

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

Case number: NCT/8742/2013/73(3) & 75(1)(b)&(2) CPA

In the matter between:

SIMON SIMELANE

APPLICANT

and

**PRETORIA FRANCHISE SUPPORT SERVICES (PTY) LTD
T/A FASTWAY COURIERS (PRETORIA)**

RESPONDENT

Coram:

Ms P Beck – Member

Date of Hearing – 14 November 2013

JUDGMENT

APPLICANT

1. The Applicant in this matter is Simon Simelane, a major male residing in Ekangala ("the Applicant").

RESPONDENT

2. The Respondent is Pretoria Franchise Support Services (Proprietary) Limited, a company registered in terms of the relevant company laws of South Africa, with registration number 2008/010251/07, trading as Fastway Couriers (Pretoria) and with registered address stated as Parktown North ("the Respondent").

APPLICATION TYPE

3. This is an application in terms of section 75(1)(b) and section 75(2) of the Consumer Protection Act 68 of 2008 ("the Act"), for leave to apply directly to the Tribunal on the premise that the National Consumer Commission ("NCC") issued a notice of non-referral in response to a complaint by the Applicant.

BACKGROUND

4. The Applicant, a Courier Franchisee, and the Respondent as Regional Franchisee, entered into a 'Courier Franchise Agreement' on 14 June 2011. In terms of this agreement the Applicant bought a franchise from the Respondent. The commencement date of the franchise is defined in the agreement, in clause 1 thereof, as the date on which the 'franchise shall begin operating' and is stipulated as 20 June 2011.
5. The material terms of the agreement are *inter alia* as follows:
 - 5.1 The Respondent grants the Applicant a licence to establish and operate the franchise during the franchise period in the exclusive territory;
 - 5.2 The Applicant shall pay an amount of R62 500-00 in respect of establishment fees and R5000-00 in respect of training fees to the Respondent, on or before 20 June 2011;
6. On 6 June 2011 the Applicant paid an amount of R110 000-00 to the Respondent, which amount is accumulated by various entries such as the licence fee, establishment fee, training fee, a uniform, scanner deposit, deeds, float, a start-up fee, etc.
7. It is noted from correspondence dated 11 July 2011, that a client of the franchisor complained to the Respondent that the Applicant was using an open bakkie for deliveries.

¹ The Applicant signed this agreement on 10 June 2011 and the Respondent on 14 June 2011.

8. On 21 July 2011, the Respondent hand delivered a letter to the Applicant, referring to a Courier Franchise Agreement entered into on 12 January 2009.² It is stated that, in terms of such agreement and Courier Franchisee Contractors Manual:

"Each Courier Vehicle must be:

- *Sign written to the Franchise Support Office specifications,*
- *A white long wheel base van or such larger vehicle as approved by the Regional Franchisee,*
- *Approved in writing by the Regional Franchisee before you commence operations,*
- *Kept clean and tidy with the exterior of the Courier Vehicle being washed at least once every business day,*
- *The interior of the vehicle must be clean and tidy at the start of every business day.*

Each Courier Vehicle must be fitted with:

- *An operational remote activating alarm system and a remote locking device.*
- *An operational mobile phone.*
- *Satellite tracking.*

Any damage to a courier vehicle must be repaired as soon as reasonably possible but not exceeding one calendar month at the Courier Franchisee's own expense. Courier vehicles may be replaced at any time provided that the age and nature of the courier vehicle is approved in writing by the Regional Franchisee."

9. The Applicant was informed in the letter referred to *supra* that his vehicle does not comply with the cited specified requirements and that he had to remedy the defect within 7 days of the date of such letter. It was further stipulated that a failure to remedy the defect as indicated could result in termination of the Franchise Agreement.³

² This is evidently the incorrect date, as the agreement was entered into on 14 June 2011.

³ Despite the evident shortcomings of the letter in terms of the date of the agreement, it is also not stated in which specific respects the Applicant's vehicle did not satisfy these obligations.

10. On 9 September 2011 the Respondent hand delivered a Notice of Termination of the Franchise to the Applicant. The Respondent refers in the notice to 'Notices of Event of Default' delivered to the Applicant on 22 July 2011 and 5 & 11 August 2010 (sic), in terms of which the Applicant was notified that he had failed to comply with the obligations set out in clause 2.2 of the agreement between the parties. The Notice of Termination indicates that the Applicant received three notices of default within a 12 month period and in terms of clause 11.1(c) of the agreement between the parties, and that the Respondent is entitled to terminate the agreement.
11. The Applicant avers that he, at no stage, received any of the three alleged notices of default, relating to a default of clause 2.2 of the agreement. The notice dated 5 August 2011 was handed to the Applicant on 9 September 2011, the day on which the agreement was terminated by the Respondent. The notice received on 21 July 2011 did not relate to clause 2.2 of the agreement.
12. Clause 11.1(c) of the agreement states the following:

"the courier franchise has been given written notice of default by the regional franchise three times within any period of 12 consecutive months under clause 11.1(a) and/or (b) and in each of such prior instances the courier franchise has cured the default within the time permitted, then if the courier franchise again fails within the same 12 month period to perform any obligation referred to in clause 11.1 (a) and/or (b);"
13. The agreement does not make provision for the refund of the establishment fee, the training fee or any other amounts paid to the Respondent, upon termination of the agreement by either party. The Applicant may only recover the amounts paid for labels, in the event that those labels were not used by customers by that time.
14. On 14 September 2011 the Applicant lodged a complaint against the Respondent with the NCC.
15. According to the written complaint, the Applicant disputes the validity of the non-compliance letter received on 21 July 2011, as it refers to an agreement entered into on 12 January 2009.

The Applicant further indicates in the written complaint that the relevant vehicle was fitted with a space saver canopy within two weeks.⁴

16. The NCC forwarded the complaint to the Respondent on 9 December 2011, to which the Respondent reacted on 11 January 2012. The Applicant was not satisfied with the Respondent's response and the matter was set down for conciliation on 7 February 2012.
17. The NCC found the Respondent to have breached the agreement between the parties and a Compliance Notice was consequently issued to the Respondent on 2 March 2012. The NCC's rationale for finding the Respondent to have breached the agreement is the following:
 - 17.1 The agreement between the parties confers the right on the Applicant to terminate the agreement, however without an entitlement to a refund. This is allegedly in contravention of section 40(1)(c) of the Act;⁵
 - 17.2 The unilateral termination of the agreement by the Respondent is in contravention of section 48(2)(a) of the Act;⁶
 - 17.3 The Respondent failed to adhere to the provisions of the agreement in that it failed to issue three notices of default prior to terminating the agreement, as required by clause 11.1 of the agreement;
 - 17.4 The Respondent was consequently ordered to refund the Applicant.
18. The Compliance Notice was addressed to "Fastway Couriers" at address 49 Eland Street, Koedoespoort Industrial, Pretoria. The sections of the Act contravened are stated to have been section 40(1)(a)(c)⁷, section 48(1)(a)(ii)(b)(c)(i)(ii)(iii)⁸ and section 65(2)(a)(b)(c)⁹.

⁴ The Applicant does not indicate when the two week period commenced.

⁵ "40. (1) A supplier or an agent of the supplier must not use physical force against a consumer, coercion, undue influence, pressure, duress or harassment, unfair tactics or any other similar conduct, in connection with any—

(a) ...

(b) ...;

(c) negotiation, conclusion, execution or enforcement of an agreement to supply any goods or services to a consumer;"

⁶ "48. (2) Without limiting the generality of subsection (1), a transaction or agreement, a term or condition of a transaction or agreement, or a notice to which a term or condition is purportedly subject, is unfair, unreasonable or unjust if—
(a) it is excessively one-sided in favour of any person other than the consumer or other person to whom goods or services are to be supplied;"

⁷ "40. (1) A supplier or an agent of the supplier must not use physical force against a consumer, coercion, undue influence, pressure, duress or harassment, unfair tactics or any other similar conduct, in connection with any—

(a) marketing of any goods or services;

(b) ...;

(c) negotiation, conclusion, execution or enforcement of an agreement to supply any goods or services to a consumer;"

⁸ "48. (1) A supplier must not—

19. The Respondent did not react to the Compliance Notice.
20. The Compliance Notice stipulates in paragraph 3 thereof that the NCC will call upon the Tribunal to impose an administrative fine of R500 000-000, in terms of section 112 of the Act, in the event of the Respondent's failure to comply with the notice;¹⁰
21. Subsequent to the issuing of the Compliance Notice, the NCC was advised on 12 May 2012 by Richard Robertson of Isicabucabu Franchising (Pty) Ltd t/a Fastway Couriers (Johannesburg), that the entity to whom the notice applies is in fact Pretoria Franchise Support Services (Pty) Ltd, that the Fastway franchise with the said entity has been terminated and that the said entity was allegedly in liquidation.
22. On 12 March 2013 the NCC issued a notice of non-referral as the facts do not constitute grounds for a remedy under the Act.
23. On 3 May 2013, the Applicant submitted an application to the Tribunal, as referred to *supra*, and requests that the Tribunal orders the Respondent to refund to him an amount of R 110 000-00 plus interest of 15,5%.

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- (a) offer to supply, supply, or enter into an agreement to supply, any goods or services—
 - (i) ...; or
 - (ii) on terms that are unfair, unreasonable or unjust;
 - (b) market any goods or services, or negotiate, enter into or administer a transaction or an agreement for the supply of any goods or services, in a manner that is unfair, unreasonable or unjust; or
 - (c) require a consumer, or other person to whom any goods or services are supplied at the direction of the consumer—
 - (i) to waive any rights;
 - (ii) assume any obligation; or
 - (iii) waive any liability of the supplier, on terms that are unfair, unreasonable or unjust, or impose any such terms as a condition of entering into a transaction.”

⁹ “65. (2) When a supplier has possession of any prepayment, deposit, membership fee, or other money, or any other property belonging to or ordinarily under the control of a consumer, the supplier—

- (a) must not treat that property as being the property of the supplier;
- (b) in the handling, safeguarding and utilisation of that property, must exercise the degree of care, diligence and skill that can reasonably be expected of a person responsible for managing any property belonging to another person; and
- (c) is liable to the owner of the property for any loss resulting from a failure to comply with paragraph (a) or (b).”

¹⁰ Section 100 of the Act stipulates the following in subsection (6):

“If a person to whom a compliance notice has been issued fails to comply with the notice, the Commission may either—

- (a) apply to the Tribunal for the imposition of an administrative fine; or
- (b) refer the matter to the National Prosecuting Authority for prosecution as an offence in terms of section 110(2), but may not do both in respect of any particular compliance notice.”

APPLICABLE SECTIONS OF THE CPA

24. Section 1

Definitions

“agreement” means an arrangement or understanding between or among two or more parties that purports to establish a relationship in law between or among them;

“consumer”, in respect of any particular goods or services, means—

- (a) ...*
- (b) ...*
- (c) ...*
- (d) a franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5(6)(b) to (e);*

“consumer agreement” means an agreement between a supplier and a consumer other than a franchise agreement;

“franchise agreement” means an agreement between two parties, being the franchisor and franchisee, respectively—

- (a) In which, for consideration paid, or to be paid, by the franchisee to the franchisor, the franchisor grants the franchisee the right to carry on business within all or a specific part of the Republic under a system or marketing plan substantially determined or controlled by the franchisor or an associate of the franchisor;*
- (b) under which the operation of the business of the franchisee will be substantially or materially associated with advertising schemes or programmes or one or more trade marks, commercial symbols or logos or any similar marketing, branding, labelling or devices, or any combination of such schemes, programmes or devices, that are conducted, owned, used or licensed by the franchisor or an associate of the franchisor; and*

- (c) *that governs the business relationship between the franchisor and the franchisee, including the relationship between them with respect to the goods or services to be supplied to the franchisee by or at the direction of the franchisor or an associate of the franchisor;*

“service” includes, but is not limited to—

- ...(g) *rights of a franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5(6)(b) to (e), irrespective of whether the person promoting, offering or providing the services participates in, supervises or engages directly or indirectly in the service;*

25. Section 4

Realisation of consumer rights

- “4. (1) *Any of the following persons may, in the manner provided for in this Act, approach a court, the Tribunal or the Commission alleging that a consumer’s rights in terms of this Act have been infringed, impaired or threatened, or that prohibited conduct has occurred or is occurring:*
- (a) *a person acting on his or her own behalf;*
 - (b) *an authorised person acting on behalf of another person who cannot act in his or her own name;*
 - (c) *a person acting as a member of, or in the interest of, a group or class of affected persons;*
 - (d) *a person acting in the public interest, with leave of the Tribunal or court, as the case may be; and*
 - (e) *an association acting in the interest of its members.*
- (2) *In any matter brought before the Tribunal or a court in terms of this Act—*
- (a) *the court must develop the common law as necessary to improve the realisation and enjoyment of consumer rights generally, and in particular by persons contemplated in section 3(1)(b); and*
 - (b) *the Tribunal or court, as the case may be, must—*
 - (i) *promote the spirit and purposes of this Act; and*

- (ii) *make appropriate orders to give practical effect to the consumer's right of access to redress, including, but not limited to—*
 - (aa) *any order provided for in this Act; and*
 - (bb) *any innovative order that better advances, protects, promotes and assures the realisation by consumers of their rights in terms of this Act.*
- (3) *If any provision of this Act, read in its context, can reasonably be construed to have more than one meaning, the Tribunal or court must prefer the meaning that best promotes the spirit and purposes of this Act, and will best improve the realisation and enjoyment of consumer rights generally, and in particular by persons contemplated in section 3(1)(b).*
- (4) *To the extent consistent with advancing the purposes and policies of this Act, the Tribunal or court must interpret any standard form, contract or other document prepared or published by or on behalf of a supplier, or required by this Act to be produced by a supplier, to the benefit of the consumer—*
 - (a) *so that any ambiguity that allows for more than one reasonable interpretation of a part of such a document is resolved to the benefit of the consumer; and*
 - (b) *so that any restriction, limitation, exclusion or deprivation of a consumer's legal rights set out in such a document or notice is limited to the extent that a reasonable person would ordinarily contemplate or expect, having regard to—*
 - (i) *the content of the document;*
 - (ii) *the manner and form in which the document was prepared and presented;*
 - and
 - (iii) *the circumstances of the transaction or agreement.”*

26. Section 7

Requirements of franchise agreements

- “7. (1) *A franchise agreement must—*
- (a) *be in writing and signed by or on behalf of the franchisee;*
 - (b) *include any prescribed information, or address any prescribed categories of information; and*
 - (c) *comply with the requirements of section 22¹¹.*

¹¹ Section 22 of the CPA provides for right to information in plain and understandable language.

- (2) *A franchisee may cancel a franchise agreement without cost or penalty within 10 business days after signing such agreement, by giving written notice to the franchisor.*
- (3) *The Minister may prescribe information to be set out in franchise agreements, generally, or within specific categories or industries."*

27. Section 48

Unfair, unreasonable or unjust contract terms

"48. (1) A supplier must not—

- (a) offer to supply, supply, or enter into an agreement to supply, any goods or services—*
 - (i) at a price that is unfair, unreasonable or unjust; or*
 - (ii) on terms that are unfair, unreasonable or unjust;*
 - (b) market any goods or services, or negotiate, enter into or administer a transaction or an agreement for the supply of any goods or services, in a manner that is unfair, unreasonable or unjust; or*
 - (c) require a consumer, or other person to whom any goods or services are supplied at the direction of the consumer—*
 - (i) to waive any rights;*
 - (ii) assume any obligation; or*
 - (iii) waive any liability of the supplier, on terms that are unfair, unreasonable or unjust, or impose any such terms as a condition of entering into a transaction.*
- (2) Without limiting the generality of subsection (1), a transaction or agreement, a term or condition of a transaction or agreement, or a notice to which a term or condition is purportedly subject, is unfair, unreasonable or unjust if—*
- (a) it is excessively one-sided in favour of any person other than the consumer or other person to whom goods or services are to be supplied;*
 - (b) the terms of the transaction or agreement are so adverse to the consumer as to be inequitable;*
 - (c) the consumer relied upon a false, misleading or deceptive representation, as contemplated in section 41 or a statement of opinion provided by or on behalf of the supplier, to the detriment of the consumer; or*

- (d) *the transaction or agreement was subject to a term or condition, or a notice to a consumer contemplated in section 49 (1), and—*
- (i) *the term, condition or notice is unfair, unreasonable, unjust or unconscionable; or*
 - (ii) *the fact, nature and effect of that term, condition or notice was not drawn to the attention of the consumer in a manner that satisfied the applicable requirements of section 49.”*

28. Section 69

Enforcement of rights by consumer

“A person contemplated in section 4(1) may seek to enforce any right in terms of this Act or in terms of a transaction or agreement, or otherwise resolve any dispute with a supplier, by —

- (a) *referring the matter directly to the Tribunal, if such a direct referral is permitted by this Act in the case of the particular dispute;*
- (b) *...”*

29. Section 75

Referral to Tribunal

“(1) If the Commission issues a notice of non-referral in response to a complaint, other than on the grounds contemplated in section 116¹², the complainant concerned may refer the matter directly to—

- (a) *...;or*
 - (b) *the Tribunal, with leave of the Tribunal.*
- (2) *...*
- (3) *A referral to the Tribunal, whether by the Commission or by a complainant in terms of subsection(1), must be in the prescribed form.*
- (4) *The Tribunal—*
- (a) *must conduct a hearing into any matter referred to it under this Chapter, in accordance with the requirements of this Act, and the applicable provisions of the National Credit Act pertaining to the proceedings of the Tribunal; and*

¹²Section 116 of the Act stipulates that“(1) A complaint in terms of this Act may not be referred or made to the Tribunal or to a consumer court more than three years after—

- (a) *the act or omission that is the cause of the complaint; or*
- (b) *in the case of a course of conduct or continuing practice, the date that the conduct or practice ceased.”*

(b) may make any applicable order contemplated in this Act or in section 150 or 151 of the National Credit Act, read with the changes required by the context. (5)..."

ISSUES TO BE DECIDED

Preliminary issues

30. The Tribunal must determine whether the requirements for default judgment have been met.
31. The Tribunal has to consider the issue of condonation for the late filing of the Applicant's application.

The main application

32. The Applicant is applying in terms of section 75(1)(b) and section 75(2) of the Act, for leave to apply directly to the Tribunal on the premise that the NCC issued a notice of non-referral in response to a complaint submitted by the Applicant.
33. The Applicant further applies for an order directing that the Respondent refunds the Applicant an amount of R110 000-00. This aspect can only be determined once leave to refer has been granted by the Tribunal and the merits of the matter are adjudicated upon.

APPLICANT'S SUBMISSIONS

34. The Applicant submits that the non-compliance letter, dated 21 July 2011, does not constitute a valid default notice; that it failed to indicate in which respects he failed to comply with the stipulated obligations; that the Respondent failed to provide him with three default notices required in terms of clause 11.1(c) of the relevant agreement and that the Notice of Termination of Franchise handed to him on 9 September 2011 rendered the Respondent in breach of the agreement.

35. The Applicant further submits that the relevant vehicle was fitted with the required space saver canopy within two weeks of the complaint¹³ and consequently the Applicant was not in breach at the time of termination of the franchise agreement by the Respondent.
36. At the hearing itself the Applicant submitted that the basis of his complaint is that the Respondent failed to adhere to the terms of the franchise agreement, and more specifically the requirements of notice in the event of breach of the agreement. Stated differently, the complaint of the Applicant before the Tribunal stems from breach of the franchise agreement by the Respondent resulting in the damages suffered by the Applicant.

RESPONDENT'S SUBMISSIONS

37. The Respondent failed to oppose the application and the application will therefore have to be dealt with on the basis of a default judgment as provided for in Rule 25(2) of the Rules.

CONSIDERATION OF THE FACTS AND THE LAW

Factors to be taken into consideration in the default application

38. The Applicant served the Respondent with the application which was deemed complete on 11 July 2013 and, in terms of the provisions of Rule 13 of the Tribunal Rules, the Respondent is to file its response by 1 August 2013, however it failed to do so. The Applicant therefore filed an application for default judgment in terms of Rule 25(2) with the Tribunal.
39. Rule 3(2)(v)(vi) of the Tribunal Rules provides that the Tribunal may consider applications for default judgment in terms of Rule 25. The said Rule 25(3) provides as follows:
- 3) *The Tribunal may make a default order –*
- (a) *After it has considered or heard any necessary evidence; and*
- (b) *If it is satisfied that the application documents were adequately served.*
40. This formulates the test for an Application for default judgment before the Tribunal.

¹³ The Applicant does not indicate when the two week period commenced.

41. The Tribunal is satisfied that the Applicant has placed sufficient evidence before the Tribunal to make a determination on the matter.
42. As far as the second requirement is concerned, the amendment of the Rules by Government Notice 428 of 29 June 2011 clearly provides that the Tribunal need only be satisfied that the application documents were adequately served on the Respondent. In this matter the Tribunal was provided with proof of service of the main application on the Respondent.¹⁴
43. The Tribunal is satisfied that the Application was served on the Respondent.

Whether the Tribunal may grant condonation for the late filing of the application

44. The NCC issued a notice of non-referral on 12 March 2013 to the Applicant. On 3 May 2013, the Applicant submitted the current application to the Tribunal. In accordance with Table 2 of the Regulations¹⁵, the Applicant had to bring its application to the Tribunal within 20 business days from the date of issue of the Notice of Non-referral by the NCC. The Applicant may bring its application to the Tribunal within a longer period, provided that this period is permitted by the Tribunal.
45. The Applicant failed to bring the current application to the Tribunal within the stipulated 20 business days and it is therefore required of the Applicant to bring an application for condonation in the prescribed form T1.r34. A party may apply for condonation of the late filing of an application, papers or any other document or non-compliance with the Rules of the Tribunal ("the Rules")¹⁶. Such an application may be brought for an order to:
 - (a) *Condone the late filing of a document or application;*
 - (b) *Extend or reduce the time allowed for filing or serving;*
 - (c) *Condone the non-payment of a fee; or*
 - (d) *Condone any other departure from the rules or procedures*¹⁷

¹⁴ The main application was served via courier on the Respondent at 282 Magg Street, Unit 1, Watloo, Pretoria. It is uncertain as to the correctness of this address, as the address provided to the NCC is 49 Elands Street, Koedoespoort Industrial, Pretoria and the registered address of the Respondent, as contained in the relevant agreement also differs from the addresses as stated above.

¹⁵ National Credit Regulations, published in Government Notice R489 of 31 May 2006 (GG 268864).

¹⁶ Regulations for Matters Relating to the Functions of the Tribunal and Rules for the Conduct of Matters before the National Consumer Tribunal, 2007 – Published under GN789 in GG30225 of 28 August 2007 as amended by GenN428 in GG34405 OF 29 June 2011

¹⁷ Rule 34(1) of the Rules

46. The Tribunal may grant such an order on good cause shown.¹⁸

In *Melane v Santam Insurance Company Limited*¹⁹ it was held that:

"The approach is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degrees of lateness, the explanation therefore, the prospects of success and the importance of the case. These facts are inter-related: they are not individually decisive. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay. There is a further principle which is applied and that is that without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused...cf Chetty v Law Society of the Transvaal 1985(2) SA 756 (A) at 765 A-C; National Union of Mineworkers and Others v Western Holdings Gold Mine 1994 15 ILJ 610 (LAC) at 613E. The courts have traditionally demonstrated their reluctance to penalize a litigant on account of the conduct of his representative but it emphasized that there is a limit beyond which a litigant cannot escape the results of the representative's lack of diligence or the insufficiency of the information tendered. (Saljee & Another NNO v Minister of Community Development 1965 (2) A 135 (A) 140H-141B; Buthelezi & Others v Eclipse Foundries Ltd 18 ILJ 633 (A) at 6381-639A.)"

47. In *Head of Department, Department of Education, Limpopo Province v Settlers Agriculture High School and Others*²⁰ it was held that the standard of considering an application of this nature is the interests of justice.
48. Whether it is in the interest of justice to grant condonation depends on the facts and circumstances of each case. It requires the exercise of a discretion on an objective conspectus of all the facts. Factors that are relevant include but are not limited to:
1. the nature of the relief sought;
 2. the extent and cause of the delay;
 3. the effect of the delay on the administration of justice and other litigants;

¹⁸ Rule 34(2) of the Rules

¹⁹ 1962 (4) SA 531 (A) at 532C-F

²⁰ 2003 (11) BCLR 1212 (CC) at para[11]

4. the reasonableness of the explanation for the delay;
5. the importance of the issue to be raised in the intended appeal; and
6. the prospects of success²¹

From the dictum in *Melane*²² it was held that these factors are interrelated and should not be considered separately.

49. On the date of the hearing an application for condonation for the later filing of the Application in terms of the rules was not before the Tribunal. The Presiding Member posed questions to the Applicant at the hearing, in particular the reason why the application for condonation was not brought before the Tribunal and the reason for the delay by the Applicant in lodging the Applicant's complaint with the Tribunal. The response of the Applicant was that he was not aware of the process to be followed nor of the existence of the Tribunal nor had the NCC advised him of the process to be followed. Within four (4) days of becoming aware of the Tribunal and its requirements the Applicant filed its application with the Tribunal. The Tribunal is satisfied with the explanation provided to the Tribunal by the Applicant at the hearing. The degree of non compliance is further not extensive and having considered all relevant factors the Tribunal condones the late filing of the Application with the Tribunal.

The Non Referral

50. A 'consumer' includes, in terms of Section 1 of the Act, a 'franchisee' in terms of a franchise agreement, to the extent applicable in terms of section 5(6)(b)–(e). In terms of Section 69(1)(a) of the Act a consumer, which includes a franchisee as indicated may seek to enforce any right in terms of the Act or in terms of an agreement, by referring the matter directly to the Tribunal, if such a direct referral is permitted by this Act in the case of the particular dispute.
51. The NCC issued a Notice of Non-referral to the Applicant on 12 March 2013, in the prescribed form, as provided for in Section 72(1) of the Act. The specific notice of non-referral avers that the NCC held the view that the complaint does not allege any facts which, if true, would

²¹ Van Wyk v Unitas Hospital and Others 2008(4) BCLR 442 (CC) at para 20 as applied in Camagu v Lupondwana Case No 328/2008 HC Bisho.

²² 1962 (4) SA 531 (A) at 532C-F

constitute grounds for a remedy under the Act.²³ Section 75(1)(b) of the Act stipulates that the Applicant may, in the event of the issuing of a notice of non-referral by the NCC, refer the matter directly to the Tribunal, with the leave of the Tribunal.

52. In the matter of *Westinghouse Brake and Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd*²⁴, the following was held: *"It is a general rule in the construction of statutes that a deliberate change of expression is prima facie taken to import a change of intention"*.²⁵ The specific provisions of Section 75(1)(b) of the Act and the requirement of the granting of leave to refer contained therein is such a "deliberate change of expression". By including this requirement the legislature expressed its intention of a separate requirement namely that a Section 75(1)(b) referral cannot be adjudicated on without the applicant in a specific matter first having obtained leave from the Tribunal to make such a referral
53. When determining whether the Applicant should be granted leave to refer the matter 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* – matter, as cited above, 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."*
54. The Tribunal will therefore, when considering whether to grant the Applicant leave to refer or not, use the same test as applied in the High Court for applications for "leave" and will therefore consider:
1. The Applicant's reasonable prospects of success with the referral;
 2. Whether the matter is of substantial importance to the Applicant or Respondent.
55. The Applicant's 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, or whether the

²³ This is contradictory to the Compliance Notice issued by the NCC. In terms of section 100(6) of the Act, the NCC may refer the matter to the Tribunal for the imposing of an administrative penalty. The NCC did however elect not to do so and issued a Notice of Non-referral. The Applicant is entitled to approach the Tribunal on this basis.

²⁴ 1986 (2) SA 555 (A) at par 15.

²⁵ See *Barrett, N.O. v Macquet*, 1947 (2) SA 1001 (AD) at p 1012; *Port Elizabeth Municipal Council v Port Elizabeth Electric Tramway Co Ltd* 1947 (2) SA 1269 (AD) at p 1279

Applicant may be assisted with a certificate in terms of Section 115(2) of the Act, following a declaration of prohibited conduct.

56. The matter is evidently of substantial importance to the Applicant, should the value of the requested refund be considered. It is however evident, and on the admission of the Applicant, that the Applicant and the Respondent, insofar as this agreement relates, are engaged in a contractual dispute. A court (not the Tribunal) would have to interpret the applicable agreement's termination clause and make a finding on whether or not the Respondent acted in breach of that clause, and whether the Applicant suffered damages as a result thereof. This is evidently a question of interpretation and application of the relevant provisions of the agreement.
57. In effect, the Tribunal is requested to award damages to the Applicant, resulting from a contractual dispute or breach. Jurisdiction to award damages on this basis vests in the courts.
58. Section 115(2) of the Act provides that if a person is entitled to commence an action in the civil court, the applicant must file with the Registrar of the Court or the Clerk of the Court, a notice from the Chairperson of the Tribunal in the prescribed form, specifying the following:
 1. Certifying whether the conduct constituting the basis for the action has been found to be a prohibited or required conduct in terms of this Act; and
 2. Stating the date of the Tribunal's finding.
59. It is evident that the Respondent did not contravene the Act in its failure to comply with clause 11.1(c) of the agreement, and the Respondent's conduct therefore does not constitute prohibited conduct in terms of the Act. It may constitute breach of the agreement. Accordingly, Section 115(2) of the Act does therefore not find application.
60. The NCC's rationale for finding the Respondent to have breached the agreement was also considered. The NCC stated that the agreement between the parties confers the right on the

Applicant to terminate the agreement, however without an entitlement to a refund. The NCC stated the foregoing to be in contravention of section 40(1)(c) of the Act.²⁶

61. It is the finding of the Tribunal that the right of the Applicant to terminate the agreement, however without an entitlement to a refund, falls rather within the ambit of section 48(2)(a) of the Act. This section stipulates that an agreement is unfair, unreasonable or unjust if it is excessively one-sided in favour of any person other than the consumer. It is evident that the provision of the agreement in question substantially favours the Respondent and is unfair, unreasonable and unjust.
62. Therefore if it could be held that the Respondent is in contravention of section 48(2) of the Act, the Applicant would, in such an instance be entitled to a certificate in terms of section 115(2) of the Act for engaging in prohibited conduct. However, the Applicant's damages resulted directly from the Respondent's terminating the said agreement, without giving the due and required notice. The Applicant's damages did not result from the one-sided clause relating to the possible termination of the agreement by the Applicant. The damages suffered by the Applicant resulted on the Applicants admission solely from the breach of the franchise agreement by the Respondent.

Can the Tribunal make a determination on the breach of contract upon which the Applicant bases his Application

63. At the hearing of the matter the Applicant submitted that the basis of his complaint is that the Respondent failed to adhere to the terms of the franchise agreement, more specifically the requirements of notice in the event of alleged breach of contract.
64. Section 4(2)(b)(ii) of the CPA provides as follows:

"(2) In any matter brought before a Tribunal or a court in terms of this Act-

(a) ...

²⁶ "40. (1) A supplier or an agent of the supplier must not use physical force against a consumer, coercion, undue influence, pressure, duress or harassment, unfair tactics or any other similar conduct, in connection with any—

(a) ...

(b) ...;

(c) negotiation, conclusion, execution or enforcement of an agreement to supply any goods or services to a consumer;"

- (b) *The Tribunal or court, as the case may be, must-*
- (i) *promote the spirit and purposes of this Act;and*
 - (ii) *make appropriate orders to give practical effect to the consumer's right of access to redress , including, but not limited to-*
 - (aa) *any order provided for in this Act;and*
 - (bb) *any innovative order that better advances, protects, promotes and assures the realisation by consumers of their rights in terms of this Act."*

Section 75(4)(b) provides as follows-

- (4) *The Tribunal-*
- (a) ...
 - (b) *make any applicable order contemplated in this Act or in section 150 or 151 of the National Credit Act, read with the changes required by the context."*

Section 150 of the NCA provides as follows:

- In addition to its other powers in terms of this Act, the Tribunal may make an appropriate order in relation to prohibited conduct or required conduct in terms of this Act, or the Consumer Protection Act, 2008, including-*
- (a) *declaring conduct to be prohibited in terms of this Act;*
 - (b) *interdicting any prohibited conduct;*
 - (c) *imposing an administrative fine in terms of section 151, with or without the addition of any other order in terms of this section;*
 - (d) *confirming a consent agreement in terms of this Act or the Consumer Protection Act, 2008 as an order of the Tribunal;*
 - (e) *condoning any non-compliance of its rules and procedures on good cause shown;*
 - (f) *confirming an order against an unregistered person to cease engaging in any activity that is required to be registered in terms of this Act;*
 - (g) *suspending or cancelling the registrant's registration, subject to section 57(2) and (3);*
 - (h) *requiring payment to the consumer of any excess amount charged together with interest at the rate set out in the agreement; or*

- (i) *any other appropriate order to give effect to a right, contemplated in this Act or the Consumer Protection Act, 2008.*

Section 151 of the NCA provides as follows-

"The Tribunal may impose an administrative fine in respect of prohibited or required conduct in terms of this Act or the Consumer Protection Act, 2008."

Section 151(2) of the NCA provides as follows –

"An administrative fine imposed in terms of the Act may not exceed the greater of-

- (a) *10 per cent of the respondent's annual turnover during the preceding financial year*
;or
(b) *R1 000 000".*

65. It is clear from a reading of these sections that the Tribunal is not empowered to make an order in respect of contractual non-compliance. Further the Tribunal being a creature of statute can only make orders provided for in the Act. The contractual dispute arose out of a franchise agreement. Section 7(2) of the CPA deals specifically with franchise agreements and provides as follows:

(1) *A franchise agreement must –*

- (a) *Be in writing and signed by or on behalf of the franchisee;*
(b) *Include any prescribed information, or address any prescribed categories of information; and*
(c) *Comply with the requirements of section 22.*
- (2) *A franchisee may cancel a franchise agreement without cost or penalty within in 10 business days after signing such agreement, by giving written notice to the franchisor.*
- (3) *The Minister may prescribe information to be set out in franchise agreements, generally, or within specific categories or industries."*

Regulation 292)(e) specifically provides that *"any provision in a franchise agreement to which these regulations apply which is in conflict with this regulation is void to the extent of this conflict."*

CONCLUSION

66. It is clear to the Tribunal that a section 115(2) certificate in respect of prohibited conduct in terms of section 48(2) of the Act, will not enable the Applicant to recover the Applicants damages from the Respondent because it is evident from the hearing of the matter and the admission of the Applicant that no *causal nexus* exists between the cause of the Applicant's damages and the prohibited conduct of the Respondent in relation to section 48(2) of the Act.
67. However, the current franchise agreement was entered into in June 2011. The CPA is therefore applicable to this matter. There is further, on record, sufficient prima facie evidence before the Tribunal that the current franchise agreement does not comply with the extensive list of requirements as prescribed by section 72(2) of the CPA and that such non-compliance, on the face of it, amounts to prohibited conduct on the part of the respondent through the Respondents non compliance with regulation 2 and 3 of the CPA.

ORDER

Accordingly, the Tribunal makes the following order-

Leave to refer is granted to the Applicant.

Authorised for issue by the National Consumer Tribunal

Case number NCT/8742/2013/73/3/75(1)(b)
Date: 2014.01.07 S (2) CPA
Ccy mm dd

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