

**IN THE NATIONAL CONSUMER TRIBUNAL,  
HELD IN CENTURION**

**CASE NO: NCT/3584/2011/101(1)**

In the matter between

**CJ Digital SMS Marketing CC**

**Applicant**

and

**The National Consumer Commission**

**Respondent**

Date of Hearing: 27 September 2012

Coram:

Prof T Woker	-	Presiding Member
Prof B Dumisa	-	Deputy Chairperson & Member
Adv F Manamela	-	Member

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**JUDGMENT**

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**INTRODUCTION**

- 1 The Applicant is CJ Digital SMS Marketing CC t/a Dynabidz, a close corporation, which conducts an online retail business.
- 2 The Respondent is the National Consumer Commission established in terms of section 85 of the Consumer Protection Act, Act 68 of 2008 (CPA).
- 3 The Applicant brought an application to the National Consumer Tribunal (Tribunal) to have a compliance notice issued against it by the Respondent, reviewed and cancelled in terms of section 101(1) of the CPA.

- 4 The Tribunal has jurisdiction to hear this matter in terms of section 101(1) of the CPA. This section provides that a person issued with a compliance notice in terms of section 100 may apply to the Tribunal in the prescribed manner and form for its review.
- 5 This judgment follows the hearing of this matter held on 27 September 2012 at the offices of the Tribunal in Centurion. The judgment is based largely on written submissions by all the parties as well as oral arguments presented by the Applicant at the hearing.
- 6 In line with the Tribunal rules which allow the presiding member of the Tribunal to decide on the procedure which should be followed at a hearing,<sup>1</sup> the presiding member issued a directive to the parties on 25 September 2012.
- 7 This directive informed the parties that on 27 September 2012, the Tribunal intended to deal only with certain procedural aspects which had been raised by the Applicant in its founding affidavit and the compliance notice itself and that it did not intend to deal with the merits of the matter. In particular the Tribunal informed the parties that at the hearing of 27 September 2012 it would not deal with the business practices of the Applicant.
- 8 The directive informed the parties that the merits of the Applicant's business practice would be dealt with at a later stage (if necessary) after the Tribunal had considered the following:
- (1) The procedure followed by the Respondent prior to the issuing of the compliance notice.
  - (2) Whether the compliance notice complied adequately with the requirements of section 100.
  - (3) Whether in the circumstances surrounding this complaint (in particular the fact that the complainant in this matter was seeking compensation for her loss) the issuing of a compliance notice was the most appropriate procedure which should have been followed by the Respondent.

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<sup>1</sup> Rule 21 of the Tribunal Rules provides that a hearing must be informal and follow procedures determined by the presiding member in terms of rule 17 (5) (e) or at any time during the hearing. See *Murray Cloete NO and others v NCC and 3 others* NCT 4454/2012/101 (1) (P) CPA and *Auction Alliance (Pty) Ltd v NCC and 2 others* NCT 4570/2012/101(1) (P) CPA where the Tribunal's power to issue directives and the reasons why such directives are issued is discussed.

- 9 This judgment focuses on these three issues. The Respondent was specifically requested to address the Tribunal on points (2) and (3) in the directive. However, for reasons which are not known to the Tribunal, the Respondent elected not to attend the hearing.

## BACKGROUND

- 10 The Applicant describes itself as an on-line retailer.<sup>2</sup> The Applicant sells watches, handbags, computer accessories, mobile phones, iPads, iPods, kitchen and dining equipment, perfume and holiday packages, and other similar goods directly to consumers via its website *www.dynabidz.co.za*. The Applicant commenced business in January 2011.
- 11 The Applicant distinguishes itself from other online retailers on the basis that it provides a "unique shopping experience" for consumers. Consumers do not purchase goods in the normal sense, instead they register on the Applicant's website and they then bid for goods.
- 12 The idea appears to be that consumers bid small amounts for goods and that if they are successful, they receive the goods at a fraction of their retail cost. Such businesses appear to be known as "penny auctions".
- 13 For the purpose of this judgment it is not necessary to analyse exactly how the Applicant's "unique shopping experience" for consumers operates, suffice to state that the Respondent received a complaint from a consumer who had spent in excess of R1 million bidding for goods on the Applicant's website.
- 14 The Respondent then informed the Applicant that it was engaging with the Applicant in an "investigation/mediation" in terms of section 72(1)(d) and 99(f) of the CPA.
- 15 From the documents received by the Tribunal, it appears that the complainant had received certain goods from the Applicant but that she had spent far more than she could afford (or that

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<sup>2</sup> Para 9 of the Applicant's founding affidavit.

the goods were worth) and she was seeking the return of the money which she had paid to the Applicant.<sup>3</sup>

- 16 The Applicant refused to refund the complainant on the basis that the complainant was an active user of the website (she was one of the top three purchasers on the site) and that her bids had been used, even though at times she was not successful in obtaining the goods she wanted.
- 17 The complainant bid on 119 different products from 1 April 2011 to 15 July 2011.<sup>4</sup> Even when she was successful in obtaining the goods she bid for, she did not always take possession of these goods because, the Applicant alleged, she elected to have her account credited with bids in lieu of the goods purchased. This would allow her to have a higher number of bids available to her and she could participate in further product bidding.
- 18 The Respondent attempted to resolve the matter with the Applicant in favour of the complainant and when it was unsuccessful it issued a compliance notice.
- 19 This compliance notice alleged that the Applicant was engaged in prohibited conduct in that the Applicant contravened section 65(2)(a) of the CPA read with regulation 24(a) and regulation 44(3)(q).
- 20 In terms of this compliance notice, the Applicant was instructed to refund the complainant the amount of R1 043 521.95 which she had spent participating on the Applicant's website failing which the Respondent would seek the imposition of an administrative fine in the amount of R3 million to be imposed on the Applicant by the Tribunal.
- 21 The Applicant sought to have the compliance notice reviewed for a number of reasons including the following:

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<sup>3</sup> Although the compliance notice orders the Applicant to refund the complainant the full amount she spent on the website, both the Respondent and the complainant conceded that the complainant received certain goods and that the Tribunal could take this into consideration when making an order that the Applicant refund the consumer. Whether or not such an order can be made by the Tribunal is discussed below.

<sup>4</sup> Para 28 of the Applicant's founding affidavit. The consumer bid on goods such as iPods, microwave oven, washing machines, game consol, Kindle eReader, television and computers.



- (1) The Respondent did not deal with the complaint in the manner provided for in the CPA.
- (2) The Applicant did not contravene the CPA.
- (3) It would be unfair and prejudicial to order the Applicant to refund the total amount which the complainant had spent bidding for products, some of which she had received.

22 Having perused all the documents submitted to the Tribunal,<sup>5</sup> the Tribunal decided that it would focus on certain procedural aspects first as well as the compliance notice itself before considering the merits of the Applicant's business.

### ISSUES TO BE DECIDED BY THE TRIBUNAL

23 As discussed above, the Tribunal decided that it would focus on the following three issues:

- (1) The procedure followed by the Respondent prior to the issuing of the compliance notice.
- (2) Whether the compliance notice complied adequately with the requirements of section 100.
- (3) Whether in the circumstances surrounding this complaint (in particular the fact that the complainant in this matter was seeking compensation for her loss) the issuing of a compliance notice was the most appropriate procedure which should have been followed by the Respondent.

### THE PROCEDURE FOLLOWED BY THE RESPONDENT PRIOR TO ISSUING THE COMPLIANCE NOTICE

24 The CPA empowers the Respondent to investigate complaints relating to consumer matters. In terms of section 72, the Commission may on its own initiative decide to investigate a matter<sup>6</sup>

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<sup>5</sup> It must be noted that the Respondent failed to submit its answering affidavit within the time limits set by the Tribunal Rules. It later applied for condonation and submitted its answering affidavit. This issue would normally have been dealt with by the Tribunal prior to continuing with other matters (either before the hearing or at the hearing itself). The Applicant, at the hearing objected to condonation being granted on the basis that sufficient reasons for its late filing were not provided. As stated above the Respondent did not appear at the hearing and was therefore unable to answer the Applicant on this point. The Tribunal nevertheless decided that it would consider the Respondent's answering affidavit as well as the reasons given for its late filing because these documents provided valuable insight into the procedure followed by the Respondent prior to the issuing of the compliance notice. Section 101 (2) provides that after considering any representations by the Applicant as well as *any other relevant information* the Tribunal may confirm, modify or cancel all or part of a notice. So although the answering affidavit may not have been properly filed and the reasons given for condonation may have been insufficient to justify the granting of condonation, the Tribunal decided to consider these documents as "other relevant information".

and it may appoint an investigator to investigate the matter.<sup>7</sup> Once the investigation is concluded the Respondent has certain options available to it in terms of section 73. One such option is the issuing of a compliance notice.<sup>8</sup> In *City of Johannesburg v the National Consumer Commission*<sup>9</sup> the Tribunal concluded that a compliance notice is issued once the Commission has concluded an investigation. The Tribunal reached this conclusion by evaluating those sections of the CPA which deal with investigations by the Commission and compliance notices.<sup>10</sup> This issue was extensively canvassed by the Tribunal in the abovementioned *City of Johannesburg* - matter and so we do not intend to deal with all the issues again. In that judgment that Tribunal explained that a concluded investigation was necessary in order to:

- establish the facts of the complaint;
- measure those facts against the CPA in order to reach the belief on reasonable grounds that the person against whom the compliance notice is to be issued was engaged in prohibited conduct;<sup>11</sup>
- ensure that the compliance notice complies with the prescribed requirements as set out in section 100 (3). The notice must provide details of the nature and extent of the non-compliance as well as the steps which must be taken to remedy the non-compliance.

25 The question to be considered by the Tribunal is whether the Respondent, in this matter, concluded its investigation prior to issuing the compliance notice.

26 The Respondent sent a letter to the Applicant on 29 July 2011 in which it informed the Applicant that the Respondent was conducting an investigation/mediation into the Applicant's business in terms of sections 72(1)(d) and 99(f) of the CPA and it called on the Applicant to respond to the complaint.<sup>12</sup>

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<sup>6</sup> Section 72(1).

<sup>7</sup> Section 72(1)(d).

<sup>8</sup> Section 73(1)(c)(iv)

<sup>9</sup> [2012] ZANCT 6

<sup>10</sup> In particular sections 72, 73 and 100.

<sup>11</sup> A consumer may have a valid complaint against a supplier, but before a compliance notice is issued, the complaint must constitute prohibited conduct under the Act.

<sup>12</sup> See annexure JW8 of the Applicant's founding affidavit.

- 27 Section 72(1)(d) authorizes the Commission to appoint an investigator to investigate a complaint whilst section 99(f) empowers the Commission to negotiate and conclude undertakings and consent orders contemplated in section 74. Section 74 provides that if a matter has been investigated by the Commission and the Commission and the respondent to a complaint (In this case this would be the Applicant in this matter) agree on the proposed terms of an appropriate order, the Tribunal or a court, may confirm that agreement as a consent order.
- 28 From this it seems that although an inspector was appointed to investigate the complaint, the Commission was also attempting to resolve this issue and reach a consent agreement between the parties. This is also borne out by the documents submitted to the Tribunal. It appears that the Commission held a number of meetings referred to as conciliation meetings but these attempts were unsuccessful.<sup>13</sup>
- 29 The Respondent stated in its answering affidavit that once it became clear that the matter could not be resolved through such attempts a decision was made to issue a compliance notice.<sup>14</sup>
- 30 There is in fact no clear indication from the documentation submitted to the Tribunal that an investigation, which may have been started, was actually completed. For example, there is no report from an investigator which sets out the details of the investigation conducted by the Respondent. Whilst the Respondent alleges in its answering affidavit that an investigation was concluded, there is no evidence of this in the documents submitted to the Tribunal.
- 31 Instead the documentation suggests that a full and complete investigation did not take place. Paragraph 60 of the Respondent's answering affidavit contains the following statement:
- "... there was no factual dispute about the operation of the business, but there was an issue about its legality. Had there been a dispute about how it actually operate, then the Respondent would have actually had to investigate exactly how it operates before*

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<sup>13</sup> Para 58 of the Respondent's answering affidavit.

<sup>14</sup> Para 58 of the Applicant's answering affidavit. See also para 1.4 of the Respondent's explanation for the late filing of its answering affidavit where it is stated that the matter was "given to Mrs Fikile Ntuli to attempt to have the parties settle the matter and failed". Mr Thupayatlase, Director of Legal Services at the Commission, states in this explanation that "as a normal process of the Commission and after the matter had failed conciliation attempts, it was brought to legal department and that is where I am sitting. At that point the Compliance Notice had already been issued".

*it can decide if such operation fouls any law or any provision of the Consumer Protection Act first before it try to have the parties settle or even issue a compliance notice".*

- 32 This is also borne out by the explanation submitted by Mr Thupayatlase, the Director of Legal Services of the Respondent, setting out the reasons why the answering affidavit was filed late. He stated that one of the reasons why he did not file the answering affidavit earlier was because although the Respondent was of the view that there had been a violation of the CPA, it could not understand exactly how the business operated. Once they received the Applicant's founding affidavit in support of its application for a review, the Respondent formed the view that in fact the Applicant could be committing a crime. The Respondent then decided to consult various law enforcement agencies such as the SAPS, Commercial Crimes Unit and the Organised Crime Units "which took forever".<sup>15</sup> Mr Thupayatlase stated that he needed to make a decision of whether "to withdraw the compliance notice and let the matter be handled by the police or continue with the compliance notice or run a parallel process".<sup>16</sup>
- 33 Section 73 provides for various options which the Respondent may follow *once it has concluded an investigation* (our emphasis). These options include referring the matter to the National Prosecuting Authority if the Respondent is of the view that an offence has been committed in terms of the Act or the issuing of a compliance notice if the person has engaged in prohibited conduct.
- 34 From this it is clear therefore that the investigation must be completed before the decision is made so that an informed decision can be made regarding which route is the most appropriate route to follow. In addition, there is no provision in the Act which provides for the Respondent to withdraw a compliance notice which has already been issued. The only option is to apply to the Tribunal for cancellation.
- 35 An evaluation of the documents before the Tribunal indicates that the compliance notice was issued before the investigation was completed. It also seems that the compliance notice was

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<sup>15</sup> Para 1.7 of Mr Thupayatlase's explanation for late filing of the answering affidavit.

<sup>16</sup> Para 1.8 of Mr Thupayatlase's explanation for late filing of the answering affidavit.



issued, not because the Respondent was of the view that the Applicant was engaged in prohibited conduct but because the Respondent was unable to persuade the Applicant to reach an appropriate consent agreement with the complainant. This approach by the Respondent (ie the issuing of a compliance notice because no consent agreement is reached) has been discussed by the Tribunal in a number of other decisions.<sup>17</sup>

- 36 A compliance notice is issued when the Respondent believes that a person, in this case the Applicant, has engaged in prohibited conduct. Therefore the compliance notice must be issued in order to ensure that the entity complies with the Act and not for some other purpose. Hoextra<sup>18</sup> points out that if a court finds that powers have been used for unauthorized purposes, or purposes which are not contemplated when the powers were conferred, it will hold that the decision or action is illegal. This will be the result even when the powers are mistakenly used for praiseworthy purposes.
- 37 This situation is now governed by Promotional of Administrative Justice Act (PAJA) Act 3 of 2000. Section 6(2)(e)(ii) provides that action may be reviewed if it was taken for an ulterior purpose or motive. There is also an overlap here with section 6(2)(e)(i) which refers to "a reason not authorized by the empowering provision". Hoextra argues that section 6(2)(e)(vi) which refers to actions taken "arbitrarily or capriciously" could also apply.<sup>19</sup>
- 38 The documents before the Tribunal indicate that the Respondent issued the compliance notice because the Applicant refused to refund the complainant the money which she had spent on the website and not because the Applicant was engaged in prohibited conduct.
- 39 This conclusion is supported by the fact that the compliance notice does not set out the steps which the Applicant must take to remedy the non-compliance with the CPA but instead orders the Applicant to refund the complainant the money which she had spent on the website (this is discussed further below).

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<sup>17</sup> See Vodacom v NCC NCT/2793/2011/101 (1)(P)) [2012] ZANCT 9 and Cell C v NCC NCT/2737/2011/101 (1)(P)) [2012] ZANCT 18

<sup>18</sup> At 309.

<sup>19</sup> At 309.

## THE COMPLIANCE NOTICE

40 As far as the compliance notice itself is concerned, there are two issues which concern the Tribunal:

- (1) Whether the compliance notice complies with the requirements of section 100 of the CPA; and
- (2) Whether the Commission can, in a compliance notice, order that the party engaged in prohibited conduct refund the complainant for his or loss or damage.

### Requirement for a valid compliance notice

41 Compliance notices are governed by section 100 of the CPA. A compliance notice must set out

- (1) The person or association to whom the notice applies;
- (2) The provisions of the Act which have not been complied with;
- (3) Details of the nature and extent of the non-compliance;
- (4) Any steps which are required to be taken and the period within which those steps must be taken; and
- (5) Any penalty that may be imposed in terms of this Act if those steps are not taken.

42 In this regard Section 100(3)(c) which provides that the notice must set out the details of the nature and extent of the non-compliance and section 100(3)(d), which provides that the notice must set out the steps which must be taken and the period within which those steps must be taken, are most relevant.

43 It is useful again to consider the purpose for which a compliance notice is issued. The purpose of a compliance notice is to ensure that a party who is not complying with the CPA, is informed of its non-compliance and is given an opportunity to amend its ways and ensure that in the future, going forward, it does comply with the CPA. For this reason the CPA requires (in section 100(3)) that the non-compliance be identified, that the party be informed of the steps which it must take to ensure it cures the non-compliance identified and that it be given a period of time

in which to amend its behaviour. In other words, a compliance notice is a second chance for a transgressor to ensure that it brings its conduct within the ambit of the Act. If the transgressor complies with the compliance notice, then that is the end of the matter. It is only when a party fails to comply with a compliance notice that it will be referred to the Tribunal for the imposition of an administrative penalty.

- 44 In this particular matter the Respondent has identified various sections of the CPA which, in its view, the Applicant is transgressing. These are set out in the compliance notice. This is in order to comply with the requirements of section 100(3)(c). For the purposes of this judgment it is not necessary to evaluate the adequacy of the information supplied by the Respondent (the CPA requires that details of the nature and extent of the non-compliance must be set out and in this instance the Respondent has simply set out those sections of the Act which it is of the view have been transgressed without providing any further details). The next section deals with steps which must be taken by the Applicant (section 100(3)(d)). Taking into consideration the purpose of a compliance notice it would be expected that the Respondent would set out the steps which the Applicant needs to take to bring the prohibited conduct to an end. In this compliance notice the Applicant is ordered to refund the Respondent, but nothing is said about the prohibited conduct itself. It seems therefore that, provided the Applicant refunds the complainant, the Applicant may continue with the conduct which the Respondent has identified as prohibited conduct. This defeats the purpose of a compliance notice which is to bring the prohibited conduct to an end. Therefore the compliance notice does not comply with the requirements of section 100(3).

#### **The ordering of a refund.**

- 45 The Respondent has ordered the Applicant to refund the complainant the money which she has spent on the website. The steps which must be taken when a consumer suffers loss or damage as a result of a person engaging in prohibited conduct are set out in section 115(2). This section provides that a person who has suffered loss or damage as a result of prohibited conduct or dereliction of required conduct and who is entitled to institute a claim in a civil court for the assessment of the amount or awarding of damages, must file with the registrar or clerk of the court a notice from the Chairperson of the Tribunal in the prescribed form certifying

whether the conduct constituting the basis for the action has been found to be a prohibited or required conduct in terms of the CPA, the date of the finding and the section of the Act in terms of which the Tribunal made its finding.

- 46 From this it is clear that a consumer, who wishes to claim for loss or damages as a result of prohibited conduct, must do so through the civil courts.<sup>20</sup> This also presupposes that the Respondent has referred the matter to the Tribunal so that the Tribunal can make a finding into prohibited or required conduct which will enable the Chairperson of the Tribunal to issue the necessary certificate. This required process indicates that neither the Tribunal nor the Respondent has the power to order a party to refund or pay damages to a consumer. This can only be done once the process set out in section 115 has been followed. The parties can agree on an award of damages in a consent order and if this is the case, the complainant may not institute a claim in a civil court for further damages.<sup>21</sup> However by its very nature, a consent order is an order made after the parties have reached agreement and if there is no agreement, the matter should be referred to the Tribunal for a hearing into prohibited conduct so that the complainant may institute action in the civil courts for damages.

#### **WAS THE ISSUING OF A COMPLIANCE NOTICE THE APPROPRIATE PROCEDURE TO FOLLOW IN THESE CIRCUMSTANCES?**

- 47 Once the Respondent has concluded an investigation and it is of the view that the person under investigation is involved in prohibited conduct, it has a number of regulatory options available to it. These are set out in section 73 and include the following:
- (1) Referring the matter to the equality court;
  - (2) Proposing a draft consent order;
  - (3) Referring the matter to the Tribunal or a consumer court;
  - (4) Issuing a compliance notice.

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<sup>20</sup> This was also discussed in *Nayyara Distribution Enterprise CC v Earlyworks 266 (Pt) Ltd t/a Gloria Jeans Coffees SA* [2012] ZANCT NCT/4454/2012/101(1)(P)CPA ; *Murray, Cloete N.O., Klein, Norman N.O & Edwards, Elizabeth Margaret NO v NCC and 3 Others; Auction Alliance (Pty) Ltd v NCC & 2 Others* NCT/4454/2012/101(1)(P)CPA, NCT/4570/2012/101(1)(P)CPA [2012] ZANCT 17

<sup>21</sup> Section 115 (2) (a).



48 It is accepted that the Respondent has the discretion to decide which route to follow. However this discretion must be exercised in such a manner that the Respondent is able to achieve the best possible outcome for the consumer/complainant. In circumstances where a consumer has suffered loss or damage, it is not appropriate that the Respondent issue a compliance notice. If it is possible to reach agreement between the parties, the Respondent can propose a draft consent order but if there is no agreement between the parties then the matter must be referred to the Tribunal for a hearing into prohibited conduct. It is only once the Tribunal has reached a conclusion that the person was engaged in prohibited conduct that a certificate can be issued which will enable the consumer to proceed to the civil courts where he or she will have to prove their damages.

## CONCLUSION

49 For all the reasons set out above the Tribunal concludes that:

- the Respondent did not follow the processes and procedures as set out in the Act which govern the investigation of complaints prior to the issuing of compliance notice;
- The compliance notice is defective because it does not comply with the requirements of section 100(3).
- The Respondent has exceeded the bounds of its powers by ordering the Applicant to refund the complainant.

50 However, as stated at the outset the Tribunal has not made any findings regarding the manner in which the Applicant's business is conducted.

## ORDER OF THE TRIBUNAL

51 The compliance notice is hereby cancelled and the matter is referred back to the Respondent for a full and complete investigation into the business practices of the Applicant.

[Signed]

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Prof T Woker  
Presiding Member

Prof B Dumisa & Adv F Manamela concurring.

Authorised for issue by the National Consumer Tribunal

Case number \_\_\_\_\_

Date: 2013 / 10 / 01  
          day    mm    dd

National Consumer Tribunal  
Ground Floor, Building B  
Lakefield Office Park,  
272 West Avenue, Centurion 0157  
[www.thenct.org.za](http://www.thenct.org.za)

