

ASSESSMENT

1. Dispute identification

Complaint No. : 201511-0005146
Nature of dispute : Injury from activity
Adjudicator : N Melville
Date : 29 February 2016

2. Summary of the complaint

On Saturday, 22 November 2014 the complainant took part in an obstacle course race on the premises of the supplier. During the race he broke his ankle, was rushed to hospital, and had to undergo surgery.

The complainant accepted that these race events are physical by nature, and as such carry with them an inherent risk which might reasonably be accepted by its customers. However, he believes his injury was as a result of negligence by the supplier and it could easily have been avoided.

The obstacle where he sustained his injury was a simple water slide. The pool of water in which customers landed after sliding down a slope had a tarpaulin floating on its surface. The tarp had been in that dangerous condition since about 9 a.m. By the time the complainant used the obstacle at about 1.00 p.m. several ankle injuries had occurred, including several sprains and at least one other broken ankle that he knows of. Despite these injuries, the tarp was ignored and nothing was done to improve the safety of the obstacle.

Details of steps taken to resolve the complaint

1. Submitted a complaint to the Warrior Company general contact email address.
2. Corresponded with the managing director.
3. Corresponded with the new shareholder.

Outcome proposed

The complainant seeks compensation for pain and suffering - R120 000.

3. The response of the supplier

The supplier responded that it did everything at the race to make the event and obstacles as safe as possible and therefore had dedicated safety officers, engineers to sign off on all obstacles and efficient medical and maintenance crews. It tries to avoid injuries at all cost. It is really sorry to hear about the complainant's alleged injury at its event.

It does not agree however that the injury which was allegedly sustained at the event was due to negligence. The event had over 8 000 participants and there were less than 10 injuries reported at this obstacle, which is proof that it was not a problem obstacle. The tarp on the slide was specifically put there to make the surface of the slide slippery and even to prevent injuries. The supplier struggles to see how someone's ankle can get tangled on a smooth tarp without any holes in it. It is much more likely that the complainant went into another participant due to not giving the participant ahead of him sufficient time to get out of the water. The supplier raised the following concerns / questions regarding the complaint:

1. Why did the complainant wait 2 months to report the problem? It would have been able to investigate the obstacle and liaise with the marshals if it was reported earlier, but by the time that it was reported, the obstacle was taken down and the marshals could not clearly recall the incident.
2. The complainant signed a waiver and indemnity and assumed the risk at his own will and it was clearly stated that obstacles are potentially dangerous.
3. The complainant client mentioned that he noticed that the obstacle was unsafe since 9 a.m. that morning, but still opted to do the obstacle at 1 p.m. Why did he still do it and why did he not report the alleged unsafe obstacle that morning? He could have easily completed the race without doing that obstacle.
4. The complainant claims that he had medical expenses without medical aid, but provided no prove of that in previous communication either.

It is not willing to pay the settlement requested by the complainant.

4. The reply of the Complainant (verbatim)

1. Why did he wait 2 months to report the problem? We would have been able to investigate the obstacle and liaise with the marshals if it was reported earlier.

I was focused on my recovery and secular work during the initial time following the injury, and thus couldn't report the problem as early as Mr P. would've preferred. However, an investigation can still be made - the photos on the race website clearly show the dangerous condition of the obstacle.

2. Your client signed a waiver and indemnity and assumed the risk at his own will and it was clearly stated that obstacles are potentially dangerous.

I did not sign a waiver or an indemnity. However, even if I did, this does not absolve the supplier from their responsibility to do what they can to ensure a safe environment for their customers. Mr P. claims that they "*do everything at the race to make the event and obstacles as safe as possible*", yet, on 22 November 2014, despite repeated injuries at the obstacle in question, nothing was done to fix the problem with the tarp.

3. Your client mentioned that he noticed that the obstacle was unsafe since 9am that morning, but still opted to do the obstacle at 1 pm. Why did he still do it and why did he not report the alleged unsafe obstacle that morning. Your client could have easily completed the race without doing that obstacle.

Mr P. assumes that I had foreknowledge about the unsafe obstacle. I did not. The first time I saw the obstacle was seconds before it broke my ankle, and even then, there was no way for me to know that it was unsafe. The reason I said it was unsafe from 9am is because this can be clearly seen in the photos taken of that obstacle on that day. I reviewed the photos after my injury. As an example, please review the attached photo1.jpg image. As can be seen in this photo, it was taken at 9:09 am, and the tarp is floating dangerously near the surface of the water (bottom left).

4. Your client claims that he had medical expenses without medical aid, but provided no prove of that in previous communication either.

I can provide any proof that Mr P. requires, if necessary. However, the damages I am claiming include compensation for pain and suffering and discomfort.

In addition to the above, I need to clear up a few things which Mr P. mentioned in his response.

"The event had over 8000 participants and we had less than 10 injuries reported at this obstacle, which is prove that it was not a problem obstacle."

This doesn't seem to make sense. If there were 9 injuries at the slippery dip obstacle on that day, I would think that that IS proof that there was a problem. And this is not simply my opinion. I have eye witness reports that at least two other participants were evacuated in ambulances at around the time I broke my ankle because of injuries caused by the slippery dip obstacle. L., the paramedic who initially attended to my injury at the obstacle, expressed his confusion as to why a decision had not been made to close the obstacle, since the paramedics were being called back to it repeatedly to treat injuries.

"The tarp on the slide was specifically put there to make the surface of the slide slippery and even to prevent injuries. We struggle to see how someone's ankle can get tangled on a smooth tarp without any holes in it."

To help make it clear how the injuries at the slippery dip occurred, I have attached the image file photo2.jpg, which is a photo taken of Mr M. milliseconds before he broke his ankle in almost the identical manner in which mine was broken. This photo was taken about two hours before I sustained my injury at this obstacle. Notice how Mr M. is entering the water at speed, and landing feet first into the tarp floating on the water. I landed in the water in a similar way. That is how my feet became entangled in the tarp. If the tarp had been safely tied down as it was on the other half of the obstacle (as seen behind Mr M. in photo 2), the injuries would not have occurred.

"It is much more likely that your client went into another participant due to not giving the participant ahead of him sufficient time to get out of the water."

Regardless of how likely it is, this is not what happened. Photo 1 clearly indicates that there was nobody in front of Mr M., and he didn't bump into another person when he sustained his injury. The same is true in my case. There was nobody in front of me, close enough to slide into them, when I went down the slippery dip. I have numerous eyewitnesses who can confirm this.

5. Defining the issues

It is necessary to decide whether the activity put on by the supplier, in particular the floating tarpaulin, was the cause of the consumer's injury and consequently whether the supplier is liable to compensate him, and, if so, for what damages.

6. Legal considerations

Applicable provisions of the CPA

There are five sections of the CPA that relate to claims for or awards of damages:

- Section 61, which enables consumers to sue suppliers and manufacturers of goods for damages or injuries suffered by them as a result of using or consuming the goods, irrespective of whether or not there was any negligence on the part of the supplier or manufacturer;
- Section 70 (4)' which provides that, with the consent of a complainant, a consent order emanating from alternative dispute resolution agent may include an award of damages to the complainant;
- Section 74 (3), which provides that, with the consent of a complainant, a consent order emanating from the Commission may include an award of damages to the complainant;
- Section 76 (1)(c), which refers to a court awarding damages against a supplier for collective injury to all or a class of consumers generally; and
- Section 115 (2)(a), which deals with instituting a claim in a civil court for loss or damage suffered as a result of prohibited conduct, or dereliction of required conduct.

The provision that deals with activities and facilities is section 58 (1), which says:

The supplier of any activity or facility that is subject to any—
(a) risk of an unusual character or nature;
(b) risk of which a consumer could not reasonably be expected to be aware, or which an ordinarily alert consumer could not reasonably be expected to contemplate, in the circumstances; or
(c) risk that could result in serious injury or death,
must specifically draw the fact, nature and potential effect of that risk to the attention of consumers in a form and manner that meets the standards set out in section 49.

Applicable provisions of the Code

9.2. In particular, the CGSO shall:

...

9.2.3 decline to deal with or discontinue dealing with those matters:

9.2.3.4 in which the Complaint does not allege any facts which, if true; and

9.2.3.5 terminate the process by notice to the parties.

10.3.3 Other Processes: After a preliminary assessment of the Complaint, or Dispute, or at any stage during the process that any of the factors referred to below become apparent, the CGSO shall not further consider a Complaint or Dispute that in the opinion of the Ombudsman:

...

10.3.3.3 could more appropriately be dealt with by the police, a court of law, by any regulatory body or through any other dispute resolution process.

Case law

Algoa Bus Company (Pty) Ltd v South African Transport & Allied Workers Union and Others [2014] ZALCPE 5; [2014] 8 BLLR 786 (LC) at paras 25-36:

In the courts, where there is a serious dispute of fact, incapable of resolution on the papers, the matter ought to be resolved by the hearing of oral evidence.

7. Consideration of facts and law

There is no provision in the CPA that creates liability for injuries or other damages arising from an activity or facility supplied by a supplier, whether caused negligently or otherwise. This means that there is nothing in the complaint that would constitute grounds for a remedy under the Code or CPA and consequently, the CGSO must terminate the process.

Furthermore, the supplier is not prepared to accept liability and has denied that it was negligent or that the tarpaulin used at the obstacle was the cause of the complainant's injury. These are issues that can only be resolved through a process of hearing of oral evidence of witnesses and experts. The CGSO is an alternative dispute resolution agent, not a court, so it is unable to perform this function.

8. Conclusion

It became apparent during the course of the CGSO's attempt to facilitate a settlement that the complaint does not constitute grounds for a remedy under the CPA and there is a dispute of fact that it is not possible to resolve on the papers. The CGSO process is accordingly terminated and the complainant is hereby informed that this is a matter that might more appropriately be dealt with by a court of law. The institution of legal proceedings, if so advised, would be at the complainant's own expense. This does not constitute legal advice.

Name: Adv N Melville

Designation: Ombudsman

Date: 29 February 2016