

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

Case Number: NCT/21238/2015/75 (1)(b)

In the matter between:

BREYTENBACH GLASS

APPLICANT

And

DEN BRAVEN

RESPONDENT

Coram:

Prof J Maseko - Presiding Member

Adv. FK Manamela - Member

Mr. Xolela May - Member

Date of the hearing: 16 October 2015

JUDGMENT AND REASONS

APPLICANT

1. The Applicant in this matter is Breytenbach Glass CC, a close corporation duly registered and incorporated in terms of the Close Corporations Act 69 of 1984, and having its principal place of business at Wilrp Parek, ("hereinafter referred to as the Applicant").

2. At the hearing, the Applicant was represented by Adv MA Kruger, instructed by Scholtz Attorneys.

RESPONDENT

3. The Respondent is Den Braven S.A a private Limited company duly registered and incorporated in terms of the Company Laws of the Republic of South Africa, and having its principal place of business at Ferndale ("hereinafter referred to as the Respondent").
4. The Respondent was represented by Mr Claudio Bollo of Biccari, Bollo Mariano Incorporated Attorneys.

APPLICATION TYPE

5. This is an application in terms of Section 75(1)(b) of the Consumer Protection Act 68 of 2008 (the Act), wherein the Applicant seeks the following order :
 - 5.1 that leave be granted to refer a matter directly to the Tribunal;
 - 5.2 that the conduct of the Respondent be declared to be prohibited conduct;
 - 5.3 that the Respondent be declared to be liable for the harm caused by the product failure alternatively the defect in the goods supplied by the Respondent to the Applicant, further alternatively the inadequate instructions or warnings provided to the Applicant pertaining to any hazard arising from or associated with the use of the goods supplied by the Respondent to the Applicant;
 - 5.4 that a certificate as contemplated in section 115(2) (b) of the Consumer Protection Act be issued;
 - 5.5 that the Respondent pays the costs of this application; and
 - 5.6 further and/or alternative reliefs.

JURISDICTION

6. The National Consumer Tribunal (Tribunal) has jurisdiction to hear this matter in terms of section 27 of the National Credit Act read with section 75(1) (b) of the Consumer Protection Act. Section 75 of the CPA provides:
 1. *If the Commission issues a notice of non-referral in response to a complaint, other than on the grounds contemplated in section 116, the complainant concerned may refer the matter directly to–*
 - (a) *the consumer court,.....or*

(b) *the Tribunal, with leave of the Tribunal.*

BACKGROUND

7. The Applicant brought an application before Tribunal to refer the matter to the Tribunal in terms of section 75(1)(b) of the Consumer Protection Act.
8. The Applicant further prays for the following orders along the lines stated in paragraph 5 above.
9. Earlier, and before this matter was filed with the Tribunal in terms of this application, a condonation application for the late filing of the main application was granted in favour of the Applicant in June 2015.
10. The matter was subsequently set down for hearing by the Tribunal on 20 October 2015

THE HEARING

Points in limine raised by the Respondent

11. The Respondent raised two points *in limine* at the outset of the proceedings and presented its argument as follows:
 - 11.1 that the Applicant has neither alleged nor demonstrated in its founding affidavit that it is a “consumer” who is entitled to approach the Tribunal, due regard being had to section 5(2)(b) of the Consumer Protection Act No. 68 of 2008; and accordingly, the Act does not apply to transactions complained by the Applicant
 - 11.2 that, there are pending proceedings before the Roodepoort Magistrate's Court under case No.7364/14, which proceedings were launched before the Applicant approached the Tribunal on 13 November 2014, and which was done with the knowledge of the Magistrate's Court proceedings.
 - 11.3 The present proceedings ought accordingly to be stayed, pending the outcome of the Magistrate's Court proceedings.

11.4 The Respondent (*Plaintiff in the Magistrate's Court*), instituted proceedings in the Roodepoort Magistrate's Court on 11 August 2014, for payment by Applicant (*Defendant in the Magistrate's Court*) of the sum of R 84,124. 97, being the amount due, owing and payable by the Applicant to the Respondent, in respect of goods sold and delivered by the Respondent between September and October 2013.

11.5 According to the Respondent, the Summons was served on the Applicant on 14 August 2014.

11.6 The Respondent prays that the Applicant's claim be dismissed with costs, alternatively, stayed pending the outcome of the Magistrate's Court proceedings, which precede the referral of the matter to this Tribunal.

The Applicant's answer to the points *in limine*:

12. The Applicant denies that there is any merit in the preliminary points raised by the Respondent for the following reasons:

12.1 the supply of silicone product by the Respondent to the Applicant for the purpose set out in in the Applicant's affidavit, brings this matter within the application of the Act as contemplated in section 5 of the CPA.

12.2 the Applicant is a consumer as defined in section 1 of the Act and this does not preclude the Tribunal from concluding that the Applicant indeed is a consumer.

12.3 the Applicant however concedes that it is "*common cause*" that the Applicant's annual turnover exceeds 2 million rand.

12.4 the Applicant's referral of this matter to the Tribunal hinges on the provisions of section 61 of the Act, where the Tribunal is empowered to make a determination in respect of Respondent's delictual liability.

12.5 that even though the Applicant may be excluded in terms of section 5, section 5(5) is relevant for the Tribunal to make a determination of liability against the Respondent. The Applicant further argues that, the key question should be: whether in the Magistrates court's proceedings there is an issue that is determinable in the Tribunal and the outcome of the Magistrate's court is not determinative of the outcome of this case before the Tribunal. Further that the Tribunal should determine issues around liability and not the contractual matter before the Roodepoort Magistrate's Court.

12.6 that, referral to the National Consumer Commission ("the NCC") presupposes referral to the Tribunal because the law requires consumers to approach the NCC first.

12.7 that the Tribunal should not be precluded from making a determination in respect of other sections of the Act, like section 53.

12.8 that the goods supplied by the Respondent were not suitable for the purpose intended and that the Respondent should have issued a warning that the silicone should not be used for mirrors.

In its closing argument, the Applicant referred the Tribunal to case law: Caesarstone Sdot-Yam Ltd v World of Marble and Granite 2000 CC and Others¹ and CJ Digital SMS Marketing CC v NCC.²

Respondent's Reply

13. In its reply the Respondent referred the Tribunal to the Applicant's (Defendant in the Magistrate's court matter) special plea³ where the Applicant indicated that the same cause of action in respect of the same matter was still pending. Further that section 5(5) must be read with sections 60; 61; 68; 69 and 71⁴. In concluding, the Respondent indicated that it had hoped that the Applicant would amend its papers and make a counterclaim in respect of the claim the Respondent instituted before the Magistrate's court.

ISSUES TO BE DECIDED

14. The Tribunal has to decide on the following issues:

14.1 whether or not the Applicant should be granted leave to refer a complaint directly to the Tribunal;
and on the preliminary points raised by the Respondent in opposition to such an application:

¹ 2013(6) SA499(SCA) A

² NCT/3584/2011/101(1) Para 46 thereof. The Tribunal rendered the compliance notice issued by the NCC defective and ordered its cancellation. Explicitly, the Tribunal addresses the issue of damages in this paragraph and stated the following: "From this it is clear that a consumer, who wishes to claim loss or damages as a result of prohibited conduct, must do so through the civil courts. This also presupposes that the Respondent has referred the matter to the Tribunal so that the Tribunal can make a finding into prohibited 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. However, by its very nature, a consent order is an order made after the parties have reached an 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"

³ Page 91, para 5 thereof in the paginated bundle which reads: "there is accordingly proceedings pending between the parties on the same cause of action and in respect of the same subject-matter"

⁴ Of the CPA

- 14.2 whether or not the Applicant is a consumer as defined in terms of section 1 and section 5(2)(b) the CPA and is entitled to approach the Tribunal;
- 14.3 whether or not the proceedings before the Tribunal ought to be held in abeyance pending the outcome of the proceedings of the Roodepoort Magistrate's court, and
- 14.4 whether or not the Tribunal has jurisdiction to hear this matter.

ANALYSIS OF PROVISIONS OF THE CPA APPLIED TO THE FACTS AND FINDINGS

15. The provisions of the Act which are relevant to this application are as follows

15.1 Section 1. Definitions

In this Act-

' consumer ', in respect of any particular goods or services, means-

- (a) *A person to whom those particular goods or services are marketed in the ordinary course of the supplier's business;*
- (b) *A person who has entered into a transaction with a supplier in the ordinary course of the supplier's business, unless the transaction is exempt from the application of this Act by section 5(2) or in terms of section 5(30);*
- (c) *.....*
- (d) *.....*

15.2 Section 5. Application of this Act

(1) This Act applies to-

- (a) *.....*
- (b) *.....*
- (c) *.....*
- (d) *goods that are supplied in terms of a transaction that is exempt from the application of this Act, but only to the extent provided for in subsection (5)*

(2) This Act does not apply to any transaction-

- (a) *.....*
- (b) *in terms of which the consumer is a juristic person whose asset value or annual turnover, at the time of the transaction, equals or exceeds the threshold value determined by the Minister in terms of section 6*
- (c) *....*

16. The Applicant has conceded that it falls within the determination of the Minister's threshold as far as the annual turnover is concerned. However, notwithstanding that, the Applicant denies that the application of the Act excludes the Applicant from approaching the Tribunal. The Applicant, in its replying affidavit states that it is a consumer as defined in section 1 of the Act without substantiating why it holds such a view. The Applicant further states the following in the affidavit:"

"I am advised that the fact that the Applicant has not expressly stated that it is a consumer does not preclude this honourable Tribunal from concluding that the Applicant indeed is a consumer having regard to what is said in the founding affidavit. Be that as it may and to the extent that it may be required, I confirm that the Applicant indeed is a consumer as defined in the Act".

It is not the function of the Tribunal to conclude that a person is a consumer unless the Act says so. The Tribunal is bound by the law that establishes it and does not have inherent powers to make such a determination except where specifically provided for by the Act

17. Accordingly, the Applicant's argument finds no basis in law to be regarded as *bona fide* defence and such a statement amounts to a bare denial. On this point alone, the point *in limine* is upheld.
18. The Applicant, in its affidavit, submits that the referral of the matter to the Tribunal is in terms of 5(5), read with section 61; sections 49; 53; 55; alternatively section 58 of the CPA. These sections are categorised under certain Parts of the CPA: (the merits of which may+ be determined should the Applicant succeed in this hurdle (section 75(1)(b))

Part B- purpose, policy and application of the Act (sections 3-7); Part G- right to fair, just and reasonable terms and conditions (sections 48-52); and Part H- right to fair value, good quality and safety (sections 53-62) These provisions are applicable to goods supplied to consumers as defined in the Act. Having regard to the fact that the Applicant is disqualified from the definition of a consumer, the Tribunal cannot even begin to determine the application of these provisions, by virtue of the fact that they are irrelevant for purposes of the present matter before the Tribunal. This is an application in terms of section 75 (1) (b) for leave to refer a complaint directly to the Tribunal.

Lis alibi pendens

19. The Applicant concedes that the Respondent has commenced proceedings in the Roodepoort Magistrate's court but denies that the Respondent's defence of *lis alibi pendens* is justifiable in the circumstances. The Applicant insists that the proceedings before the Tribunal must not be stayed pending the outcome of the proceedings in the Magistrate's court, because the issues are different. The Respondent sued the Applicant for the payment of outstanding amounts, owing, due and payable to the Respondent for the goods supplied to the Applicant. At the heart of this doctrine of *lis pendens* ("dispute elsewhere pending") is the critical issue that, if two courts were to hear the same dispute involving the same parties on the same subject matter, it is possible they would reach inconsistent decisions. As such, the court may refuse to exercise jurisdiction when there is parallel litigation pending in another jurisdiction.

20. In *Caeserstone Sdot-Yam Ltd v The World of Marble and Granite CC*⁵ the court held that:

"As its name indicates, a plea of lis alibi pendens is based on the proposition that the dispute (lis) between the parties is being litigated elsewhere and therefore it is inappropriate for it to be litigated in the court in which the plea is raised. The policy underpinning it is that there should be a limit to the extent to which the same issue is litigated between the same parties and that it is desirable that there be finality in litigation.

The courts are also concerned to avoid a situation where different courts pronounce on the same issue with the risk that they may reach differing conclusions. It is a plea that has been recognised by our courts for over 100 years"

The Court went on further to state:

"[12] Voet said that there are three requirements for a successful reliance on a plea of lis pendens. They are that, the litigation is between the same parties; that the cause of action is the same; and, that the same relief is sought in both. In Hassam & Another v Berrange NO⁶, Zulman AJ expressed these requirements in the following terms:

"Fundamental to the plea of lis alibi pendens is the requirement that the same Plaintiff has instituted action against the same Defendant for the same thing arising out of the same cause"

21. The principle outlined in *Caesarstone* has guided the courts in matters such as this and the Tribunal is not an exception. However the merits of each case will have to be determined

⁵ *supra*

⁶ 2012(6) SA 329(SCA) para 19

separately as they relate to each individual case differently. The Tribunal followed this guided approach in matters previously referred to it⁷. In the current matter before the Tribunal, the Respondent raises the same defence. The question therefore, is whether or not the three requirements for a successful *lis alibi pendens* have been met.

22. The Applicant has admitted this fact (*lis pendens*) in its special plea in response to papers served out of the Magistrate's court. What is surprising is that the Applicant, when sued by the Respondent in the Roodepoort Magistrate's Court for the amount owing in respect of goods supplied to it (*the goods being the subject matter of the Applicant's current application*), the Applicant, according to the Respondent, didn't lodge a counter claim. This fact was never opposed by the Applicant during the hearing. It follows therefore that the Applicant, in opposing the matter in the Magistrate's court, would rely on the same defence as canvassed in the current application: that the product supplied by the Respondent is unsafe; hazardous; defective and unfit for the purpose for which it was intended. Put differently, the Applicant may raise all the allegations in this application levelled against the Respondent in terms of the Consumer Protection Act. It follows therefore that the three requirements of *lis pendens*: same matter, same parties and same cause of action and relief sought, are met.⁸ There is nothing precluding the Applicant from pursuing a damages claim in the judicial courts, for harm and / loss suffered as a result of defective, unsafe and harmful products allegedly supplied by the Respondent. Such a competency resides with judicial courts.

23. In the matter of *Nestle(South Africa)(Pty)Limited v Mars Inc*⁹, Nugent AJA, (as he then was) stated the following:

"The defence of lis alibi pendens shares the features in common with the defence of res judicata because they have a common underlying principle, which is that there should be finality in litigation. Once a suit has been commenced before a tribunal that is competent to adjudicate upon it, this suit must generally be brought to its conclusion before that tribunal and should not be replicated (lis alibi pendens). By the same token, the suit will not be permitted to revive once it has been brought to its proper conclusion (res judicata). The same suit between the same parties should be brought once and finally".

⁷In *Bonga Nkanyiso Mdletshe v Mercedes Benz Financial Services SA (Pty) Ltd* NCT/9163/2013/128(1)(P). The Tribunal ruled that it has jurisdiction to hear the matter and dismissed a defence of *lis alibi pendens* on the basis that in a credit agreement where the Respondent instituted action against the Applicant for the outstanding balance on the vehicle finance loan agreement, the Applicant rightly so defended the matter on grounds relating to the value of the vehicle and the amount it was sold for. The Tribunal went further to say: "while it can be argued that there is a certain overlap between the two matters, in this instance it is not to the degree envisaged by the *lis pendens* doctrine". The Tribunal further referred to the provisions of section 130(3)(b) of the NCA. See also *Yako v Mercedes Benz* NCT/4044/2012/128(1)

⁸ Para 20 *supra*

⁹ 2001(4)(SA)542 SCA,

24. The Respondent commenced proceedings out of the Magistrate's court, by issuing summons on 11 August and served the Applicant on 14 August 2014. The Applicant argues that by its referral of the complaint to the NCC on 11 August 2014, presupposes the commencement of proceedings in the National Consumer Tribunal and that, for that reason the Applicant's action preceded the Respondent's commencement of an action in the Magistrate's court. The Applicant relies, among others, on this reason that the Respondent cannot succeed on the defence of *lis pendens*. This cannot be correct. The referral of complaints to the NCC and the NCT is dealt with separately in the Act. The NCC cannot be equated to an adjudicative body like the Tribunal. Notwithstanding, the NCC issued a notice of non-referral¹⁰ on the grounds similar to those before the Tribunal denying the Applicant to approach the Tribunal directly, *that is*, that the Applicant is not a consumer as defined in the Act.
25. The Tribunal in the preceding paragraphs has already stated that the Applicant is not a consumer as defined in the Act. It follows therefore that the Tribunal is not competent to hear the Applicant and cannot on that basis grant the Applicant leave to refer the complaint to this Tribunal. Accordingly the second point *in limine* is upheld.

ORDER

26. On the basis of the afore-going, the Tribunal makes the following order:

26.1 The application for leave to refer a complaint directly to the Tribunal is hereby refused;

26.2 Accordingly, the Tribunal has no jurisdiction to hear the matter, in that

26.2.1 the Applicant is not a consumer as defined in the Act for the purposes of this application;

26.2.2 the requirements of *lis alibi pendens* have been established; and

26.3 There is no order as to costs

DATED ON THIS 12th DAY of NOVEMBER 2015

[Signed]

¹⁰ See section 75(1)(b) and subsection (4); section 150 of the NCA

Adv. FK Manamela
(Member)

Prof JM Maseko (Presiding Member) and Mr Xolela May (Member), *concurring*

Authorised for issue by National Consumer Tribunal
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