



RECOMMENDATION

Reference Number	: 20160/-0009184
Nature of dispute	: Timeous Delivery of Goods
Adjudicator	: Bonita Hughes
Date	: 06 October 2016

Summary of the complaint

The complainant enquired about some of the supplier's products. The supplier sent the complainant a quotation on 12 January 2016 and the complainant paid the supplier the quoted price on the same day. The complainant required the order to be delivered in March 2016.

After not receiving the hats in March 2016 the complainant cancelled the order. The supplier advised that if she wants to cancel there will be a cancellation fee of 60%.

The complainant would like a full refund.

Summary of the Supplier's response

The supplier sent e-mail correspondence between him and the complainant.

According to the supplier they were still within the time limits as per their standard terms and conditions. The terms and conditions provides that delivery can take place between 2-28 weeks.

When the complainant requested cancellation the timeframe in which the supplier should deliver the hats have not yet passed and therefore the supplier charged a 60% cancelation fee.

Steps taken by CGSO to resolve the matter

Our office referred the matter to the supplier as per the provisions of our Industry Code:

Clause 11.2.7.7 of the Code: If the Complaint is one that appears to fall within the CGSO's jurisdiction and the complainant has already taken up the matter with the Participant, the CGSO shall inform the Designated Officer, in writing, that a Complaint has been lodged with the CGSO and the Participant have 15 (fifteen) Business days from receipt of the communication to investigate and attempt to resolve the Dispute with the Complainant or to provide the CGSO with its reasons for repudiating the Complaint.

The supplier failed to respond within the required timeframe and a follow up e-mail was send.

The supplier then informed our office that we are falsely accusing them and that they will not be intimidated

by this office. The supplier also complained about CGSO's poor performance, unprofessional conduct and bad attitude.

It must be noted that at this point our office have merely referred the matter in accordance with the Industry Code, which in terms of clause 4 applies to all Participants within the goods and services industry.

The supplier also requested that the case agent be removed from his matter and a new person must attend to the matter. The supplier further requested a written apology from our office.

Our office reiterated that we require the supplier's response in order to assess the matter and make a recommendation.

The Supplier still did not want to provide feedback as he does not trust this office's judgment.

Our office considers the supplier's responses unfounded and unreasonable. Further to this clause 5.1.11 of the Industry code provides that: *The Participant under this Code are required to co-operate with all reasonable requests made by the CGSO in a timely manner. Any failure to co-operate with the CGSO may be taken into consideration by the NCC and the Tribunal when issuing a compliance notice or proposing an administrative fine.*

After numerous correspondence with the supplier, they then send a response.

Assessment

We have considered all the evidence presented by both the complainant and the supplier and advise as follows:

The complainant maintains that she cancelled the agreement after not received the goods on the agreed date.

The supplier however advised that as per their terms and conditions they were still within the delivery timeframe and will have to charge 60% cancellation fee in order to cancel the agreement.

It is necessary to decide whether the Complainant was entitled to cancel the order in terms of the provisions of the Consumer Protection Act (CPA).

The law

Consumer Protection Act

19. Consumer's rights with respect to delivery of goods or supply of service

(1) This section does not apply to-

- (a) the supply of goods or services to a franchisee in terms of a franchise agreement; or
- (b) a transaction if the performance of that transaction is governed by section 46 of the Electronic Communications and Transactions Act.

(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 to deliver the goods or perform 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; or

(b) the agreed place of delivery of goods or performance of services is the supplier's place of business, if the supplier has one, and if not, the supplier's residence; and

(c) goods to be delivered remain at the supplier's risk until the consumer has accepted delivery of them, in accordance with this section.

(3) If an agreement does not provide a specific date or time for delivery of any goods or performance of any services, the supplier must not require that the consumer accept delivery or performance of the services at an unreasonable time.

(4) The consumer is regarded to have accepted delivery of any goods on the earliest of the following circumstances:

(a) When the consumer expressly or implicitly communicates to the supplier that the consumer has accepted delivery of such goods; or

(b) when the goods have been delivered to the consumer, and-

(i) the consumer does anything in relation to the goods that would be inconsistent with the supplier's ownership of them; or

(ii) after the lapse of a reasonable time, the consumer retains the goods without intimating to the supplier that the consumer has rejected delivery of them, subject to subsection (5).

(5) When a supplier tenders delivery to a consumer of any goods, the supplier must, on request, allow the consumer a reasonable opportunity to examine those goods for the purpose of ascertaining whether the consumer is satisfied that the goods-

(a) are of a type and quality reasonably contemplated in the agreement, and meet the tests set out in section 18 (3) and (4); and

(b) in the case of a special-order agreement, reasonably conform to the material specifications of the special order.

(6) If the supplier tenders the delivery of goods or the performance of any services at a location, on a date or at a time other than as agreed with the consumer, the consumer may either-

(a) accept the delivery or performance at that location, date and time;

(b) require the delivery or performance at the agreed location, date and time, if that date and time have not yet passed; or

(c) cancel the agreement without penalty, treating any delivered goods or performed services as unsolicited goods or services in accordance with section 21.

(7) If the supplier delivers to the consumer a larger quantity of goods than the consumer agreed to buy, the consumer may either-

(a) reject all of the delivered goods; or

(b) accept delivery of the goods, and-

(i) pay for the agreed quantity at the agreed rate; and

(ii) treat the excess quantity as unsolicited goods in accordance with section 21.

(8) If the supplier delivers to the consumer some of the goods the supplier agreed to supply mixed with goods of a different description not contemplated in the agreement, the consumer may-

(a) accept delivery of the goods that are in accordance with the agreement and reject the rest; or

(b) reject all of the delivered goods.

Consideration of the law and facts

The supplier provided our office with copies of the communication between themselves and the complainant.

From the communication the following were evident:

The complainant sent an enquiry to the supplier with regards to the prices of their hats and fascinators.

The supplier advised the complainant that the prices are valid until 15 January 2016. They further advised the complainant of their standard turnaround times which is 2 -28 weeks. They explained that in terms of the contract the order must be completed by 12 August 2016. They however then continued and stated:

*“Contractually, any order placed today should be completed by us on 12/08/2016 BUT we always try to complete all orders within a short period of time. The timetable above is meant to be used as a reference as our products are made by hand. **If you want an order by end February or March 2016, please place the order this week, thank you.** We have a Rush Order Fee of R500 which speeds up production. Now you know. If you have any questions, please let us know.”*

The complainant then placed an order and provided the supplier a list of items she requires. The supplier sent her a quote for the amount of R4950.00. In this communication the supplier once again acknowledged the fact that the complainant will require delivery by March 2016:

*“**You require collection in March.** In order to guarantee collection, we need to conclude this deal today and receive payment today. Please advise whether you accept the quote? If you do, we will send you an invoice immediately.”*

The complainant then requested an invoice and immediately made the payment. The supplier sent the

complainant an e-mail to check if she did receive the invoice and the complainant replied that she has already made the payment. The supplier advised that they will wait for payment to reflect.

The supplier subsequently to their communication advising that if an order is placed in the week of 12 January 2016 delivery can be done in February or March 2016 send the following communication to the complainant:

*“The payment reflected in our Absa Bank account after midnight on 15/01/2016.
We will purchase the material on 18/01/2016 and start on the order accordingly.
Please be advised that this delay will have an effect on the date of completion of your order.
While we will always try and complete an order as soon as possible, please be advised that our products are handmade and that our Standard Turnaround Time is 2-28 weeks, as per our Terms and Conditions. If need be, we reserve the right to fall back on said Standard Turnaround Time. Please just bare that in mind at all costs, thank you.”*

On 03 March 2016 the complainant enquired about her order. The supplier responded and advised that they are still busy with the order and that they plan to complete order in this month (March 2016).

With no feedback from the supplier the complainant on 04 April 2016 followed up on her order. We do not see that the supplier responded to this e-mail or at any point provided the complainant with an update on the order.

The next communication was in May 2016. It seems the complainant started to phone the supplier as she got concerned as she has not yet received her order as yet. The supplier is of the view that at this point the complainant threatened them and used abusive language.

This is the supplier's proof of threats to them:

“Hi

I will send you the email correspondence from F where he mentions that I would have to put my order through and pay straight away so that I could have my hats by March hence my reason for extreme concern

Regards

H

On 13 May 2016, at 4:19 PM, N wrote:

Dear H

Please provide written proof where we confirmed that your order would be completed in March 2016.

We stick to our Standard Turnaround Time with each order. Weird how we would confirm such a thing.

Kind regards,

This is the supplier's proof of abusive language:

Yes definitely because it doesn't look like I will be getting my hats

Thank you

H

On 13 May 2016, at 3:18 PM, N wrote:

Dear H

We RESENT the fact that you called us SCAM ARTISTS on the telephone this afternoon. You are entitled to a refund. Would you like a refund?

Kind regards,
N

The supplier mentions a telephone conversation which we have no copy of or proof of any abusive language used. Further to this our office do not see the complainant's follow ups and concern raised regarding late delivery as threats. It rather seems that a consumer who paid almost R5 000.00 for goods to be delivered in March 2016 getting scared that she might not receive her goods. The supplier at this point agreed to cancel the transaction subject to a 60% cancellation fee. It must be noted that this cancellation fee was not disclosed or contained in any term or condition previously sent to the complainant.

Further to this from all the communication between the supplier and the complainant it is clear that the complainant needed delivery in March 2016. Further to this the supplier committed themselves to deliver by March 2016. Their standard terms and conditions which they keep on referring to cannot be relied upon because they entered into an agreement based on its own unique terms and conditions in which they committed to delivery in March 2016.

For a contract to be considered valid and binding in South Africa, the following requirements must be met:

1. There must be consensus ad idem between the contracting parties.
2. The parties must have seriously intended the agreement to result in terms which can be enforced.
3. The parties must have the capacity to contract.
4. The agreement must have certain and definite terms.
5. The necessary formalities must be observed.
6. The agreement must be lawful.
7. The contractual obligations must be possible of performance.
8. The content of the agreement must be certain.

The supplier advised the complainant that an order must be placed within the week of 12 January 2016 in order to get the goods delivered in February or March 2016. In another communication they reiterate that delivery will be done if the agreement was finalised on the 12th of January 2016. Based on this representation made by the supplier the complainant accepted and made payment. A valid agreement therefore came into effect based on the condition that delivery will be done by March 2016.

Once an agreement is concluded based on certain terms and conditions a party to the agreement cannot subsequently change a condition specifically agreed upon by referring to standard terms and conditions which are in conflict with the accepted terms and conditions.

On a balance of probabilities, we therefore conclude that the complainant and the supplier entered into an agreement for the goods to be delivered in March 2016.

As the supplier failed to deliver the goods on the agreed date the complainant would be entitled to cancel the agreement as per Section 19 of the Consumer Protection Act:

(6) If the supplier tenders the delivery of goods or the performance of any services at a location, on a date or at a time other than as agreed with the consumer, the consumer may either-

- (a) accept the delivery or performance at that location, date and time;
- (b) require the delivery or performance at the agreed location, date and time, if that date and time have not yet passed; or
- (c) cancel the agreement **without penalty**, treating any delivered goods or performed services as unsolicited goods or services in accordance with section 21.

The supplier failed to deliver the goods in March 2016 as per the agreement. The complainant are therefore entitled to cancel the agreement as provided for in terms of Section 19(6)(c) of the Consumer Protection Act. This section provides that a consumer can cancel the agreement without penalty.

Our recommendation

It is recommended that the complainant is allowed to cancel the agreement with the supplier without penalty and that the supplier refund the complainant the full amount paid – R4 950.00.