

**IN THE KWAZULU NATAL CONSUMER TRIBUNAL
HELD AT DURBAN**

CASE NO: KZNCT03/21

IN THE MATTER BETWEEN

**KWAZULU NATAL CONSUMER PROTECTOR 1ST PLAINTIFF
NOKWAZI NZIMANDE 2ND PLAINTIFF**

AND

AFRICA WILD TRAVEL CC RESPONDENT

DEFAULT JUDGMENT

Coram:

Ms. A. Sewpersad Presiding member

Ms. P. Ndlovu Member

Adv R. Hand Member

Date of Hearing 6th April 2022

Date of Judgment 23rd April 2022

DETAILS OF HEARING AND REPRESENTATION

1. The matter was set down for a hearing on 6th April 2022 at 24th Floor, 333 Bay House, Anton Lembede Street, Durban.
2. The First Plaintiff is the Office of the KwaZulu- Natal Consumer Protector established in terms of s5 of the KwaZulu-Natal Consumer Protection Act 04 of 2013, represented herein by Ms. D. Moshoehoe.
3. The Second Plaintiff is Ms. Nokwazi Z. Nzimande, the Consumer.
4. The Respondent is Africa Wild Travel CC, a close corporation duly incorporated and registered in accordance with the Close Corporation Act 84 of 1984 under registration number B2006097037, having its principal place of business at 320 Dr Pixley Kaseme Street, Durban, which address it has chosen as its domicilium citandi et executandi.
5. The Consumer appeared in person and the Respondent was in default of appearance.
6. The Respondent was personally served with a notice to attend the hearing on 22nd February 2022, and the Tribunal is therefore satisfied that he is aware of the proceedings and that the matter may proceed in terms of Section 17(1) of the KwaZulu Natal Consumer Protection Act 04 of 2013.
7. The First Plaintiff handed in a bundle of documents which was admitted into evidence.
8. The proceedings were recorded and form part of the evidence and shall not be repeated save for the salient aspects relevant to our finding.

9. The interpreters present were Mr Abednego Babayi Ntokozo and Mr Malusi Mnikathi Gumede.

ISSUE TO BE DECIDED

10. Whether the Respondent's conduct is declared prohibited conduct in contravention of s17 of the Consumer Protection Act 68 of 2008?

SURVEY OF EVIDENCE

NOKWAZI NZIMANDE testified as follows:

11. On 20th December 2019 she together with her family booked a trip to Dubai through the Respondent for a trip scheduled on 7 August 2020 and paid the full amount of R54 000-00(FIFTY-FOUR THOUSAND RANDS) by way of an electronic funds transfer of R27 000-00(TWENTY-SEVEN THOUSAND RANDS) on 20th December 2019 and a further R27 000-00(TWENTY-SEVEN THOUSAND RANDS) on 27th January 2020 respectively.
12. On 16th March 2020 she sent an email to the Respondent with an intention to cancel the trip due to the coronavirus outbreak as she was anxious and unsure of what would transpire in the future. The Respondent advised her against cancellation and suggested that the trip be postponed to a later date at no cost.
13. In view of the ban on international travel to most countries she sent an email to the Respondent again in May 2020, indicating that there was uncertainty around international travel and when the lockdown would end and enquired on her rights of recourse in the event of international travel still being prohibited at the time of her trip and of the implications of her intention to cancel the trip. The Respondent promised to resolve the issue as soon as their offices were open for business after the lockdown.

14. On 9th July 2020 the Respondent sent her an email informing her that, in view of the Covid 19 pandemic, she would unfortunately not be travelling to Dubai, and they suggested that the trip be postponed to a later unknown date. Noting the rise in the spread of the coronavirus globally, she declined to request to postpone the trip to a later date.
15. She received a further email from the Respondent on 13th July 2020 requesting her to change her holiday destination and suggesting that she travel within South Africa between September 2020 and 2021. She again declined and indicated that they were not open to alternatives if they were unable to travel to Dubai in August 2020 as originally planned. On 14th July 2020 she was informed that Management would contact her regarding the matter.
16. Weeks passed without any communication from Management as promised and she sent an email and made a call to the Respondent on 3rd August 2020 and spoke to a Consultant Thandayena and informed her that she received no response from Management. Thandayena informed her that an email had already been sent to her requesting for her banking details for the refund. She immediately submitted her banking details after the discussion as she had not received any emails requesting same. On 5th August 2020 the Respondent sent her an email apologizing for the delay in responding to her email and informed her that they were awaiting details from their suppliers of what cancellation fees would be charged and as soon as that information was obtained, she would be informed accordingly. She was further advised that this process would take longer as the suppliers were currently not working.

17. She requested intervention from the Consumer Tribunal as her trip did not take place due to the Covid 19 pandemic as informed by the Defendant in July 2020.

18. She subsequently received a refund of R25 000-00 (TWENTY-FIVE THOUSAND RANDES) on 2nd November 2020 and was promised that the balance of R29 000-00(TWENTY-NINE THOUSAND RANDES) would be paid during November 2020, however, to date the balance remains outstanding.

ANALYSIS OF EVIDENCE AND SUBMISSIONS

19. Section 17 of the Consumer Protection Act 68 of 2008 provides as follows:

“Consumer’s right to cancel advance reservation, booking or order

17. (1) This section does not apply to a franchise agreement, or in respect of any special-order goods.

(2) Subject to subsections (3) and (4), a consumer has the right to cancel any advance booking, reservation or order for any goods or services to be supplied.

(3) A supplier who makes a commitment or accepts a reservation to supply goods or services on a later date may—

(a) require payment of a reasonable deposit in advance; and

(b) impose a reasonable charge for cancellation of the order or reservation, subject to subsection (5).

(4) For the purposes of this section, a charge is unreasonable if it exceeds a fair amount in the circumstances, having regard to—

(a) the nature of the goods or services that were reserved or booked.

(b) the length of notice of cancellation provided by the consumer.

(c) the reasonable potential for the service provider, acting diligently, to find an alternative consumer between the time of receiving the cancellation notice and the time of the cancelled reservation; and (d) the general practice of the relevant industry.

(5) A supplier may not impose any cancellation fee in respect of a booking, reservation, or order if the consumer is unable to honor the booking, reservation or order because of the death or hospitalisation of the person for whom, or for whose benefit the booking, reservation or order was made.”

20. It is common cause that on 15th March 2020, the President announced a National State of Disaster in terms of the Disaster Management Act 57 of 2002 and on 26th March 2020 the country was placed under lockdown level 5, prohibiting and restricting movement of persons and goods in the Republic and due to the lockdown, the Consumer could not travel to Dubai and was informed accordingly by the Defendant on 17th July 2020.
21. The Covid-19 virus impacted many countries globally, with schools and businesses being closed and thus inevitably affecting contractual obligations nationally and internationally.
22. Our law makes provisions for such circumstance where a *force majeure* causes a contract to become impossible to perform. In the case of *Peters, Flamman & Co v Kokstad Municipality*¹the Court held that: “if a person is prevented from performing his contract by vis major or casus fortuitus...he is discharged from liability.” The terms “force majeure, vis major and casus fortuitus are used interchangeably and refer to an extraordinary event or circumstances beyond the control of the parties, a so-called “act of God.”

¹ 1919 AD 427

23. In the case of *Glencore Grain Africa (Pty) v Du Plessis N.O & others*² the Court held that certain conditions must be fulfilled in order for a force majeure to trigger the type of impossibility that extinguishes a party's contractual obligations. These are:

- a) The impossibility must be objectively impossible.
- b) It must be absolute as opposed to probable.
- c) It must be absolute as opposed to relative, in other words if it relates to something that can in general be done, but the one party seeking to escape liability cannot personally perform, such party remains liable in contract.
- d) The impossibility must be unavoidable by a reasonable person.
- e) It must not be the fault of either party.
- f) The mere fact that a disaster or event was foreseeable, does not necessarily mean that it ought to have been foreseeable or that it is avoidable by a reasonable person.

24. The Covid-19 pandemic has been declared a global pandemic by the World Health Organisation and the effect of the prohibition on international travel would make the performance of the obligations under the contract impossible and would fall under the common law doctrine of force majeure. The general effect of a force majeure is that it extinguishes the obligations owed between the parties and no action for damages for a breach of contract is available to a party to a contract where the other party is unable to perform as a result of the force majeure.

25. In the circumstances the Tribunal finds that the Defendant's conduct is declared prohibited conduct in contravention of s17 of the Consumer Protection Act 68 of

² [2007] JOL 21043 (O)

2008 and that the Consumer is entitled to a refund of the balance of R29 000-00(TWENTY-NINE THOUSAND RANDS).

ORDER

Accordingly, the Tribunal makes the following order:

26. The conduct of the Defendant, Africa Wild Travel CC is declared prohibited conduct in contravention of S17 of the Consumer Protection Act 68 of 2008.
27. The Defendant is ordered to refund the Consumer, Nokwazi Nzimande, the sum of R29 000-00 (TWENTY-NINE THOUSAND RANDS).
28. The above amount is to be paid within 30 days of delivery of this judgment.
29. There is no order as to costs.

ASHA SEWPERSAD

DEPUTY CHAIRPERSON

Mr R. Hand (Member)and Ms. P. Ndlovu (Member) concurred