

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

Case number: **NCT/302216/2023/75(1)(b)**

In the matter between:

DAISY ON CALL (PTY) LTD

APPLICANT

And

CODESWOP (PTY) LTD

RESPONDENT

Coram:

Dr MC Peenze - Presiding Tribunal Member

Ms Z Ntuli - Tribunal Member

Mr CJ Ntsoane - Tribunal Member

Date of Hearing - 18 November 2024

Date of Judgment - 26 November 2024

JUDGMENT AND REASONS

THE PARTIES and REPRESENTATION

1. The applicant in this matter is Daisy On Call (Pty) Ltd (the applicant), a private company duly incorporated under the company laws of South Africa. The applicant has an asset value and annual turnover of less than R2 000 000.00 (two million rands) and is defined as a consumer under section 1 of the Consumer Protection Act 68 of 2008 (the CPA).¹ The applicant's directors, Leonie Fourie and Christiaan Fourie, represented the applicant at the hearing.

¹ Section 5(2) provides that: "This Act does not apply to any transaction – (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.

2. The respondent is Codeswop (Pty) Ltd (the respondent), a private company duly incorporated under the company laws of South Africa and a supplier as defined in section 1 of the CPA. Elaine Jordaan, an attorney from Elaine Jordaan Attorneys Inc., represented the respondent at the hearing.

TERMINOLOGY

3. A reference to a section in this judgment refers to a section of the CPA.

APPLICATION TYPE

4. This is an application in terms of section 75(1)(b). In this application, the applicant, with leave granted by the Tribunal, seeks redress against the respondent. The applicant alleges that the respondent contravened the CPA by failing to deliver a web-based application that conformed to the material specifications of a special order and seeks a refund of the deposits paid.

BACKGROUND

5. In May 2019, the parties entered into an agreement in terms of which the respondent would develop and supply a web and mobile-based application (the goods) to the applicant. Although the project implementation plan determined that invoices would be made once the project was completed, the applicant agreed to the payment of deposits whilst the project was in progress. These deposits were not to be allocated against the project as payments until the final delivery of the goods. The deposits were to be made on reaching certain milestones as recorded in the project implementation plan. The worst-case estimate for project completion was set at the end of April 2020.
6. The respondent commenced the project in May 2019, and the applicant made periodic deposits totalling R393,493.52 from May 2019 to October 2020.
7. The applicant submitted that the respondent did not complete the coding project and failed to deliver the goods on the contracted delivery date, namely by the end of April 2020. After various attempts to fast-track the finalisation of the goods, the parties agreed on 11 August 2021 as a final deadline. However, by 11 August 2021, the respondent has still not rendered the goods for inspection

and approval. On 1 September 2021, the respondent issued a final invoice, demanding payment of the total amount before the goods would be delivered.

8. The applicant avers that the invoice was premature and constituted a breach of the contract, as the contractual goods still needed to be delivered for final scrutiny. According to the applicant, the respondent refused to complete the project and deliver the goods as contracted. The alleged breach of the agreement is the cause of the applicant's complaint.
9. The applicant requests a finding of prohibited conduct, and a refund of the deposits paid. They cited sections 65, 19, 41, and 55 to substantiate their claim.
10. The respondent opposes the application.

THE HEARING

11. During the hearing, the applicant argued that the respondent's conduct was prohibited, as it expected payment without the applicant having had the opportunity to inspect the goods. The applicant also emphasised that no product was delivered per the contract and that it does not have access to or ownership of any of the work done or allegedly done in terms of the agreement.
12. The applicant argued that the respondent retained deposits in contravention of the CPA and misled it regarding its competency in delivering the contracted goods.
13. The respondent submitted that it failed to deliver the goods by March 2020 due to the applicant's poor co-operation. It further avers that, by 1 September 2021, it was ready to deliver the goods but did not release the product because the applicant first needed to make full payment of the amount owed.
14. The respondent argued that the contract was not for delivering goods but services. Accordingly, the respondent submitted that it is entitled to withhold the product until the services rendered are paid. Further, the respondent believes it cannot be held responsible if the applicant's expectation of the product is not met, as the respondent was not selling a shelf product.

15. According to the respondent, the periodic deposits confirmed that the applicant was happy with the various milestones and that the services rendered were of acceptable quality.
16. The respondent submitted that it was willing to deliver the product. However, as the applicant refused to make full payment after the invoice was rendered, it was within its rights not to release the product for final inspection or at all.

APPLICABLE SECTIONS OF THE ACT

17. Per section 19(2), it is an implied condition of every transaction for the supply of goods or services that –
 - “(a) the supplier is responsible to deliver the goods or perform the services—
 - (i) on the agreed date and at the agreed time, if any, or otherwise within a reasonable time after concluding the transaction or agreement;
 - (ii) at the agreed place of delivery or performance; and
 - (iii) at the cost of the supplier, in the case of delivery of goods; ...
 - (c) goods to be delivered remain at the supplier’s risk until the consumer has accepted delivery of them, in accordance with this section.”
18. Section 19 (3) states that if an agreement does not provide a specific date or time for delivery of any goods or performance of any services, the supplier must not require that the consumer accept delivery or performance of the services at an unreasonable time. Per subsection (4), the consumer is regarded to have accepted delivery of any goods on the earliest of the following circumstances:
 - “(a) When the consumer expressly or implicitly communicates to the supplier that the consumer has accepted delivery of such goods; or
 - (b) when the goods have been delivered to the consumer, and—
 - (i) the consumer does anything in relation to the goods that would be inconsistent with the supplier’s ownership of them; or
 - (ii) after the lapse of a reasonable time, the consumer retains the goods without intimating to the supplier that the consumer has rejected delivery of them, subject to subsection (5).”

19. Section 19(5)(b) states that when a supplier tenders delivery to a consumer of any goods, the supplier must, on request, allow the consumer a reasonable opportunity to examine those goods to ascertain whether the consumer is satisfied that the goods –
 - “(a) are of a type and quality reasonably contemplated in the agreement and meet the tests set out in sections 18(3) and (4); and
 - (b) in the case of a special-order agreement, reasonably conform to the material specifications of the special order.”

20. Section 20(2)(b) states that the consumer may return goods to the supplier and receive a full refund of any amount paid for those goods if the supplier has delivered goods that the consumer did not have an opportunity to examine before delivery, and the consumer has rejected delivery of those goods for any of the reasons contemplated in section 19(5).

21. Section 19(6) outlines that if the supplier tenders the delivery of goods or the performance of any services at a location, on a date or at a time other than as agreed with the consumer, the consumer may either –
 - “(a) accept the delivery or performance at that location, date and time;
 - (b) require the delivery or performance at the agreed location, date and time, if that date and time have not yet passed; or
 - (c) cancel the agreement without penalty, treating any delivered goods or performed services as unsolicited goods or services in accordance with section 21.”

22. Section 41 prohibits false, misleading, or deceptive representations in marketing goods or services.

23. Section 51(1) outlines that a supplier must not make a transaction or agreement subject to any term or condition if:
 - “(a) its general purpose or effect is to—
 - (i) defeat the purposes and policy of this Act;
 - (ii) mislead or deceive the consumer; or
 - (iii) subject the consumer to fraudulent conduct;
 - (b) it directly or indirectly purports to—

- (i) waive or deprive a consumer of a right in terms of this Act;
- (ii) avoid a supplier's obligation or duty in terms of this Act;
- (iii) set aside or override the effect of any provision of this Act; or
- (iv) authorise the supplier to—
 - (aa) do anything that is unlawful in terms of this Act; or
 - (bb) fail to do anything that is required in terms of this Act;
- (h) it requires the consumer to forfeit any money to the supplier—
 - (i) if the consumer exercises any right in terms of this Act [sic].”

24. Section 55 deals with consumers' right to safe, good-quality goods.

25. Section 65 deals with a supplier's obligation to hold and account for a consumer's property. Subsection 2(a) determines that when a supplier has possession of any pre-payment or deposit belonging to or ordinarily under the control of a consumer, the supplier must not treat that property as the supplier's property.

CONSIDERATION OF PROHIBITED CONDUCT

26. The Tribunal has considered whether the respondent's conduct constitutes prohibited conduct² in terms of the CPA. In doing so, the Tribunal is mindful of its wide-ranging powers to make appropriate orders concerning prohibited conduct.³

Section 55

27. In the present matter, the applicant argued that the respondent contravened section 55. It was common cause that the goods were delivered, and therefore, the state of the goods cannot be determined. Accordingly, the alleged transgression of section 55 cannot be considered.

Section 19

28. Concerning the alleged transgression of section 19, the Tribunal finds in favour

² Prohibited conduct is defined in section 1 as meaning an act or omission in contravention of the Act.

³ See *National Credit Regulator v Dacqup Finances CC trading as ABC Financial Services – Pinetown and Another* (382/2021) [2022] ZACSA 104 (24 June 2022).

of the applicant.

29. The definition of goods in section 1 of the CPA includes any tangible object, including a web and mobile-based application. It is not disputed that the applicant explained their expectations before the order was finalised. Given that the applicant had agreed to purchase a web and mobile-based application through a special order (project), the product should have been delivered and examined before any demand for payment. According to the undisputed evidence before the Tribunal, the applicant did not receive a web and mobile-based application. The respondent insisted on full payment before releasing the product. In this matter, the respondent failed to allow the applicant a reasonable opportunity to examine the goods to ascertain whether they were satisfied with their order.
30. The Tribunal considered that the development process included various phases but was persuaded that the transaction's object was the delivery of the goods.
31. Any work the respondent did was for reasonable testing, preparation or delivery of the goods. The respondent's argument that the work done by the respondent constituted services rendered is, therefore, misplaced. Similarly, any deposits made by the applicant should not be considered as payment for the services rendered but an indication of progress in the development of the product. The applicant should not be penalised for having made deposits in good faith that the product would be delivered.
32. The agreement between the parties outlines that:

*"On completion of the final milestone a Tax Invoice will be provided by Codeswop with the full project amount (R374,000.00 excluding VAT) and VAT payable (R56,100.00). At such time, upon written approval from Daisy On Call, the deposit payments to date will only then be allocated as payments against said Tax Invoice. The total outstanding amount will be reflected at that point in time on a statement that reflects all (aforementioned) payments made."*⁴

⁴ See page 91 of the record.

33. On the evidence, the Tribunal is persuaded that the respondent failed to deliver the final product per the agreement. It issued a final invoice before the applicant could examine and inspect the product. Although the applicant had inspected the website's functionality as it was being developed, all the applicant's comments regarding its suitability and expected utility had not been addressed. The respondent's subsequent refusal to provide the product for final inspection provides convincing evidence of its failure to provide the goods within a reasonable time after concluding the transaction or agreement. As goods to be delivered remain at the supplier's risk until the consumer has accepted delivery, the goods in this matter were effectively not delivered.
34. Any payments demanded or deposits withheld should either be explicitly regulated by the agreement or occur per the CPA. As the agreement demands written approval before a final invoice can be issued, and as the applicant has still not obtained the final product for inspection and approval, the withholding of deposits did not occur per the agreement.
35. Further, as outlined in section 19(5), despite any contractual term, the supplier may not tender delivery to a consumer of any goods without allowing the consumer a reasonable opportunity to examine those goods to ascertain whether the consumer is satisfied that the goods are of a type and quality reasonably contemplated in the agreement, and in the case of a special-order agreement, reasonably conform to the material specifications of the special order. By failing to provide the applicant with the goods and further failing to provide the applicant with an opportunity to examine the goods as required by law, the respondent transgressed section 19(5).
36. The Tribunal is persuaded that the applicant specifically informed the respondent of the purpose they wished to acquire the web and mobile-based application. Further, the respondent acted knowledgeable about providing web- and mobile-based applications. Given that the respondent demanded payment in contravention of section 19(5), the applicant was entitled to treat the goods as unsolicited and receive a full refund of deposits made as per section 20(2)(b).

Section 41

37. Although the applicant made persuasive arguments that the respondent misled them that they had the professional capacity to deliver the product as envisaged, the only evidence before the Tribunal is the failure to deliver the product. The mere failure to deliver the product is not in itself a deceptive or false presentation. The Tribunal noted the disagreements about the goods' functionality during the development phase and believed that the respondent did not intend to make false or misleading representations about their capabilities. The Tribunal is not persuaded that the applicant provided sufficient evidence for the Tribunal to make a finding that the respondent's failure to deliver the product resulted from a deceptive representation. The respondent argued it intended to retain deposits to secure payment for their services. However, this intention should have been contracted explicitly, as the applicant did not receive any benefit from the work done by the respondent.
38. Based on the agreement's wording, the deposits were not to constitute payment for services rendered but intended to be held as deposits to be offset against the purchase price once the goods were approved. If the respondent intended the deposits to serve as payment for services, the applicant was misled, and the withholding of their deposits would have constituted a contravention of section 41.

Sections 65 & 51

39. The Tribunal further considered the respondent's argument that the contract must be interpreted as providing the right to retain deposits irrespective of whether the product is acceptable to the client. The Tribunal is not as sanguine as the respondent concerning its interpretation of sections 65(2)(a) and 51(1). The respondent may not treat deposits as its property or make a transaction or agreement subject to any term or condition if such terms would waive or deprive a consumer of a right in terms of the CPA. As the consumer, the applicant cannot contract not to challenge the quality or suitability of the goods, and the contract may not require the consumer to forfeit a deposit if consumers would exercise their right to demand an inspection and challenge the quality of the goods.

40. To the extent that the respondent intended to require the consumer to forfeit their deposits in the event that they demanded scrutiny of the final product, the Tribunal is persuaded that the respondent is also in contravention of sections 51(1)(b)(i)-(ii) and 51(1)(h).

CONCLUSION

41. The Tribunal finds that the respondent infringed upon the applicant's right to examine the web and mobile-based application before issuing a final invoice. The respondent thereby transgressed section 19. The respondent further transgressed sections 65 and 51 by retaining deposits without delivering the goods.
42. The rights afforded to consumers under the CPA are there to protect them. An infringement of those rights could have serious financial consequences for a consumer. The applicant is, therefore, entitled to a refund.

ORDER

43. Accordingly, the Tribunal makes the following order:
- 43.1 The respondent has contravened the following sections of the CPA:
(a) sections 19(2) and 19(5), read with section 20(2)(b);
(b) section 65; and
(c) sections 51(1)(b)(i)-(ii) and 51(1)(h).
- 43.2 The respondent's contravention of the above sections of the CPA is declared prohibited conduct.
- 43.3 The respondent is ordered to refund the applicant the purchase price of R393,493.52 within ten days of this judgment's issuance.
- 43.4 There is no cost order.
- (signed)*
Dr MC Peenze
Presiding Tribunal member
Tribunal members Ms Z Ntuli and Mr CJ Ntsoane concur.

