

Contract

Unreasonable contract terms

**Refusal to proceed until paid in full is unfair, unreasonable and unjust:
Supplier not liable to replace or refund.**

Complaint ref : 20131024923
Adjudicator : Bonita Hughes
Date : 15 January 2014

1. Summary of the complaint

In January 2013, the consumer enlisted the services of the supplier to install roller shutter doors at his residence. He signed the agreement and paid a deposit of R17 146.59. The supplier refuses to proceed with the installation until the consumer pay the full instalment price.

The consumer alleges that the contract terms are unfair, unreasonable and unjust and believes that some clauses contravened section 48 of the Consumer Protection Act. The consumer would like the supplier to do the installation after which he will pay the outstanding amount.

2. The response of the supplier

The supplier advised that the consumer signed the agreement which states that the full payment must be made before installation.

3. Summary of outcome

A valid contract came into being when the agreement was signed. Only a court of law can declare the contract void. The consumer may, however, in spite of any term to the contrary, cancel an advanced order in terms of section 17(2) of the CPA, subject to the imposition of a reasonable charge for cancellation

1. Attempts to resolve the complaint

The above explanation was given but the customer was not satisfied.

5. Investigative findings

No investigation has been undertaken.

6. Legal considerations/Applicable provisions of the *Code of Conduct*

Code:

8.1 The criteria to be used in resolving disputes includes:

8.5.1 the law, especially the Act and the Code (in cases where there is conflict between the interpretation of the Code or the Act, the Act will always prevail);

8.5.2 applicable industry codes or guidelines;

8.5.3 Fairness in all the circumstances.

Applicable provisions of the CPA:

Section 3 of the Consumer Protection Act provides the purpose of the Act. One of the purposes listed is to protect consumers from unconscionable, unfair, unreasonable, unjust or otherwise improper trade practises.

Section 48 (1) and (2) of the CPA relates to unreasonable terms. Contracts for example, cannot be one-sided, inequitable, or require the consumer to waive any of his or her rights.

Section 51 which addresses prohibited transactions, agreements, terms or conditions as well as Section 50 which grants the courts powers to ensure fair and just conduct, terms and conditions.

Section 52 of The CPA grants the courts authority to decide on fair and just conduct, as well as terms and conditions that can be regarded as being unfair to the consumer.

7. Consideration of facts and law

The consumer would like the following:

- 1.) The consumer would like the supplier to refund his deposit or he would like The supplier to install the goods after which he will pay the outstanding amount.

The consumer's claim is based on allegations that The supplier contravened Section 48 of the CPA as certain clauses in the terms and conditions of the contract are unfair, unreasonable and unjust.

Remedies available to a consumer:

Section 52 bestows powers on the ordinary courts in respect of unfair contract terms. It empowers such courts to ensure fair and just conduct, terms and conditions. The ordinary courts can therefore intervene where a supplier has contravened section 48.

Section 52 enumerates the possible orders that a court may make where the agreement is in whole or in part unfair or unreasonable.

If a consumer alleges that the agreement or a term of the agreement is void, the court has the power to make an order to sever the part or the term to the extent required to render the agreement lawful. The court may also declare the whole agreement void where severability is not possible. The doctrine of severability is used where a portion of an agreement is unreasonable. The unreasonable part is severed by the court and the remainder which is reasonable is enforced.

The CPA gives an ordinary court exclusive jurisdiction over unfair, unjust and unreasonable terms. This is because section 52 sets out the factors that a court should consider and the orders that can be made.

It must also be noted that should the court rule that certain clauses are unjust and unreasonable that clauses would be struck out but the remaining contract would still be enforceable.

The consumer would thus in terms of the contract still be obliged to pay the total amount before the goods can be installed.

The consumer would only be able to get a refund for the deposit if the court declares the entire contract void.

A valid contract came into being when the agreement was signed. Only a court of law can declare the contract void. The consumer may, however, in spite of any term to the contrary, cancel an advanced order in terms of section 17(2) of the CPA, subject to the imposition of a reasonable charge for cancellation for the order (section 17(3)(b) UNLESS the goods were special-order (section 17(1), (i.e. the supplier expressly or implicitly was required or expected to procure, create or alter specifically the goods to satisfy the consumer's requirements (definition section))).

8. Conclusion

Based on the information provided by the parties, the consumer is bound by the contract terms and will have to pay the outstanding funds in order to get the goods installed unless he elects to cancel the order, subject to the payment of a cancellation fee, if the roller shutter doors were not special order.

9. Suggested resolution

The consumer should elect to pay the outstanding balance as per the contract after which the supplier should install the goods, or cancel the order if the goods were not special order and be repaid the deposit less a reasonable cancellation fee.

