

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

Case No: NCT/4900/2012/60(3)&101(1)(P)

In the matter between:

CLUB LEISURE GROUP

APPLICANT

And

THE NATIONAL CONSUMER COMMISSION

RESPONDENT

Coram:

Prof T Woker - Presiding Member

Ms D Terblanche - Member

Mr X May - Member

Hearing Date - 22 January 2014

JUDGMENT AND REASONS

INTRODUCTION

1. The Applicant is Club Leisure Group, a company duly registered in accordance with the laws of South Africa (hereinafter referred to as "the Applicant").

2. The Respondent is the National Consumer Commission (hereinafter referred to as "the Respondent"), an organ of state within the public administration established in terms of Section 85 of the Consumer Protection Act, Act 68 of 2008 ("CPA").
3. The Applicant was represented at the hearing of this matter by its Director of Core Operations, Mr Pieter Snyman.
4. The Respondent did not file an answering affidavit and did not appear at the hearing.
5. 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.
6. The Tribunal has jurisdiction to hear the application 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 review of such compliance notice.
7. This judgment follows the hearing of this matter on 22 January 2014 at the Tribunal in Centurion.
8. The Applicant's representative submitted oral arguments in support of the written application.

BACKGROUND

9. Mr. L.E Ahutu (subsequently referred to as "the Complainant") entered into an agreement on 24 January 2011 with Flexi Holiday Club, a leisure club which forms part of the Club Leisure Group.
10. Upon entering into the agreement with Flexi Holiday Club the complainant acquired 4000 points which entitled him to certain vacation rights. For the purposes of this judgment and because of the

findings of the Tribunal, it is not necessary to explain how the club operates and how it forms part of the Club Leisure Group.

11. The Complainant subsequently laid a complaint against the Applicant with the Respondent regarding the manner in which the Flexi Holiday Club allegedly marketed the particular product. The complainant alleged that he was misled by the marketing agent and as result thereof was persuaded to attend the marketing of the product. The Complainant was allegedly offered a prize. The complaint was further that certain ancillary charges reflected in the agreement were not discussed with him; and that Flexi Club refused to cancel the agreement. The Complainant also alleged that the contract was or later became unaffordable.
12. The Respondent convened a meeting between the parties on 03 November 2011. The Applicant's representative stated that he offered to resolve this matter by cancelling the complainant's agreement but this was subject to the complainant forfeiting all the money which he had already paid. The complainant rejected this settlement offer.
13. A compliance notice was issued against the Applicant by the Respondent in terms of which the Respondent required of the Applicant to refund all monies paid by the Complainant to the Applicant.
14. The Applicant then applied to the Tribunal for a review of the above referred to compliance notice.

APPLICANT'S SUBMISSIONS

15. The Applicant submitted that the CPA in effect from 31 March 2011, does not have retrospective application, unless specifically provided for in terms of the transitional provisions as set out in schedule 3(2).

16. The Applicant submitted that the conduct that forms the subject matter of the compliance notice took place prior the commencement of the CPA and therefore falls outside of the Respondent's jurisdiction.
17. The Applicant also alleged that the CPA does not apply because the agreement entered into, in order to purchase points, was a credit agreement governed by the National Credit Act, 34 of 2005 and is therefore not a transaction governed by the CPA.
18. The Applicant pointed that the compliance notice was signed on the 31 March 2012 but was only sent by an email on the 15 May 2012. This has prejudiced the Applicant because the Applicant was unable to respond within the time frame set out in the notice.
19. The Applicant submitted that the Respondent did not conclude an investigation in respect of complaint, as required by virtue of the provisions of Section 72 of the CPA, and therefore should not have issued the compliance notice as the completion of an investigation is a jurisdictional prerequisite for the issuance of a compliance notice.
20. The Applicant submitted that the compliance notice itself is defective as it does not contain details regarding the alleged contravention.
21. The compliance notice was not served on the Applicant correctly. The notice was served electronically by email on the 15th of May 2012 and not as per the requirements of Section 118 of the CPA, read with Section 100 of the CPA and Rule 6 of the Rules of the Tribunal¹.
22. The Applicant submitted that the compliance notice was served on the incorrect party because Flexi Holiday Club is a separate legal entity from Club Leisure Group. The compliance notice should have been served on Flexi Holiday Club.

¹ For the Conduct of Matters before the National Consumer Tribunal published under GN789 in GG30225 of 28 August 2007 as amended by GenN428 in GG34405 OF 29 June 2011 (hereinafter "the Rules of the Tribunal").

RESPONDENT'S SUBMISSIONS

23. The Respondent did not file an answering affidavit and was not present at the hearing,

APPLICABILITY OF THE CPA TO THIS MATTER

24. The general effective date on which the CPA came into operation is 31 March 2011.
25. The contract which formed the basis of this complaint was concluded on 24 January 2011.
26. The issues raised by the Applicant in this matter relate to the circumstances surrounding the conclusion of the contract. The contract was concluded on 24 January 2011 which was before the general effective date of the CPA.
27. Item 3 of Schedule 2 of the CPA determines the extent to which the CPA applies to "*pre-existing transactions and agreements*". The CPA does not apply to any transaction concluded, or agreement entered into, before the general effective date of the CPA being 31 March 2011.
28. Section 53 and 58 of the CPA apply to pre-existing transactions: "*only with respect to any goods or service supplied to the consumer in terms of the agreement, on or after the general effective date*"
29. There is no empowering provision in the CPA vesting the Respondent with authority to issue a compliance notice retrospectively in this respect.

CONCLUSION

30. The Tribunal finds that the CPA is not applicable to this matter, as the agreement was entered into prior to the general effective date of the CPA. Considering that the compliance notice therefore fails

to clear this first hurdle relating to its lawfulness it is not necessary to evaluate any further aspects relating to the Applicant's submissions.

31. For the reasons set out above, the Tribunal concludes that the compliance notice issued by the Respondent was not issued in accordance with the provisions of the CPA.

ORDER

Accordingly, the Tribunal makes the following order:

32. The Compliance notice issued by the Respondent is hereby cancelled; and
33. No order is made as to costs.

DATED ON THIS 22nd OF JANUARY 2014

[Signed]

Mr. X May

Member

Prof T Woker (Presiding Member) and Ms D Terblanche (Member) concurring.

Authorised for issue by the National Consumer Tribunal

Case number

Date 20/11/14
2014 / 11 / 14

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