

**IN THE NATIONAL CONSUMER TRIBUNAL  
HELD IN CAPE TOWN**

Case Number: **NCT/107447/2018/75(1) (b)**

In the matter between

**GAVINTHREN AND LEAH JOAN GOVENDER**

APPLICANTS

and

**ADVANCE POOLS CC**

RESPONDENT

Coram:

Prof Tanya Woker – Presiding member

Date of hearing – 9 October 2018

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**APPLICATION FOR LEAVE TO REFER  
JUDGMENT AND REASONS**

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**THE PARTIES**

1. The Applicants are Gavinthren and Leah Joan Govender consumers who lodged a complaint with the Consumer Goods and Services Ombud (CGSO) and the National Consumer Commission (the NCC), in terms of Section 72(1) (a) of the Consumer Protection Act, 2008 (the CPA) (hereinafter referred to as “the Applicants”). At the hearing, the Applicant represented themselves.
2. The Respondent is Advance Pools CC, a provider and installer of pools, with registration number 2006/115264 and whose postal address is 9 Volt Close, Kya Sand, Randburg, Gauteng (hereinafter referred to as “the Respondent”). There was no appearance at the hearing by the Respondent or its representative.

**APPLICATION**

3. The application brought before the Tribunal is in terms of section 75(1)(b) of the CPA. The Applicant lodged a complaint with the NCC and received a notice of non-referral in response. In July 2018 the Applicants applied for condonation for the late filing of their application for leave to refer their complaint

directly to the Tribunal. Condonation was granted by the Tribunal on 2 August 2018. The Applicant is now applying for leave from the Tribunal for the complaint to be referred directly to the Tribunal.

4. In accordance with section 75(1)(b), only the application for leave is being considered at this stage by a single member of the Tribunal.
5. This judgment is based on the documents before the Tribunal as well as information provided by the Applicants at the hearing held on 9 October 2018.

## **BACKGROUND<sup>1</sup>**

6. The Applicant's complaints arise out of a contract they concluded with the Respondent during August 2016 for the fitment of a fibreglass pool, securing of coping, the installation of two securing layers of paving and a retaining wall.
7. The Applicants complained that the pool installation and the workmanship was defective and of poor quality.
8. The defect and poor quality they complained about are amongst others:
  - 8.1 Internal and external cracks in the pool;
  - 8.2 Lifting of the coping causing cracks in the surrounding paving;
  - 8.3 Sagging of the retaining wall;
  - 8.4 Problems with the pool pump; and
  - 8.5 Excess sand and stone in the pool that could not be removed with conventional cleaning methods and have not been removed.
9. The Applicants obtained various reports, opinions regarding the defective installation and poor workmanship and quotations for the repairs thereof.<sup>2</sup> These confirmed their view that the Respondent has contravened various provisions of the CPA.

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<sup>1</sup> It is noted that much of this background has already been set out in the judgment relating to the application for condonation but for the sake of completeness the information is repeated here.

<sup>2</sup> See expert report at pages 80-88 of the documents before the Tribunal. In this report the recommendations state that the pool cannot be left in this condition. The pool has to be taken out and rebuilt following proper procedures (see page 88).

10. Initially the Applicants instituted a claim for damages against the Respondent in the Small Claims Court. This claim involved two separate claims: claim 1 for the physical damage caused to the existing patio paving adjacent to the pool installation and claim 2 which related to completing the construction of the pool.<sup>3</sup> Prior to the hearing, the Applicants informed the Small Claims Court and the Respondent that they were withdrawing claim 2 because it had come to their attention that the work which the Respondent had done was in fact defective (and not just incomplete) and the claim for damages would be beyond the jurisdiction of the Small Claims Court. The Small Claims Court awarded the Applicants' claim for damages of R15 000. The Applicants are of the view that these damages were awarded in respect of claim 1 only and that claim 2 has not yet been adjudicated on by an appropriate dispute resolution entity.
11. The NCC non-referred the Applicants' complaint on the basis that their complaints have been resolved in the Small Claims Court.
12. The Applicants however have explained that their claim in the Small Claims Court was totally different and distinguishable from the complaints that they now have against the Respondent namely defective workmanship and poor quality of work.

## THE HEARING

13. The Respondent has not filed any documents with the Tribunal indicating that it intends to oppose the application. The Tribunal was satisfied that the Applicants filed the application on the Respondent by registered mail.<sup>4</sup>
14. The Respondent did not appear at the hearing and was also not represented, therefore the matter was heard on a default basis in accordance with rule 24 (b) of the Tribunal Rules.<sup>5</sup> This rule provides that if a party to a matter fails to attend or be represented at the hearing the presiding member may continue with the proceedings in the absence of that party provided the presiding member is satisfied that the party had been properly notified of the date, time and venue of the proceedings, before making any decision.
15. The Tribunal was satisfied that the Respondent was notified of the hearing.

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<sup>3</sup> At the time of instituting the claims in the Small Claims Court, the Applicants were only concerned that the Respondent had not yet completed the pool and the 2<sup>nd</sup> claim therefore related to getting him to complete the pool.

<sup>4</sup> See page 9 of the documents before the Tribunal for the track and trace report.

<sup>5</sup> Rules for the Conduct of Matters Before the National Consumer Tribunal

## **APPLICANT'S CASE**

16. At the hearing the Applicants set out the facts which led to this hearing. These facts have been set out under background above and so it is not necessary to repeat them again.
17. The Applicants also informed the Tribunal that they had consulted the CPA and had attempted, although without any legal representation, to identify those sections of the Act that they believed were relevant to their complaint.
18. These included *inter alia* the following:
  - (1) Section 54 (1) (a) which deals with the right of a consumer to demand quality service;
  - (2) Section 55 the consumers' rights to safe, good quality goods; and
  - (3) Section 56 (2) which provides that within six months after the delivery of any goods to the consumer, the consumer may return the goods to the supplier, without penalty, and at the supplier's risk and expense, if the goods fail to satisfy the requirements and standards contemplated in section 55 and the supplier must, at the direction of the consumer, either–
    - (a) repair or replace the failed, unsafe or defective goods; or
    - (b) refund to the consumer the price paid by the consumer for the goods.

## **THE LAW APPLICABLE TO THE APPLICATION**

19. The question now before the Tribunal is whether or not leave should be granted for the matter to be heard by the Tribunal. The Tribunal can only assess the reasonable prospects of success by considering whether the CPA finds application in the dispute and may therefore be adjudicated on by the Tribunal.
20. In this regard it must further be borne in mind that the Tribunal is merely considering the application for leave at this stage and is not engaging in a determination of the merits of the main dispute between the parties. At this stage, the Tribunal is merely assessing whether the Applicant has made out a case that should be considered by the Tribunal.

21. In 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.”*

22. The Tribunal, when considering whether to grant the Applicant leave to refer or not, uses the same test as applied in the High Court for applications for “leave.”<sup>6</sup>

23. The Tribunal will therefore consider the following factors:

- (1) whether the matter is of substantial importance to the Applicant; and
- (2) the Applicant’s reasonable prospects of success with the referral.

#### **Is the matter of considerable importance to the Applicants?**

24. The Applicants have made numerous attempts to resolve this matter. The documents before the Tribunal indicate a long history of emails between the parties in which the Applicants appealed to the Respondent to initially complete the work and then to rectify the damages. The Applicants initially, before they were aware of the extent of the damage caused by the defective workmanship, attempted to resolve the matter through the Small Claims Court. In order to bring their claim within the ambit of that Court, they even abandoned some of their claim relating to the damage that the Respondent caused to their existing paving.

25. Once they became aware of the extent of the damage to the uncompleted pool and the retaining wall, they withdrew that claim from the Small Claims Court and lodged a complaint with the CGSO. They then referred the matter to the NCC, and ultimately the Tribunal.

26. The Applicants have paid a substantial amount of money for a pool they cannot use. And according to the reports submitted to the Tribunal it will cost a substantial amount of money to restore their property or the pool to an acceptable state.

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<sup>6</sup> This issue has also been considered by the Tribunal in a number of other decisions, see for example, *MV Chauke v Standard Bank et al* NCT/4658/2012/141(1)(P), and *Coertze and Burger v Young* NCTT/7142/2012/73(3)&75(1)(b) CPA and *Esther Rhulani Tshwale (obo True Harvest College) v Faizan Properties* NCT/12505/2014/75(1)(b) & (2) CPA.

27. At the hearing, the Applicants submitted further pictures of their swimming pool in its present state.<sup>7</sup> It is only half filled because the crack in the fibreglass means that water continually leaks from the pool. The pool pump is not functioning which means the pool constitutes a health hazard. The Applicants feel that they are unable to host visitors at their home because the pool constitutes a danger to those visitors. The value of their property has decreased as a result of this half completed and damaged pool and this also constitutes a problem for their neighbours who are unhappy about the state of their premises.
28. Based on all of the above, the Tribunal finds that the requirement that the matter is of substantial importance to the Applicants has been met.

### **Prospects of success**

29. The second question, as to the reasonable prospects of success must be answered by considering first the issue of *res judicata*; and then whether the relevant sections of the CPA have been breached.
30. The Tribunal considered the issue of *res judicata* in the judgment relating to the application for condonation. And the presiding member concluded that the Applicants have good prospects of the Tribunal determining the issue of *res judicata* in their favour. I see no reason to deviate from this finding of that presiding Tribunal member.
31. The Applicants have also identified sections of the CPA which they argue have been breached by the Respondent. And they have made out a case against the Respondent which deserves to be heard by the Tribunal.

### **CONCLUSION**

32. The Tribunal finds that the Applicants have satisfied the requirements for the granting of leave in terms of Section 75(1)(b) of the CPA.

### **ORDER**

33. Accordingly, the Tribunal makes the following order:

(1) The application for leave from the Tribunal is granted; and

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<sup>7</sup> See Annexure A to the record.

(2) No order is made as to costs.

34. Since leave to refer the main application to the Tribunal has been granted, the normal rules and time frames for filing an answering affidavit to the main application now apply.

DATED 10 October 2018

Prof T Woker  
Presiding Member