

IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case numbers: NCT/4114/2012/101(1)CPA

In the matter between:

ADT SECURITY (PTY) LTD

APPLICANT

and

NATIONAL CONSUMER COMMISSION

RESPONDENT

Coram:

Adv F Manamela	–	Presiding Member
Mr X May	–	Member
Ms L Best	–	Member

REASONS FOR JUDGEMENT:

APPLICATION FOR REVIEW OF A COMPLIANCE NOTICE

INTRODUCTION

1. The Applicant is ADT Security (Pty) Ltd, a company duly registered in terms of the Company Laws of South Africa with its principal place of business - in Johannesburg ("the Applicant").

2. The Respondent is the National Consumer Commission, an organ of state within the public administration established in terms of Section 85 of the Consumer Protection Act ("the CPA") ("the Respondent").

APPLICATION TYPE

3. This is an application in terms of section 101(1) of the CPA for the review of a compliance notice issued by the Respondent to the Applicant in terms of section 100 of the CPA on 27 February 2012.
4. The review application has not been opposed by the Respondent, as no answering affidavit had been filed. This stands to reason that the facts alleged by the Applicant are uncontroverted.

BACKGROUND

5. On 10 March 2010 Mr. T. Nemataheni ("the complainant") and the Applicant concluded a service agreement.
6. On 24 April 2010 there was a burglary at the complainant's premises ("the incident").
7. On the morning of the incident, at around 5am, the Applicant's control room reacted to the first and second alarm activation signal received from the complainant's premises.
8. After following standard operating procedures applicable to alarm activation, which included attempting to contact the complainant on his cellphone, the complainant could not be reached.
9. The control room operator, having failed to reach the complainant, dispatched the area vehicle to the complainant's premises at 5h20. However the vehicle was responding to another call at the time, and therefore reached the complainant's premises at 5h58, forty two minutes after the first alarm activation had been received.
10. It was the Respondent's case in the compliance notice that, as a result of the forty two minute

delay in the vehicle reaching the complainant's premises, *"the complainant lost his 42 inch LCD plasma, speakers and the money he paid for that poor services"* [sic]

APPLICABLE SECTIONS OF THE CPA

11. The Commission alleged, in the compliance notice, that the Applicant's conduct amounted to a breach of the following provisions of the CPA:

11.1 Schedule 2 Item 8(1)

"8. Continued application of repealed laws

(1) Despite the repeal of the repealed laws, for a period of three years after the general effective date the Commission may exercise any power in terms of any such repealed law to investigate any breach of that law that occurred during the period of three years immediately before the general effective date.

(2) In exercising authority under subitem (1), the Commission must conduct the investigation as if it were proceeding with a complaint in terms of this Act."

11.2 Section 14(2)(b)

"14(2) If a consumer agreement is for a fixed term –

(a)...

(b) despite any provision of the consumer agreement to the contrary –

(i) –the consumer may cancel that agreement –

(aa)~...

(bb) at any other time, by giving the supplier 20 business days' notice in writing or other recorded manner and form, subject to subsection (3)(a) and (b)"

11.3 Section 54(1) and (2)

54 Consumer's rights to demand quality service

(1) When a supplier undertakes to perform any services for or on behalf of a

consumer, the consumer has a right to –

- (a) The timely performance and completion of those services, and timely notice of any unavoidable delay in the performance of those services ;*
- (b) The performance of the services in a manner and quality that persons are generally entitled to expect ;*
- (c) The use, delivery or installation of goods that are free of defects and of a quality that persons are generally entitled to expect, if any such goods are required for performance of the services; and*
- (d) The return of any property or control over any property of the consumer in at least as good a condition as it was when the consumer made it available to the supplier for the purpose of performing such services,*

having regard to the circumstances of the supply, and any specific criteria or conditions agreed between the supplier and the consumer before or during the performance of the services.

- (2) If a supplier fails to perform a service to the standards contemplated in subsection (1), the consumer may require the supplier to either –*
 - (a) Remedy any defect in the quality of the services performed or goods supplied; or*
 - (b) Refund to the consumer a reasonable portion of the price paid for the services performed and goods supplied, having regard to the extent of the failure.”*

PROCESS AT THE HEARING

12. This matter was heard on 29 November 2012 and at the premises of the Tribunal. The Applicant made oral submissions supporting its case as set out in the Founding Affidavit. These submissions were considered in addition to the written submissions contained in the application.

ISSUES TO BE DECIDED

Preliminary Matters

13. The Tribunal must determine whether the matter may be dealt with on the basis of Default

Judgment.

Main Application Matters

14. Should the criteria for default judgment be met, the Tribunal would have to consider whether the Compliance Notice may be confirmed, modified or cancelled in part or as a whole.

APPLICANT'S SUBMISSIONS

15. The Applicant states the following grounds for the setting aside of the compliance notice:
- 15.1 The Respondent lacked jurisdiction to issue a compliance notice because it impermissibly sought to apply the CPA retrospectively.
 - 15.2 The Respondent was provided with the incorrect written agreement by the complainant when he made his complaint. The Respondent therefore illegitimately decided to issue a compliance notice without having regard to the relevant agreement between the complainant and the Applicant.
 - 15.3 The Respondent was of the incorrect view that the Applicant failed to render the relevant service in a manner and quality that the consumer, the complainant in this case was entitled to expect.
 - 15.4 The Respondent issued the compliance notice based on the incorrect premise that the Applicant received the complainant's alarm "late" and that this type of problem is normally caused by "*network problems; tempering[sic] with device or outdated device*".
 - 15.5 The Respondent issued the notice on the erroneous basis that the Applicant had acted in contravention of Schedule 2, Item 8(1) and section 14(2)(b)(bb) of the CPA.
 - 15.6 The Respondent issued the notice on the erroneous basis that the Applicant had contravened section 54(1) of the CPA.

RESPONDENT'S SUBMISSIONS

16. The Respondent failed to oppose the application and accordingly the Applicant's submissions are uncontroverted.

ANALYSIS OF LAW AND FACTS

17. In order for the Tribunal to grant a default order, it has to satisfy itself that all the requirements for a default application have properly been met and sought in the proceedings as required by the Rules. The test to be applied in order to determine whether or not a default order may be applied for is that the Tribunal must firstly be satisfied that the application documents were properly served and further that "no response to the application was filed within the time stated in the application"
18. The Applicant submits that there is a proper basis for a default order to be granted in its favour in that the application was served on the Respondent on 29 March 2012, a notice of complete filing was issued on 7 May 2012 and no response was received to the application on or before 28 May 2012 or at all .
19. Upon scrutiny of the documents and the evidence presented by the Applicant during the hearing, the Tribunal established the following:
 - 19.1 a notice of complete filing of application was issued on 7 May 2012. Pursuant to that notice, the Respondent had 15 business days to file its answering affidavit. No answering affidavit was filed by or on behalf of the Respondent.
 - 19.2 a further notice of complete filing of application was issued on 3 August 2012 confirming that the Applicant's application in terms of Rule 25(2) was complete.
20. The Tribunal is therefore satisfied that the matter was properly set down as default proceedings and may be considered on a default basis.
21. The interpretation of Schedule 2 Item 8 was dealt with fully by the Tribunal in the case of *City of Johannesburg v NCC*¹, a judgment handed down by this Tribunal in March 2012.
22. Equally so, the interpretation of Schedule 2 Item 8 (and how it applies to matters which arose prior to the general effective date of the CPA) has already been pronounced upon several times by the Tribunal and specifically in the above-mentioned *City of Johannesburg*-matter. This

¹ NCT/2667/2011/101(1) (P) & NCT/2081/2011/101(1) (P)

judgment is binding on the Respondent². For the purpose of the current judgment at hand, the rest of the argument seeking to set aside the compliance notice becomes academic.

23. In order for the Respondent to rely on the continued application of repealed laws, it must show which law it is relying on, furthermore demonstrate exactly the applicability to the situation and proof of the alleged contraventions to the extent that was required in terms of that law³.
24. There is no evidence before the Tribunal that the Applicant contravened the provisions of any repealed law. The compliance notice furthermore does not set out in clear and unambiguous terms which sections of which repealed law has been contravened and to what extent.
25. Section 100(3) contains the requirements of a compliance notice and specifically states the following:

"100 Compliance notices

- (1) ...
- (2) ...
- (3) *A compliance notice contemplated in subsection (1) must set out –*
 - (a) *The person or association to whom the notice applies;*
 - (b) *The provision of this Act that has not been complied with;*
 - (c) *Details of the nature and extent of the non-compliance;*
 - (d) *Any steps that are required to be taken and the period within which those steps must be taken; and*
 - (e) *Any penalty that may be imposed in terms of this Act is those steps are not taken."*

26. It is clear that this compliance notice fails to comply with the requirements of Section 100(3) in that it does not comply specifically with section 100(3)(b) and (c). It does not clearly state which specific repealed law was contravened and to which extent, nor does it describe the nature and

² In terms of Section 152(1)(a) any decision, judgement or order of the Tribunal is binding on the Respondent in terms of matters arising out of the CPA.

³ The Tribunal has previously dealt with this aspect in *City of Johannesburg v National Consumer Commission* NCT/2667/2011/101 and NCT/2081/2011/101. See also *Volkswagen SA v NCC* NCT 3913/2012/101(1)(P)CPA

extent of the non-compliance.

27. As a result of the above, the Tribunal finds that the compliance notice issued by the Respondent in this matter is fatally flawed and stands to be cancelled as contemplated in section 101(2) of the CPA.

ORDER

28. Accordingly, the Tribunal, having heard counsel's argument and submissions on the papers, makes the following ruling:

- 28.1 the compliance notice is hereby *cancelled*
28.2 no order is made as to costs

Signed and Handed down on this 28th day of May 2013

[signed]

ADV. FK MANAMELA
PRESIDING MEMBER

Ms L Best and Mr X May concurring.

Authorised for issue by the National Consumer Tribunal

Case number _____

Date: 2013 / 06 / 03
Day month year

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