

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

Case number: **NCT/36112/2016/75(1)(b)**

In the matter between:

DAVID LAZARUS

1ST APPLICANT

HAZEL SARKIN

2ND APPLICANT

And

RDB PROJECT MANAGEMENT CC t/a

SOLID

1ST RESPONDENT

VICOSTONE

2ND RESPONDENT

Coram:

Adv J Simpson – Presiding member

Ms D Terblanche – Member

Ms H Devraj – Member

Date of Hearing – 31 May 2016

JUDGMENT AND REASONS

APPLICANT

1. The Applicants in this matter are Mr David Lazarus and Ms Hazel Sarkin, a major male and female respectively. They both reside in Cape Town. Mr Lazarus appeared on his own behalf and represented the 2nd Applicant at the hearing (hereinafter referred to as “the Applicant”).

RESPONDENTS

2. The Applicant's pleadings reflect Ms Dianne Cameron-Parker, Solid Surfaces as the 1st Respondent. It however appears (based on an invoice attached in the Applicant's pleadings) that the 1st Respondent is in fact RDB Project Management CC trading as Solid. At the hearing the 1st Respondent was represented by Ms Dianne Cameron-Parker who appeared via Skype audio and visual transmission.
3. The Applicant's pleadings reflect the 2nd Respondent as Marc Fisher, Vicostone South Africa. The juristic nature of Vicostone is unknown and does not appear from the Applicant's pleadings. At the hearing there was no appearance by the 2nd Respondent or a representative on its behalf.

APPLICATION TYPE

4. This is an application in terms of Section 75(1)(b) of the Consumer Protection Act 68 of 2008 ("the CPA").
5. In an application of this nature the Tribunal must first consider whether it will grant the Applicant leave to hear the matter. If the leave is granted then the Tribunal will consider the merits of the Application.

APPLICATION FOR LEAVE

6. Section 75(1) of the Act requires that the NCC issues a notice of non-referral in response to a complaint as a pre-requisite for a referral in terms of that section to the Tribunal.
7. The Applicant attached the Notice of non-referral from the NCC to the application.
8. In the matter of *Coertze and Burger v Young*¹ the Tribunal considered the factors which must be evaluated regarding leave. The Tribunal held that the following two factors should be considered:

- 8.1 The Applicant's reasonable prospects of success with the referral; and

¹ NCT/7142/2012/75(1)(b)&(2).

8.2 Whether the matter is of substantial importance to the Applicant or the Respondent.

9. It is firstly very clear that the matter is of substantial importance to the Applicant. He has gone to a great deal of effort to lodge the complaint with various entities including the NCC and to pursue it further with the Tribunal.
10. The cause of action took place in 2012 which is after the CPA came into operation. In considering the reasonable prospects of success the Tribunal is satisfied that the Applicant has laid a solid foundation for a complaint in terms of the CPA which the Respondents must answer to.
11. The Tribunal therefore grants leave for the matter to be heard.

BACKGROUND

12. In May 2012 the Applicants contracted the 1st Respondent to install new counter tops in their kitchen. The installation was done on 3 May 2012. On 19 October 2012, some 5 months later, the Applicant placed an electrical Salton hot tray on the counter and left it on for approximately two hours. The Applicant and his dinner guests that evening heard a loud sound and on inspection discovered that the counter had cracked from where the hot tray had been placed to the corner edge of the counter or slab. The Applicant contacted the 1st Respondent who inspected the damage a few days later. From there a dispute arose between the parties as to the cause of the damage and the liability for the repair or replacement of the slab.
13. It appears from the pleadings that the 1st Respondent obtained the stone slabs for the kitchen counters from a company called Vicostone. Vicostone also denied complete liability for the damage to the counter during November 2012.
14. The Applicant lodged a complaint with the Office of the Consumer Protector in the Western Cape in December 2012. Their attempt to mediate a settlement between the parties in September 2013 failed. The matter was then referred to the National Consumer Commission (NCC) in October 2013. The NCC referred the matter to the Consumer Goods and Services Ombudsman (CGSO) in March 2014. In July 2014 the CGSO referred the matter back to the NCC after the Respondent failed to respond to the complaint. During November 2015, more than two years

later, the NCC issued a letter on non-referral to the Applicant. The Applicant then lodged the application with the Tribunal in January 2016.

15. During the various interactions between the parties, the Respondents made various offers to settle the dispute, these offers were however not accepted by the Applicant. Essentially the Applicant was not prepared to accept a replacement counter at a reduced cost and therefore have to pay a further amount towards the replacement of the counter.
16. The 1st Respondent is essentially alleging that the slabs are only heat resistant, not heat proof. Leaving a hot plate on the surface of the counter for a period of two hours could result in damage to it. The 1st Respondent also alleges that the Applicants were informed that the slabs were only heat resistant. The Applicant denies that they were ever told the slabs were only heat resistant. The Applicant in any event argues that the slab reasonably should have been able resist a normal kitchen appliance such as an electrical hot tray being placed on it for two hours. The Applicant submitted that the hot tray is suspended above the surface of the counter to a height of 25 millimetres and is in any event not in direct contact with the surface of the slab.
17. In the specific circumstances of this matter the Tribunal does not find it necessary to consider and evaluate every allegation made by the parties in their pleadings. Ultimately it appears that there is little in dispute. The 1st Respondent supplied and installed the kitchen counters for the Applicants. A section of the kitchen counter cracked as a result of a heated kitchen appliance being placed on it. Although suggestions were made by the 2nd Respondent in e-mails, that the damage may have been caused by other circumstances, these circumstances are not explained or elaborated on at any stage. On a balance of probabilities the Tribunal finds that the cracking of the counter was caused by the placing of the electrical hot tray on the counter for a period of two hours.
18. The question which arises from this conclusion is whether the Applicant was unreasonable in leaving the electrical hot tray in the counter and reasonably should have foreseen that the counter could be damaged. In this regard a “reasonable man” test would be appropriate. Guidance as to the test for reasonableness for the purposes of the CPA can be found in Section 22 of the CPA which states as follows:

22.

(1)

(a)

(b)

(2) For the purposes of this Act, a notice, document or visual representation is in plain language if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the notice, document or visual representation is intended, with average literacy skills and minimal experience as a consumer of the relevant goods or services, could be expected to understand the content, significance and import of the notice, document or visual representation without undue effort, having regard to—

(a) the context, comprehensiveness and consistency of the notice, document or visual representation;

(b) the organisation, form and style of the notice, document or visual representation;

(c) the vocabulary, usage and sentence structure of the notice, document or visual representation; and

(d) the use of any illustrations, examples, headings or other aids to reading and understanding.

- 19.** The CPA therefore envisages the average or reasonable consumer as someone with average literacy skills and minimal experience as a consumer of the relevant goods or services. The facts placed before the Tribunal show that the counters were manufactured from a form of stone measuring 20 millimetres in thickness. Counters of this nature would therefore, at the very least, appear to be very strong and durable. Any consumer with minimal experience with stone kitchen counters would reasonably expect that the counters could easily resist any normal kitchen appliance being placed on them. In this regard it can be noted that an electrical hot tray would not be an unusual appliance for a kitchen. The tray is not in direct contact with the stone and the reasonable consumer would not predict that leaving it in the “on” position, even for a period of two hours, would cause the stone to crack. Applying the standard of the reasonable consumer to the Applicant and the facts presented, the Applicant was not unreasonable in placing the hot tray on the counter and leaving it on for the two hour period. The Applicant was further reasonably entitled to expect that the counter would tolerate the hot tray for the period of time in question. The fact that it did not, indicates that the stone was defective. Whether or not the Applicant was informed that the counter is only heat resistant does not affect this conclusion in any way.
- 20.** The 1st Respondent alleged that the Applicants were specifically informed that the type of counter being installed should not be used in direct sunlight, near fireplaces or range stoves. The Applicant denied this assertion. The 1st Respondent did not call any witnesses or provide any evidence to support this allegation. Whether or not this information was provided does not make it any less reasonable for the Applicant to have used the hot tray in the manner he did. The 1st

Respondent in any event installed the counter and therefore would have accepted that all reasonable risks of damage were sufficiently mitigated.

21. The only reasonable conclusion the Tribunal can draw from the evidence presented, which is consistent with the given facts, is that the stone counter was defective. At the very least, the counter did not exhibit the usefulness and practicality that a reasonable consumer would expect.

THE PROVISIONS OF THE CPA

22. Part H of the CPA sets out a consumer's right to fair value, good quality and safety. Section 53 of the CPA sets out the following -

53. (1) In this Part, when used with respect to any goods, component of any goods, or services—

(a) **“defect”** means—

(i) any material imperfection in the manufacture of the goods or components, or in performance of the services, that renders the goods or results of the service less acceptable than persons generally would be reasonably entitled to expect in the circumstances; or

(ii) any characteristic of the goods or components that renders the goods or components less useful, practicable or safe than persons generally would be reasonably entitled to expect in the circumstances;

(b) **“failure”** means the inability of the goods to perform in the intended manner or to the intended effect;

Section 55 of the CPA sets out the consumer's rights to goods which are reasonably suitable for the purpose intended and are free of any defects –

Consumer's rights to safe, good quality goods

55.

(1) This section does not apply to goods bought at an auction, as contemplated in section 45.

(2) Except to the extent contemplated in subsection (6), every consumer has a right to receive goods that—

(a) are reasonably suitable for the purposes for which they are generally intended;

(b) are of good quality, in good working order and free of any defects;

(c) will be useable and durable for a reasonable period of time, having regard to the use to which they would normally be put and to all the surrounding circumstances of their supply; and

(d) comply with any applicable standards set under the Standards Act, 1993 (Act No. 29 of 1993), or any other public regulation.

23. Based on the evidence presented, the Applicant and the 1st Respondent entered into an agreement to supply and install the counter. The 1st Respondent provided the counter and

arranged to have it installed. The 1st Respondent appears to have obtained the material for the counter from the 2nd Respondent but the Applicant's only transacted with the 1st Respondent. Within the context of a transaction under the CPA, the 1st Respondent supplied the goods to the Applicant and can be held responsible for any defects in the goods.

24. The provisions of Section 56 of the CPA provide for a six month time period within which the goods can be repaired, replaced or returned for a refund.

Implied warranty of quality

56.

(1) In any transaction or agreement pertaining to the supply of goods to a consumer there is an implied provision that the producer or importer, the distributor and the retailer each warrant that the goods comply with the requirements and standards contemplated in section 55, except to the extent that those goods have been altered contrary to the instructions, or after leaving the control, of the producer or importer, a distributor or the retailer, as the case may be.

(2) Within six months after the delivery of any goods to a 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.

(3) If a supplier repairs any particular goods or any component of any such goods, and within three months after that repair, the failure, defect or unsafe feature has not been remedied, or a further failure, defect or unsafe feature is discovered, the supplier must—

- (a) replace the goods; or
- (b) refund to the consumer the price paid by the consumer for the goods.

(4) The implied warranty imposed by subsection (1), and the right to return goods set out in subsection (2), are each in addition to—

- (a) any other implied warranty or condition imposed by the common law, this Act or any other public regulation; and
- (b) any express warranty or condition stipulated by the producer or importer, distributor or retailer, as the case may be.

25. When applying the provisions of the CPA to the facts accepted by the Tribunal it becomes clear that the goods, in this case the counter top, supplied by the 1st Respondent, was defective. The crack in the counter constitutes a defect within the meaning of Section 53(a) on a number of grounds – being either a material defect rendering the goods less acceptable, the goods being less practical or useful. The defect became apparent within a period of just over 5 months after it

was supplied and installed by the 1st Respondent. The Applicant therefore has recourse under Section 56 of the CPA.

PRESCRIPTION

26. Although it is trite law that prescription can only be raised by the parties in a matter², the Tribunal has inquisitorial powers and can take steps to ensure that all relevant facts are placed before it. It is further not necessary to invoke the provisions of the Prescription Act 68 of 1969, as the prescription applicable to this matter is provided for in section 116 of the CPA. The Tribunal therefore noted the issue regarding possible prescription and allowed the parties to address it in this regard at the hearing.
27. The goods were supplied on 3 May 2012, the defect occurred on 19 October 2012. The application was lodged with the Tribunal during January 2016. A period of more than three years has therefore elapsed since the defect became known to the Applicant. Section 116 of the CPA states the following –

Limitations of bringing action

116.

(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.

28. On the face of it, it would appear that the Applicant's claim has prescribed. The CPA is however very clear in its intent to ensure that consumer's rights are protected. There are numerous sections in the CPA where this intention is made very clear but for the current purposes Section 4(2)(b) of the CPA will suffice –

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

² s 17(1) of the Prescription Act 68 of 1969 provides: "A court shall not of its own motion take notice of prescription ." However, a court may allow a litigant to raise the defence of prescription at any stage of the proceedings. S 17(2).

(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).

29. Section 69 of the CPA sets out the processes that a consumer must follow to enforce their rights.

Enforcement of rights by consumer

69. 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) referring the matter to the applicable ombud with jurisdiction, if the supplier is subject to the jurisdiction of any such ombud;
- (c) if the matter does not concern a supplier contemplated in paragraph (b)—
 - (i) referring the matter to the applicable industry ombud, accredited in terms of section 82(6), if the supplier is subject to any such ombud; or
 - (ii) applying to the consumer court of the province with jurisdiction over the matter, if there is such a consumer court, subject to the law establishing or governing that consumer court;
 - (iii) referring the matter to another alternative dispute resolution agent contemplated in section 70; or
 - (iv) filing a complaint with the Commission in accordance with section 71; or
- (d) approaching a court with jurisdiction over the matter, if all other remedies available to that person in terms of national legislation have been exhausted.

30. The Applicant in this matter followed the process outlined in Section 69 of the CPA by lodging a complaint with the Western Cape Consumer Protector's office. This office is regarded as a consumer court for the purposes of the CPA.³

31. In the circumstances the Tribunal finds that prescription was interrupted during the time that the complaint was being dealt with by the Western Cape Consumer Protector Office. This would be

³ Section 1 of the CPA under Definitions - "**consumer court**" means a body of that name, or a consumer tribunal, that has been established in terms of applicable provincial consumer legislation;

from December 2012 until October 2013, when the matter was referred to the NCC. The three year period therefore started on 19 October 2012 (when the crack in the counter occurred) and would have ended on 19 October 2015. Due to the interruption of the prescription period for 11 months, the prescription period only ends on 19 September 2016.

32. The Tribunal therefore finds that the Applicant's claim has not prescribed.

APPROPRIATE RELIEF

33. In accordance with Section 56 of the CPA the Applicant has a choice to elect for a repair, replacement or refund for the defective goods supplied.
34. The Applicant asked the Tribunal to order the 1st Respondent to replace the counters. This request however came with a proviso. The colour of the new replacement slab had to perfectly match the existing other counters. If the specific damaged counter could not be replaced with the exact colour match then all the counters would have to be replaced. It is clear from the evidence submitted that it would be highly improbable that a new slab could be supplied that matches the colour of the other slabs perfectly. The Tribunal further raised with the Applicant the extreme difficulty in formulating an order that provides for all the possible disputes which could arise if the specific counter section or all of them had to be replaced. The Tribunal can easily envisage numerous disputes arising as to the quality of the new stone supplied, the manner of its fitment and any damage resulting from the dismantling of the existing counters. The situation in this matter is very different to a mass produced item such as a kettle or cell phone that would be relatively easy to replace with the same or a similar item.
35. The Tribunal therefore finds that a refund of the price paid for the goods is more appropriate. Determining the exact amount paid for the specific defective slab of stone is not easily discerned from the pleadings. Based on the invoice from Solid, dated 10 April 2012, which forms part of the Applicant's pleadings, It appears that the "work surfaces" for the kitchen was quoted at a price of R10 906.56 including VAT and the "Breakfast Bar" R7517.44 including VAT – totalling R18 424.00. The Tribunal regards the amount of R18 424.00 as appropriate and reasonable.

2ND RESPONDENT'S LIABILITY

36. There is no indication that an answering affidavit was ever filed by the 2nd Respondent. The 2nd Respondent further did not appear at the hearing. The application was therefore heard in default of the 2nd Applicant. The Applicant did not request a default order against the 2nd Respondent. Based on the evidence presented, the 2nd Respondent supplied the stone used for the counter to the 1st Respondent. There is no indication of any other transaction or interaction between the Applicant and the 2nd Respondent prior to the counter cracking.
37. In the specific circumstances of this matter the merits of the application will only be considered in respect of the 1st Respondent as the supplier of the goods.

CONCLUSION

38. The Tribunal finds that the 1st Respondent supplied a counter top to the Applicant which was defective. The Applicant is entitled to a refund of the purchase price paid for the counter tops. The Tribunal finds that the amount of R18 424.00 is appropriate and reasonable.

ORDER

39. Accordingly, the Tribunal makes the following order:
- 39.1 The Applicant's application for leave to refer the matter directly to the Tribunal is granted.
- 39.2 The 1st Respondent is to pay the amount of R18 424.00 to the Applicant within 30 business days of the date of this order.
- 39.3 There is no order as to costs.

DATED ON THIS 9th DAY OF JUNE 2016

[Signed]

Adv J Simpson

Presiding member

Ms D Terblanche (member) and Ms H Devraj (member) concurring.