance Notice is to be reviewed and set aside based on all the grounds advanced by the Applicant above.
- 9.1.6. While the NCC is supposed to first carry out an investigation of each complaint received³, there was no evidence that the NCC had done so.
- 9.1.7. As already stated above, in the absence of the Respondents, only the version of the Applicant was presented. The Tribunal was satisfied that the Respondents had been

³ Section 99(d) of the CPA

notified of the Notice of Set Down in this case. Ms. Marelize Bosch of Case management at the Tribunal, submitted on record evidence proving that the Respondents were notified of the hearing – Page 5 to page 7 of the B section of the file contained evidence showing that the notice of set down was sent via email on 24 April 2012 advising the Respondents of the hearing to be held on 25 June 2012.

10. Order

We accordingly make the following order:

10.1 The compliance notice issued by the Respondent is cancelled.

10.2 No order is made for costs.

Thus done and handed down on this 29th day of June 2012.

[signed]

Prof. Joseph M. Maseko

Presiding Member

Prof. Tanya Woker, Member and **Mr. Xolela May**, Member, concurring.