

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

CASE No: 2653/2016

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED: YES/NO</u>
DIAMOND AJ	
SIGNATURE	DATE

In the matter between:

DADA'S WORLD OF HARDWARE

APPLICANT

and

THE CONSUMER PROTECTOR LIMPOPO

FIRST RESPONDENT

PAM NDOU N.O.

SECOND RESPONDENT

K KGATLA N.O.

THIRD RESPONDENT

SH LETSOALO N.O.

FOURTH RESPONDENT

M MASEMOLE N.O.

FIFTH RESPONDENT

LP MASHA

SIXTH RESPONDENT

JUDGMENT

DIAMOND A J:

- [1] The Applicant is a building materials merchant in Polokwane.
- [2] The 6th Respondent purchased certain building materials from the Applicant on or about the 8th of July 2008 and paid the purchase price.
- [3] The 6th Respondent indicated that he wished the Applicant to deliver the building materials to the building site and paid the additional delivery fee of R 700 000-00.
- [4] After the above chronology, the versions of the parties diverged.
- [5] The Applicant states that the customer's copy of the invoice for the material was taken to the Applicant's materials yard by the person collecting the building materials. The customer's copy of the invoice, which reflected a delivery fee of R700.00, was cancelled with the inscription "Loading Self." The Applicant further maintains that the delivery fee was refunded to the person who collected the materials.
- [6] Somebody collected the building materials and left.

[7] The 6th Respondent's version is that he did not collect the materials, nor did he authorise anybody to do so on his behalf. He never received any materials. He waited for delivery to take place, but it never took place.

[8] After the incident, the Applicant, apparently suspecting the involvement of one of its employees, laid a criminal charge against the employee and discharged her.

[9] The criminal prosecution failed, due to a lack of evidence.

[10] The 6th Respondent lodged a complaint with the first Respondent regarding the incident.

[11] After an exchange of correspondence, the First Respondent issued a document entitled "SUMMONS INITIATING PROCEEDINGS BEFORE THE CONSUMER AFFAIRS COURT CONSUMER AFFAIRS (UNFAIR BUSINESS PRACTICES) ACT 1996 (ACT NO. 8 of 1996)" and the document indicates that it is issued in terms of Section 18(1) and Regulation 13(1) of this Act.

[12] The document contained an annexure which is called an "PARTICULARS(*sic*) OF CLAIM". The Applicant filed a document: Notice of Intention to Defend and filed a document which was called a Plea.

[13] Eventually, a hearing took place on the 19th day of July 2012, and the first Respondent, by way of the Consumer Affairs Court, gave a judgment on the 27th of September 2012.

[14] The Consumer Affairs Court gave the following judgment:

“That the Respondent should deliver the goods in seven days; failing which, the complainant will have to obtain an invoice and seek another supplier. The Respondent will be compelled to pay for the goods within seven days.

Failing which, the order will be up to the value of goods up to date, that is, including interest.

Failing which, a warrant will then be issued for execution by the sheriff.”

[15] The Applicant brings this review application alleging that the conduct of the Consumer Affairs Court fell short of the standards legislated in the Promotion of Administrative Justice Act, 2000.

[16] The Applicant alleges that the Consumer Affairs Court was biased during the proceedings. The Applicant contends that the Consumer Affairs Court, while the proceedings had commenced but were not yet concluded, and before the Applicant's version had been fully heard, indicated that the Applicant should settle the matter and that its version was improbable.

[17] I do not dwell on the basis of the review application or the grounds on which the first Respondent opposes the relief, for reasons that will become clear hereafter.

[18] As a preliminary step to adjudicate this application, one should get a clear understanding of the nature of the proceedings that took place before the First Respondent.

[19] In terms of the papers before this court, these proceedings are brought in terms of the Consumer Affairs (Unfair Business Practices) Act, Act No Number 8 of 1996, Limpopo. I will, henceforth, refer to this act as the "Unfair Business Practices Act".

[20] The Applicant explains in its founding affidavit that it cited the First Respondent in its capacity as the appointed Consumer Protector in terms of section 4(1) of the Unfair Business Practices Act.

[21] The Applicant further explains that it cited the 2nd, 3rd, 4th and 5th Respondents in their capacities as appointed members of the Consumer Affairs Court, created by Section 13 of the Unfair Business Practices Act.

[22] The Second Respondent is cited in his capacity as the chairperson of the Act, and the others as members of the Consumer Affairs Court.

[23] As a preliminary matter, it is important to address two issues.

First, what types of proceedings may be adjudicated by the Consumer Affairs Court? Second, what powers does the court have under its enabling legislation — that is, what types of orders is the Consumer Affairs Court empowered to make?

[24] With regard to the first question, Section 17(1)(a) of the Unfair Business Act stipulates as follows:

“shall hear, consider and make a decision on, any matter which is before it by virtue of proceedings envisaged by this Act.

[25] It is, in my view, clear that before the Consumer Affairs Court can adjudicate on a matter, the matter must be before it *“by virtue of proceedings envisaged by this Act.”* What are the procedures envisaged in the Unfair Business Act?

[26] A reading of the Unfair Business Acts reveals the following:

- Section 20 (1) states that the court may, if satisfied from information placed before it, render that the matter is urgent and that irreparable prejudice will be caused to a consumer or any group or class of consumers if the matter is not heard urgently. It may then issue a temporary order prohibiting any person from performing any act connected with an unfair business practice.

- Section 21 states that the Business Affairs Court shall confirm an arrangement in terms of Section 11 of the Act
- Section 21 states that if the Consumer Affairs Court is satisfied that an unfair business practice exists or may come into existence, and has not confirmed the arrangement, the court may issue such order as may be necessary to ensure the discontinuance or prevention of the unfair business practice. Furthermore, the section states that if the court finds that money was accepted from consumers in the course of unfair business practice and it is necessary to limit or prevent financial loss to those customers, the court may order any person to repay such money to the affected customers, together with the interest at the prescribed rate.

[27] The question is: what was the nature of the proceedings investigated by the Limpopo Consumer Protection Office and eventually adjudicated on by the Unfair Business Court? In my view, it is clear what the nature of the proceedings was, and it cannot be stated in a better way than in the words of the deponent representing the first Respondent. The deponent states in paragraph 6.8:

“The Consumer Affairs Court made an order to the effect that the Applicant has committed unfair business practices and that the Applicant should deliver the roofing material to the seized Respondent.”

[28] The Deponent further explains the comment made during the proceedings that the Applicant should consider making an offer. This comment was made within the context of Section 11(2) of the Unfair Business Act, which provides that an arrangement may be concluded at any time after the institution of the investigation but before the making of a final order by the Consumer Affairs Court. The argument of the Deponent, so it seems to me, is that when one of the members of the Consumer Affairs Court opined that the Applicant should come to an arrangement in terms of Section 11, then such a remark cannot be interpreted as being conduct by displaying bias.

[29] Then, in paragraph 21.6 of the answering affidavit, the Deponent states the following:

“Furthermore, whatever comment that was allegedly made could not change the exact nature of the matter; namely, whether the Applicant is vicariously liable and responsible for the actions of employees.”

[30] It is therefore clear that the Consumer Affairs Court regarded the matter fully within the context of the Unfair Business Practices Act.

[31] In the judgment that the court delivered, there was a reference to section 26 (2) of the Consumer Protection Act, 2008 (Act 68 of 2008)(the “Consumer Protection Act”), which requires that for every transaction there should be a record of the terms and

conditions of the agreement. In this instance, the court opined there was not such a record.

[32] In the judgment that the Consumer Affairs Court delivered, there was reference to section 26 (2) of the Consumer Protection Act, which requires that for every transaction there should be a record of the terms and conditions of the agreement. In this instance, the court opined there was not such a record. The court states there was not, and it appears that the Applicant was in constant breach of this duty by the manner in which he conducts his business, in particular with transactions of this nature. The court states¹

"I refer to the transaction where there has been a purchase, a quotation issued, and payment made, and subsequent to that, the generation of an invoice. It is clear that the Respondent has failed to produce an invoice, and by so doing, even if the terms and conditions of the agreement are not in writing, it is required by the Act, in particular Section 26 (2), that, and I will quote: "Even if the terms and conditions are not in writing, a supplier of goods or services must provide a written record of every transaction.....""

[33] In my view, the entire Unfair Business Protection Act provides mechanisms and procedures to act against unfair business practices.

[34] It is therefore imperative to take cognizance of the word definitions in the Unfair Business Act:

"business" means—

¹ Page 3 of the judgment.

- (a) offering, supplying or making available any commodity; or
 - (b) soliciting or receiving any investment;
- and

“business practice” includes—

- (a) any agreement, accord or undertaking in connection with business, whether legally enforceable or not, between two or more persons;*
- (b) any scheme, practice or method or trading in connection with business, including any method or marketing or distribution;*
- (c) any advertising or type of advertising or any other manner of soliciting business;*
- (d) any act or omission in connection with business on the part of any person whether acting independently or in concert with any other person; and*
- (e) any situation in connection with the business activities of any person or group of persons, but does not include a restrictive practice, acquisition or monopoly situation as defined in section 1 of the Maintenance and Promotion of Competition Act, 1979 (Act No. 96 of 1979);*

and finally

“unfair business practice” means any business practice which, directly or indirectly, has or is likely to have the effect of—

- (a) harming the relations between businesses and consumers;*
- (b) unreasonably prejudicing any consumer;*
- (c) deceiving any consumer; or*
- (d) unfairly affecting any consumer.*

[35] Furthermore, Section 11 of the Unfair Business Practices Act stipulates as follows:

“11. Negotiation of arrangements to discontinue unfair business practice.—

(1) The office may negotiate and conclude an arrangement with any person for—

- (a) the discontinuance or avoidance of unfair business practice;*
- (b) the reimbursement, with interest, to affected consumers;*
- (c) the discontinuance or avoidance of any aspect of unfair business practice; or*
- (d) any other matter relating to unfair business practice.*

[36] In my view, the pivotal definition is that of "business." The term "business" refers to the offering, supplying or making available any commodity to the public.

[37] In my view, the meaning of "offering," "supplying," or "making available" is clear: each word is used as a gerund, which is a verb ending in "ing" that functions as a noun within the sentence. This usage emphasise the process or activity of offering, supplying, or making available. In other words, these terms represent an ongoing component, a structural aspect of the way a supplier interacts with customers in business in general.

[38] The terms "business practice" and "unfair business practice" elaborate further on this basic definition.

[39] In my view, it is evident that, before the mechanisms of the Unfair Business Act can be activated and applied, a supplier must generally engage in business conduct that is objectionable under the provisions of the Unfair Business Act.

[40] To apply all of this to the facts under consideration: can it be said that the facts before the court display a manner of conduct by the Applicant in general with customers in general, or do the facts point to a dispute which developed between a supplier and a customer in a single transaction?

[41] That the Consumer Affairs Court was aware of the need for some structural element or general pattern of conduct by the Applicant to bring the dispute within the ambit of the Unfair Business Practices Act is evident from the remark cited in paragraph 32 above. The Consumer Affairs Court found that the Applicant was in constant breach of his duty by the manner in which he conducts his business, particularly in transactions of this nature.

[42] This remark by the Consumer Affairs Court that the applicant to was engaged in a general pattern of conduct, is in my view, nowhere substantiated by the evidence before this Consumer Affairs Court.

[43] Once again, the words of the Deponent for the first Respondent are instructive: In paragraph 21.6 of the affidavit, the Deponent described the "*exact nature*" of the inquiry before the court as the question, "*whether the Applicant is vicariously liable and responsible for the actions of employees.*"

[44] This type of dispute is purely a dispute between two parties to a contract to be adjudicated, employing the principles of the law of contract and/or the law of delict. It is therefore of a nature that falls squarely within the ambit of the courts of the law of the country.

[45] In summary, what appears from the record are allegations by the 6th Respondent that, if proven by him, would lead to the conclusion that the Applicant is in breach of contract *alternatively* delictual liability towards the 6th Respondent. The dispute does not involve an unfair business practice, as defined by the Unfair Business Practices Act.

[46] In my view, the investigation against the Applicant, which was conducted in terms of Section 6(1) of the Unfair Business Act, could never have proceeded within the four corners of that Act, as it does not exhibit any Unfair Business Practice as defined and discussed above. Rather, it merely points to a breach of contract or a delict committed by the Applicant, if proven, and any subsequent actions arising from that investigation could not constitute proceedings envisaged by the Act.

[47] In my view, the order of the unfair consumer court should be reviewed and set aside by virtue Section 6(2)(f)(i) because the order was made by the Consumer Affairs Court in a way that was not authorised by the empowering provisions of the Unfair Business Practices Act.

[48] Neither of the parties argued any of the above at the date of the hearing of this application. The question is whether the court would be entitled to adjudicate the application on the basis set

out above in circumstances where the parties did not argue the application on the above basis.

- [49] Guidance can be found in the case of *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others*² in which the Supreme Court of Appeal stated:

“It is that if a point of law emerges from the undisputed facts before the court it is undesirable that the case be determined without considering that point of law. The reason is that it may lead to the case being decided on the basis of legal error on the part of one of the parties in failing to identify and raise the point at an appropriate stage. But the court must be satisfied that the point truly emerges on the papers, that the facts relevant to the legal point have been fully canvassed and that no prejudice will be occasioned to the other parties by permitting the point to be raised and argued.

- [50] In my view, the question of whether the Consumer Affairs Court was entitled to take particular action and make the order clearly emerge from the papers, and the full facts are properly ventilated. It would lead to an error of law to ignore this and proceed with a judgment on the basis that the action fell within the ambit of the Unfair Business Act purely because the parties did not argue it before the court. I do not think any of the parties is prejudiced by this court giving this order on this basis.

I consequently make the following order:

² [2016] ZASCA 17; 2016 (3) SA 317 (SCA) para 24.

(a) The ruling made by the 2nd to the 5th Respondents, sitting as the Consumer Affairs Court on the 27th of September 2012, under case number LCC44/09/10, is hereby reviewed and set aside.

(b) The Applicant is ordered to pay the costs of the Respondents, and the costs of counsel shall be taxed on scale B, as is contemplated in Rule 67A(3)(a).




G J DIAMOND

ACTING JUDGE OF THE HIGH COURT

LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

FOR THE APPLICANT : Adv. W H YOUNG

INSTRUCTED BY: :TAR ATTORNEYS

:e-mail: taromar@telkomsa.net

FOR THE RESPONDENT :Adv M S Mphahlele

INSTRUCTED BY: :The State Attorney,
Polokwane Ref: 834/16 MAS
:armasekoameng@justice.gov.
za.

DATE OF HEARING: 27 MARCH 2025.

DATE OF JUDGMENT: 3 NOVEMBER 2025.

This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down of the judgment is deemed to be 13 NOVEMBER 2025.

POLOKWANE HIGH COURT