

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

Case number: **NCT/ 261684/2023/73(2)(b)**

In the matter between:

NATIONAL CONSUMER COMMISSION

APPLICANT

And

CRYSTAL TEARS INVESTMENT 206 CC t/a

MISTY RIVER (ENTERPRISE NUMBER B2004007967A)

1ST RESPONDENT

ELIZABETH HOOGENHOUT t/a MISTY RIVER

2nd RESPONDENT

Coram:

Mr S Hockey - Presiding Tribunal Member

Mr CJ Ntsoane - Tribunal Member

Adv. C Sassman - Tribunal Member

Date of Hearing - 25 April 2023

Date of Judgment - 2 May 2023

JUDGMENT AND REASONS

THE PARTIES AND REPRESENTATION

1. The applicant is the National Consumer Commission (the NCC), an organ of state established under section 85 of the Consumer Protection Act, 68 of 2008 (the CPA). At the hearing of this matter, the NCC was represented by Imrhan Magoro, an internal legal advisor of the NCC.

2. The first respondent is Crystal Tears Investment 206 CC (the first respondent), a close corporation duly incorporated in terms of the company laws of South Africa.
3. The second respondent is Elizabeth Hoogenhout (the second respondent), a member of the first respondent.
4. The first and second respondents were not represented at the hearing, which proceeded in their absence.

THE APPLICATION

5. The NCC referred this matter to the National Consumer Tribunal (the Tribunal) in terms of section 73(2)(b) of the CPA after it concluded an investigation into a complaint referred to it by Ms Puleng Patience Seoe (the complainant), a consumer as defined in section 1 of the CPA.

CONSIDERATION OF THE EVIDENCE ON A DEFAULT BASIS

6. In February 2023, the NCC filed this application with the Tribunal. The application was served on both respondents personally at their place of business. On 28 February 2023, the Tribunal's Registrar issued a notice of filing to all the parties.
7. In terms of Rule 13, the respondents had 15 business days to serve an answering affidavit and file the same with the Tribunal's Registrar. The respondents, however, failed to do so.
8. The applicant did not apply for a default order in terms of rule 25(2).
9. On 28 March 2023, the Tribunal's Registrar issued a notice of set down to all the parties setting the matter down for hearing due to the pleadings having closed.

10. On the hearing date, the Tribunal was satisfied that the application was adequately served on the respondents. The matter proceeded on a default basis.

11. Rule 13(5) provides that:

"Any fact or allegation in the application or referral not specifically denied or admitted in the answering affidavit, will be deemed to have been admitted."

12. Therefore, in the absence of any answering affidavits filed by the respondents, the applicant's application and all the allegations contained therein are deemed to be admitted.

BACKGROUND

13. On 27 September 2020, the complainant visited a wedding venue known as Misty River. After viewing the venue, she received a quotation from the second respondent for hiring the venue and for related services for her wedding celebration.

14. On 3 October 2020, the complainant formally booked the venue by paying a deposit of R7 000.00 into the bank account of the first respondent. In terms of the agreement reached between the parties, the wedding was to take place on 16 January 2021 and would accommodate 150 guests.

15. The complainant made two further instalments in the sums of R8 000.00 and R10 750.00 on 15 November 2020 and 28 September 2020 respectively, bringing the total amount paid to the first respondent to R25 750.00.

16. On 11 January 2021, the president of our country addressed the nation on the efforts to contain the then-prevailing Covid-19 pandemic. Because of a wave of infections prevalent at the time ascribed to a new coronavirus variant, the

nation was advised that most indoor and outdoor gatherings would not be permitted. This included social gatherings.

17. Due to the ban on social gatherings, the second respondent emailed the complainant on 12 January 2021, notifying her of the respondents' intention to postpone the wedding celebration.

18. The complainant responded to the second respondent via WhatsApp on 12 January 2021, advising that if the function was cancelled, she expected a refund.

19. On 8 February 2021, the complainant emailed the second respondent advising they would not continue with the wedding celebration because they could not postpone it indefinitely. She requested that the money she had paid towards the function be deposited into her bank account, the details of which were provided.

20. The respondents refused to refund the complainant as requested. During the investigation conducted by the NCC, the second respondent advised that they would only refund a consumer if the venue had been booked for the specific date by another client.

THE RELEVANT LEGAL PROVISIONS

21. Because the parties agreed on a date for the hiring of the wedding venue, section 19(2)¹ of the CPA finds application. In terms of this provision, it is an implied condition of every transaction for the supply of goods and services that

¹ The subsection reads: (2) Unless otherwise expressly provided or anticipated in an agreement, it is an implied condition of every transaction for the supply of goods or services that—

- (a) the supplier is responsible for delivering the goods or performing the services—
 - (i) on the agreed date and at the agreed time, if any, or otherwise within a reasonable time after concluding the transaction or agreement;
 - (ii) at the agreed place of delivery or performance; and
 - (iii) at the cost of the supplier, in the case of delivery of goods.

the supplier is responsible for delivering the goods or performing the services on the agreed date and at the agreed time, if any.

22. In terms of section 19(6)(c) of the CPA, if a supplier tenders the delivery of goods or the performance of any service at the location on a date or time other than as agreed with the consumer, the consumer may cancel the agreement without penalty, treating any delivered goods or performed services as unsolicited goods or services in accordance with section 21 of the CPA.

23. Section 21(9) provides that if a consumer has made any payment to a supplier in respect of any charge relating to unsolicited goods or services, the consumer is entitled to recover that amount, with interest from the date on which it was paid to the supplier, in accordance with the Prescribed Rate of Interest Act, 1975 (Act 55 of 1975).

EVALUATION

24. It is common cause that the complainant agreed with the first respondent to hire a wedding venue and for the provision of related services. The complainant paid an amount of R25 750.00 for this. It is further common cause that the complainant's wedding celebrations had to be cancelled three days before it was to take place due to a ban on social gatherings, which the president announced on 11 January 2021.

25. The respondent's tender to postpone the hiring of the wedding venue to an unspecified date was not accepted by the complainant, who elected to cancel the agreement with the respondents.

26. In the circumstances, the tender made by the respondents constitutes unsolicited services. The complainant is therefore entitled to a refund of the amount she paid towards the hiring of the venue and related services in terms of sections 19(2) and 19(6)(c) read with section 21(9) of the CPA.

CONSIDERATION OF AN ADMINISTRATIVE FINE

27. The NCC requested the Tribunal to impose an administrative fine on the respondents. Section 112 of the CPA authorises the Tribunal to impose such a fine in respect of prohibited or required conduct in terms of the CPA. The definition sections of both these Acts define prohibited conduct as an act or contravention of the respective Act.
28. The Tribunal finds that the refusal to refund the complainant the money she paid towards the hiring of the wedding venue and for the related services constitutes prohibited conduct in terms of the CPA. Given the attitude adopted by the respondents and the unjustifiable refusal to refund the complainant, which resulted in the latter suffering significant financial loss, the Tribunal is of the view that an imposition of an administrative fine is appropriate. Suppliers such as the respondents should not be allowed to take money from the public and refuse to refund consumers when failing to provide the service for which the funds were paid.
29. Section 112(2) of the CPA sets the limit of an administrative fine that may be imposed in terms of the CPA. The fine may not exceed the greater of 10% of the respondent's annual turnover during the preceding financial year, or R1 000 000.00. No evidence was provided regarding the respondents' turnover during the preceding financial year.
30. Section 112(3) of the CPA lists certain factors the Tribunal must consider when determining an appropriate fine. The Tribunal will deal with each of these factors in turn.
- 30.1 The nature, duration, gravity, and extent of the contravention.
The contravention is serious and involves a serious disregard for the rights of the complainant, who has been deprived of her refund since

January 2021, when she cancelled the contract with the respondents.

30.2 Any loss or damage suffered as a result of the contravention

The complainant suffered a loss of R25 750.00, intended for her wedding celebration.

30.3 The behaviour of the respondent

The behaviour of the respondents amounts to a total disregard for the consumer rights of the complainant.

30.4 The market circumstances in which the contravention took place

The contravention took place in unfortunate circumstances when, due to the coronavirus pandemic, the country, like most of the world, had to endure a lockdown involving the restriction of movements and gatherings. The wedding celebration could not proceed as social gatherings were banned at the time. The respondents understandably had to cancel the scheduled event.

30.5 The level of profit derived from the contravention

It may be that the respondents incurred some expenses towards arranging the event that had to be cancelled three days before it was due to happen. Therefore, the exact profit the respondents may have derived from the contravention is not certain.

30.6 The degree to which the respondent has cooperated with the NCC and the Tribunal

The extent of the respondents' cooperation with the NCC was to respond to the NCC's queries dated 25 July 2022. The NCC had to remind the respondents before the queries were responded to.

30.7 Whether the respondent has previously been found in contravention of the CPA

There is no evidence that the respondents previously contravened any provisions of the CPA.

31. Having considered the factors set out in section 112(3) of the CPA, the Tribunal is of the view that an administrative fine of R15 000.00 would be just and equitable in the circumstances. For the benefit of the respondents, the Tribunal has taken into account the trying circumstances that unfolded with the lockdown, during which businesses such as the first respondent had to close down during certain stages of the country's Disaster Management Regulations.

SHOULD AN ORDER BE MADE AGAINST BOTH RESPONDENTS?

32. The NCC requested that the Tribunal makes an order against both respondents. In effect, the Tribunal is urged to lift the corporate veil in respect of the first respondent and hold the second respondent personally liable. What follows is a consideration of whether this would be appropriate in the circumstances of the matter.

33. A fundamental principle of our law is that a company (or close corporation) has a separate legal personality. The first respondent is such an entity with its own corporate identity. The second respondent is a member of the first respondent, and all the evidence indicates that the second respondent acted in this capacity and in her capacity as a representative of the first respondent.

34. In *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others*,² the Appellate Division (as it was then) held:

"It is undoubtedly a salutary principle that our courts should not lightly disregard a company's separate personality, but should strive to give

² 1995 (4) SA 790 (AD).

effect to and uphold it. To do otherwise would negate or undermine the policy and principles that underpin the concept of separate corporate personality and the legal consequences that attach to it. But where fraud, dishonesty or other improper conduct (and I confine myself to such situations) are found to be present, other considerations will come into play. The need to preserve the separate corporate identity would in such circumstances have to be balanced against policy considerations which arise in favour of piercing the corporate veil.”

35. With the enactment of the Companies Act 71 of 2008, the piercing of the corporate veil has since been governed by section 20(9) of that Act³. Both section 20(9) of the Companies Act and section 65 of the Close Corporations Act 69 of 1984 provide for a general discretion to pierce the corporate veil where the courts find that the incorporation of the company or close corporation, any use of these entities or any act by or on behalf of the entity, constitute an unconscionable abuse of the juristic personality of the entity⁴.

36. In the Tribunal's view, the NCC has not shown that the first respondent was used by the second respondent in a manner that constituted an unconscionable abuse of its corporate personality. The fact that the second respondent, as a member of the first respondent may have full and effective control over the close corporation, by itself, affords no basis to disregard the separate personality of the first respondent and lift the corporate veil⁵.

ORDER

37. In the result, the Tribunal makes the following order:

³ Section 65 of the Close Corporation Act 69 of 1984 is a similar provision as section 20(9) of the Companies Act.

⁴ For a discussion of these sections and the law on piercing the corporate veil, see Ex Parte: Gore NO and Others 2013 (3) SA 382 (WC).

⁵ See Van Zyl NO and Another v Kaya NO and Others 2014 (4) SA 452 (WC) at para 33.

37.1 The first respondent has contravened sections 19(2) and (6) read with section 21(9) of the CPA.

37.2 The contraventions by the first respondent are hereby declared to be prohibited conduct.

37.3 The first respondent is ordered to refund the complainant, Ms Puleng Patience Seo, R25 750.00 with interest of 10,5% calculated from the date of payment made to the first respondent until the date of the refund; such refund is to be made within 20 business days after the issuing of this judgment.

37.4 The first respondent is ordered to pay an administrative fine in the sum of R15 000.00 within 60 business days after issuing of this judgment into the account of the National Revenue Fund, the details of which are as follows:

Bank: The Standard Bank of South Africa

Account holder: Department of Trade and Industry

Branch name: Sunnyside

Branch code: 010645

Account number: 370650026

Reference: NCT/261684/2023/73(2)(b) with the first respondent's name used as a reference.

37.5 There is no order as to costs.

(signed)

Mr S Hockey (Presiding Tribunal member)



Tribunal members Adv C Sassman and Mr CJ Ntsoane concur.