

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)



Case number: 44064/19

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

10 February 2020

DATE

SIGNATURE

In the matter between:

NICHOLAS N KOLE

PLAINTIFF

and

JACOBUS R K PIENAAR

FIRST DEFENDANT/EXCIPIENT

CREDIT BUILD BUILDING SUPPLIES (PTY) LTD

SECOND DEFENDANT

KOBUS VAN DER WESTHUIZEN N.O

THIRD DEFENDANT

MOLELEKWA ASHWORTH TAU N.O

FOURTH DEFENDANT

MASTER OF THE HIGH COURT

FIFTH DEFENDANT

AIR CHEFS SOC LTD

THIRD DEFENDANT

MINISTER OF FINANCE

FOURTH DEFENDANT

JUDGMENT

VAN STADEN, AJ:

- [1] In this matter the plaintiff inter alia sues the defendants for payment of the amount of R90 000, the amount the plaintiff paid to the second defendant over a period of time as lay-buy payment for tiles and roofing material.
- [2] The first defendant is the director of the second defendant, a company in liquidation. The third and fourth defendants are the liquidators of the second defendant.
- [3] The plaintiff resides in Soshanguve and has been building a dwelling on his erf in Soshanguve since 2005, by sourcing material from companies such as the second defendant.
- [4] Section 65 (2) of the Consumer Protection Act 68 of 2008 determines:
'(2) When a supplier has possession of any prepayment, deposit, membership fee, or other money, or any other property belonging to or ordinarily under the control of a consumer, the supplier-
 - (a) must not treat that property as being the property of the supplier;
 - (b) in the handling, safeguarding and utilisation of that property, must exercise the degree of care, diligence and skill that can reasonably be expected of a person responsible for managing any property belonging to another person; and
 - (c) is liable to the owner of the property for any loss resulting from a failure to comply with paragraph (a) or (b).'
- [5] The plaintiff's particulars of claim (the POC) allege that the first and second defendants did not comply with section 65 (2) of the CPA.
- [6] The first defendant raises an exception against the POC, alleging that no cause of action is disclosed as regards himself.

- [7] During argument Mr Letswalo for the plaintiff conceded that no cause of action is disclosed in the POC as regards the first defendant. He attempted to widen the cast net, by saying that one should have regard to all the circumstances of the matter, to determine whether a cause of action is disclosed.
- [8] This is unfortunately not sufficient. As indicated by Van Loggerenberg, Erasmus Superior Court Practice, at page D1-303:
- 'In suitable cases legitimate inferences can be drawn as to the meaning of the particulars and by implication the necessary averments can be supplied. However, while the court should endeavour to look benevolently instead of over-critically at a pleading, it should not push that benevolence to the length of upholding a declaration or particulars of claim which as it stands discloses no cause of action, by altering its language, by reading into it what is not there, and ignoring what is, and by thus making for the plaintiff a cause of action he has not himself put up.'
- [9] I am satisfied that the POC in casu do not make out a cause of action and to find that it does, would push the court's benevolence to an unacceptable length. The first defendant's exception is accordingly upheld.
- [10] I am, however, not satisfied that the normal rule in respect of costs should follow. I believe it would be fair and just that no order as to costs be made.
- [11] Section 65 (2) of the CPA places a heavy burden on a supplier to deal appropriately with the money of a person who acquires goods or services on lay-buy. The first defendant, as director of the second defendant, was its controlling mind. Ultimately he decided how the money, albeit paid into the second defendant's bank account, had to be dealt with. Ultimately he was responsible for the manner in which the plaintiff's money was dealt with.
- [12] The money was entrusted to the second defendant for something very close to the plaintiff, his dwelling. He saved up for his dwelling over a long period of time and to penalize him with costs for doing so, where he is attempting to recover the money he had saved up, would be unjust and unfair.

[13] This is especially so bearing in mind the heavy burden placed on both the first and second defendants in terms of section 65(2) of the CPA, in dealing with the plaintiff's money.

[14] Accordingly, I make the following order:

1. The first defendant's exception is upheld and the plaintiff's particulars of claim is set aside as far as the first defendant is concerned.
2. The plaintiff is granted leave to amend his particulars of claim within 15 days from date of order.
3. There is no order as to costs.



M VAN STADEN
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DATE OF HEARING: 10 FEBRUARY 2020

DATE OF JUDGMENT: 11 FEBRUARY 2020

ATTORNEY FOR EXCIPIENT: LOMBARD & PARTNERS INC

ADVOCATE FOR EXCIPIENT: ADV LERM

ATTORNEY FOR PLAINTIFF: MB POTGIETER ATTORNEYS

ADVOCATE FOR PLAINTIFF: ADV LETSWALO