

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 23655/2021

REPORTABLE: ON SAFLII
OF INTEREST TO OTHER JUDGES: YES
JUDGE KUNY  21 June 2022

In the matter between:

CHRISTINA JOHANNA STEYNBERG

Applicant

and

TAMMY TAYLOR NAILS FRANCHISING NO 45
(PTY) LTD

Respondent

(Registration No: 2020/686870/07)

JUDGMENT

KUNY J

- 1 The applicant instituted motion proceedings for relief against the respondent based on a franchise agreement entered into between the parties on or about 19 November 2020 (“the franchise agreement”).

- 2 The relief claimed in the notice of motion is as follows:
1. That the Franchise Agreement entered into between the Applicant and the Respondent, Annexure "FA4" to the Founding Affidavit, is declared void and unenforceable, on the grounds that it does not comply with the provisions of the Consumer Protection Act 68 of 2008 and its Regulations.
 2. In the alternative, and in the event of the Honourable Court finding that the whole Franchise Agreement is not rendered void and unenforceable for want of compliance with the provisions of the Consumer Protection Act 68 of 2008 and its Regulations, then that:
 - 2.1. Clause 4.5.1 of the Franchise Agreement is declared to be in conflict with the Consumer Protection Act 68 of 2008 and its Regulations, and that the Franchise Agreement is void to the extent of such a conflict rendering clause 4.5.1 invalid and unenforceable;
 - 2.2. Alternatively that clause 4.5.1 of the Franchise Agreement is rendered invalid and unenforceable as the enforcement thereof contravenes public policy.
 3. In the event of the Honourable Court granting prayer 1 or 2 supra, that the Respondent is directed to refund the Applicant the franchise fee in an amount of R345 000,00.
 4. Interest to be payable on the amount set out in prayer 3 above at a rate of 7,0% per annum from 15 December 2019 to date of final payment.
 5. Cost of the suit.
- 3 It is common cause that the applicant is a consumer and the respondent is a supplier and that the CPA and the regulations thereto applies to the franchise agreement.¹

¹ The statutory provisions and regulations quoted referred to sections of the CPA and the provisions of regulations thereto

RESPONDENT'S *IN LIMINE* OBJECTION

4 Immediately prior to the commencement of the hearing on 28 February 2022 the respondent raised a point in *limine* in relation to jurisdiction. It contended that in terms of section 69 of the Consumer Protection Act 68 of 2008 (“CPA”) the applicant was only entitled to approach this court for relief if all other remedies available to it in terms of national legislation had been exhausted. The hearing proceeded in argument of this issue only.

5 Section 69 provides as follows:

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.
- 6 It is the last mentioned phrase “ *if all other remedies available to that person in terms of national legislation have been exhausted*”, that the respondent relies upon to argue that the court does not have jurisdiction to adjudicate the applicant’s claims. It contends that the applicant has not exhausted all other remedies available to her.

THE APPLICANT’S CAUSE OF ACTION

- 7 The applicant’s cause of action is based on the following allegations:
- 7.1 Within the first week after signing the franchise agreement, the applicant discovered that the respondent had not been open and honest with her regarding the actual costs relating to the purchase and establishment of the franchise.
 - 7.2 The applicant elected to cancel the franchise agreement and on 14 December 2020 gave notice of this to the respondent. On 19 January 2021 the respondent’s attorney sent a letter to the applicant accepting the cancellation. The applicant was invited to collect products she had purchased in anticipation of setting up the franchise. Alternatively, the

respondent offered to purchase the products at 50% of their value. No offer was made to repay the franchise fee paid by the applicant.

- 7.3 On 15 February 2021 the applicant's attorney made demand upon the respondent for a refund of the R345 000 franchise fee. The respondent declined to do so.
- 7.4 The respondent failed to comply with the provisions of the CPA and the regulations thereto in relation to the conclusion of the franchise agreement. The grounds of the alleged non-compliance are extensive. *Inter alia* reference was made to various requirements contained in regulations 2(1), 3(1), 3(2), 3(3) and 3(4) to the CPA.
- 7.5 The respondent failed to fully disclose the costs relating to the opening of the franchise. In this regard the applicant alleges that the respondent did not provide details regarding the funds required to establish the business or the initial working capital that was required.
- 7.6 Regulation 2(1) read with section 7(2) requires that the first page of any franchise agreement shall state that "*a franchisee may cancel a franchise agreement without cost or penalty within 10 business days after signing such agreement, by giving written notice to the franchisor*".
- 7.7 The applicant alleges that the required statement was not made and she

was consequently not aware that she could cancel the franchise agreement within the stipulated time without incurring a penalty. She states that had this provision been drawn to her attention she would have exercised her right to cancel the agreement in terms of section 7(2).

7.8 Had the respondent disclosed all the information that it was required to disclose the applicant would not have signed the franchise agreement. She alleges that the failure to comply with the relevant legislation renders the franchise agreement void and unenforceable.

7.9 Even if the franchise agreement is not declared void, clause 4.5.1 of the franchise agreement should be declared to be unenforceable in that it contravenes public policy.

7.10 In consequence of the above the applicant claims a refund of the franchise fee paid by her after entering into the franchise agreement.

8 In my view, the applicant brings her claims for relief within the ambit of sections 40, 41 and 48 of the CPA. Accordingly, section 52 is engaged. Section 52(1) provides as follows:

Powers of court to ensure fair and just conduct, terms and conditions

52(1) If, in any proceedings before a court concerning a transaction or agreement between a supplier and consumer, a person alleges that-

(a) the supplier contravened section 40, 41 or 48; and

- (b) this Act does not otherwise provide a remedy sufficient to correct the relevant prohibited conduct, unfairness, injustice or unconscionability,

the court, after considering the principles, purposes and provisions of this Act, and the matters set out in subsection (2), may make an order contemplated in subsection (3).

9 In terms of section 52(2) a court must consider a range of factors in any matter contemplated in section 52(1). These include:

9.1 The fair value of the goods or services in question.

9.2 The conduct of the supplier and the consumer, respectively and the nature of the bargaining relationship.

9.3 The circumstances of the transaction or agreement that existed or were reasonably foreseeable at the time that the conduct or transaction occurred or agreement was made.

10 Section 52(3) provides:

- (3) If the court determines that a transaction or agreement was, in whole or in part, unconscionable, unjust, unreasonable or unfair, the court may-

(a) make a declaration to that effect; and

(b) make any further order the court considers just and reasonable in the circumstances, including, but not limited to, an order-

(l) to restore money or property to the consumer;

- (ii) to compensate the consumer for losses or expenses relating to-
 - (aa) the transaction or agreement; or
 - (bb) the proceedings of the court; and
- (iii) requiring the supplier to cease any practice, or alter any practice, form or document, as required to avoid a repetition of the supplier's conduct.

REMEDIES CONTEMPLATED IN THE CPA

- 11 The objection to the court's jurisdiction requires a consideration whether the CPA otherwise provides a remedy sufficient to correct the breaches that the applicant alleges occurred.
- 12 No reference was made in argument to the existence of a consumer court and I can find no reference to such a court having been established, as envisaged in the CPA, in terms of any provincial consumer legislation. It appears therefore that this avenue is not available to the applicant.
- 13 A Consumer Goods and Services Ombud has been established purportedly in terms of section 86(6). It defines itself, as stated on its website, as an independent body whose function is to "*mediate and resolve complaints lodged by private citizens against businesses or other entities*".² It reports to the National Consumer Commission. No submissions were made by the respondent regarding the applicant's ability to obtain the relief she seeks from the Consumer

² <https://www.cgso.org.za/cgso>

Goods and Services Ombud. Considering the facts, I do not believe that a referral to this ombud would be appropriate or sufficient to deal with the applicant's complaint. It is doubtful that the relevant ombud has the power to grant the applicant the relief she seeks in this application.

- 14 A "Tribunal" is defined in terms of the CPA as the National Consumer Tribunal established by section 26 of the National Credit Act. The Tribunal's powers in terms of its rules are as follows:

3. Powers of the Tribunal

(1) The Tribunal may deal with a matter:-

- (a) listed in Table 1A and Table 1B of these rules;
- (b) referred to the Tribunal in terms of s134(2)(c) of the Act;
- (c) originating as a complaint to the Regulator or arising from a complaint, and referred to the Tribunal in terms of s137(1), s140 or s141(1)(b) of the Act;
- (d) which is referred to the Tribunal in terms of s137(3) of the Act;

(2) The Tribunal may-

- (a) grant interim relief in respect of a matter described in rule 3(1)(c);
- (b) confirm a consent agreement entered into between parties (s 138);
- (c) consider applications related to an adjudication process-
 - (i) to intervene in proceedings in terms of rules 11 and 12;
 - (ii) to amend documents in terms of rule 15;
 - (iii) to change the forum at which a matter will be heard in terms of section 140(4) or 141(2)(a);
 - (iv) to condone non-compliance with the rules and proceedings of the Tribunal;

- (v) for an order of substituted service in terms of rule 30;
 - (vi) to grant a default order in terms of rule 25; or
 - (vii) relating to other procedural matters;
- (d)
- (f) deal with any other matter in accordance with rule 10.

15 Rule 10 provides as follows:

10 Applications in respect of matters not provided for in the rules

- (1) A person wishing to bring before the Tribunal a matter which is not listed in rule 3, or otherwise provided for in these rules, must first apply to the High Court for a declaratory order confirming the Tribunal's jurisdiction-
- (a) to deal with the matter;
 - (b) to grant the order to be sought from the Tribunal.

16 The powers of the Tribunal are circumscribed by its rules. It does not appear to have the power to grant declaratory relief or deal with claims for the payment of money. Furthermore, the Tribunal does not appear to have the power to deal with contraventions of section 40, 41 and 48. This has been specially entrusted to the court in terms of section 52(2). I am of the view, considering the principles, purposes and provisions of the CPA, that the National Consumer Tribunal would not be in a position to provide a remedy sufficient to correct the infringements complained about by the applicant.

CASE LAW

- 17 At common law there is a presumption against construing a statute so as to oust the court's jurisdiction and a curtailment of its powers will not be lightly be presumed. See in this regard *Lenz Township Co (Pty) Ltd v Lorentz NO 1961 (2) SA 450 (A)* where Steyn CJ held in relation to an *in limine* objection that the jurisdiction of the court had been ousted:

Indien dit 'n geldige beswaar is, sou dit uitloop op 'n inkorting van die seggenskap waarmee die Hof bekleed is om 'n beswaarder te hulp te kom. So 'n inkorting kan nie ligtelik aanvaar word nie. Daar bestaan 'n sterk vermoede teen wetgewende inmenging met die jurisdiksie van Howe, en 'n duidelike bepaling is nodig om daardie vermoede te weerlê. So merk BEYERS, A.R., op in de Bruin v Director of Education, 1934 AD 252 op bl. 258:

'Dis elementêr dat die regspraak van die Hof alleen deur duidelike wetgewing of noodwendige gevolgtrekking uit die Wet, uitgesluit word.³

- 18 In *Motus Corporation (Pty) Ltd t/a Zambezi Multi Franchise and another v Wentzel* [2021] 3 All SA 98 (SCA) the court held:

[26] The need for us to address the scope of section 69(d) fell away in argument, because Mr Botes SC, who appeared for Renault and Renault SA, indicated that he would not pursue the point as his clients preferred to address the issues of substance. Therefore, we did not hear full argument on the matter. The issues arising from the section will need to be resolved on another occasion. It suffices to say that the primary guide in interpreting the section will be section 34 of the Constitution and the guarantee of the right of access to courts. Section 69(d) should not lightly be read as excluding the right of consumers to approach the court in order to

³ see also *Minister of Law & Order v Hurley* 1986 (3) SA 568 (A), at 584A and *Gilbey Distillers & Vintners (Pty) Ltd v Morris NO 1991 (1) SA 648 (A)* at p657

obtain redress. A claim for cancellation of the contract and the refund of the price of goods on the grounds that they were defective falls under the *actio redhibitoria* and dates to Roman times. Our courts have always had jurisdiction to resolve such claims and there is no apparent reason why the section should preclude a consumer, at their election, from pursuing that avenue of relief until they have approached other entities.

- [27] The section is couched in permissive language consistent with the consumer having a right to choose which remedy to pursue. Those in (a), (b) and (c) appear to be couched as alternatives and, as already noted, there is no clear hierarchy. Had that been the aim it would have been relatively simple to set the hierarchy out in a sequence that would have been apparent, not “implied”, and clear for the consumer to follow. Furthermore, subsection (d) does not refer to the consumer pursuing all other remedies “in terms of this Act”, but of pursuing all other remedies available in terms of national legislation. That could be a reference to legislation other than the Act, or to the remedies under both the Act and other applicable consumer legislation, such as the National Credit Act 34 of 2005.

The court went on in this paragraph to state:

Given the purpose of the Act to protect the interests of the consumer, who will always be the person seeking redress under it, there is no apparent reason why they should be precluded from pursuing immediately what may be their most effective remedy.

- 19 In relation to purpose of the CPA the preamble states that it is enacted *inter alia* to:

19.1 Promote and protect the economic interests of consumers.

19.2 Improve access to, and the quality of, information that is necessary so that consumers are able to make informed choices according to their individual wishes and needs.

19.3 Develop effective means of redress for consumers.

20 In *Takealot Online (RF) (Pty) Ltd and Driveconsortium Hatfield (Pty) Ltd*, (unreported), Case Number 7348/2021, 11 October 2021, Western Cape High Court, Henny J dealing with an objection to the court's jurisdiction based on section 69 held:

[15] The next ground of appeal is that the court erred in granting the respondent the relief, when in terms of the agreement provision had been made for any disputes between the two parties to be dealt with by means of arbitration. The court dealt with this issue in the judgment. The argument raised, for the very first time during these proceedings, was that this court had no jurisdiction to deal with the application, because the respondent, in terms of section 69 (d) of the CPA, had not exhausted all other remedies available to it in terms of national legislation. This issue was not raised during the original hearing of the matter. In any event this argument, in my view, is misplaced, because in terms of the provisions of section 52 of the CPA, which was conceded by the applicant in its answering affidavit as was referred to earlier, only a court of law can deal with the issues raised regarding unfair, unreasonable or unjust contract terms in terms of section 48 of the CPA. An arbitrator, the Commission or Tribunal, is not empowered in terms of the act to deal with these kinds of matters. This ground of appeal, in my view, is also without merit.

21 The respondent relied on two unreported cases decided in the Free State Division of the High Court where the court held that it did not have jurisdiction to deal with the matters before it because the plaintiffs had not exhausted their remedies in terms of section 69. They are *AFCA Trading and Supply (Pty) Ltd v City Square Trading and Supply 604 (Pty) Ltd* (227/2018) [2021] ZAFSHC 29 (18 February 2021) and *Joroy 4440 CC t/a Ubuntu Procurement v Potgieter N.O. and Another* (4161/2015) [2016] ZAFSHC.

22 Both of the above decisions preceded the judgments in *Motus Corporation* and *Takealot Online (RF) (Pty) Ltd*. Although, on the face of it, the ruling in *Motus Corporation* in relation to section 69 was said to be obiter, the reasons set out in the judgment are authoritative and they carry considerable weight. I do not consider myself bound by the decisions in *AFCA Trading and Supply* and *Joroy 4440 CC* and I respectfully disagree with the findings in these cases to the extent that they are contrary to my findings in this matter.

CONCLUSION

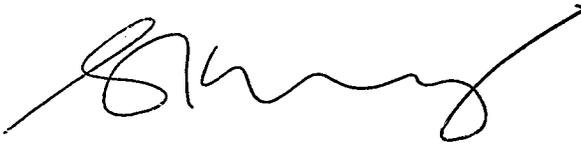
23 I have considered the principles, purposes and provisions of the CPA and the matters set out in subsection 52(2). It is by no means certain that the adjudicative and dispute resolution mechanisms referred to above provide remedies that are sufficient or adequate to deal with the infringements alleged by the applicant. In my view, the relief sought by the applicant in these proceedings could not have been effectively pursued in the manner envisaged in sections 69(b) and 69(c).

24 Accordingly, I find that this court does have jurisdiction to deal with the matter. No purpose would be served by requiring the applicant to approach the relevant ombud or National Consumer Tribunal or, by requiring her to file a complaint with the National Consumer Commission. This would merely serve to delay the adjudication of the applicant's claims.

25 In the circumstances I make the following order:

- 1 The respondent's point *in limine* is dismissed.

- 2 The respondent is ordered to pay the applicant's costs attendant upon the preparation for and argument of the point *in limine*.



JUDGE KUNY

JUDGE OF THE HIGH COURT
NORTH GAUTENG DIVISION

Date of Hearing:	28 February 2022
Date of Order:	15 June 2022
Date of Judgment:	21 June 2022
Applicant's Counsel:	Adv E van As evert@advocates-vanas.com
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