

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

Case number: **NCT/138658/2020/73(2)(b)**

In the matter between:

NATIONAL CONSUMER COMMISSION

APPLICANT

And

ISMACUBE (PTY) LTD t/a ISMEGA

RESPONDENT

Coram

Ms N Maseti - Presiding Tribunal Member

Prof B Dumisa – Tribunal Member

Mr T Bailey – Tribunal Member

Date of Hearing - 13 May 2021

Date of Order - 22 August 2021

JUDGMENT AND REASONS

THE PARTIES

1. The Applicant is **NATIONAL CONSUMER COMMISSION**, a juristic person established in terms of section 85 of the Consumer Protection Act 68 of 2008 (“the Act”), hereinafter referred to as the “Applicant or the Commission”. The Applicant’s principal place of business is at 1 Dr Lategan Drive, Groenkloof, Pretoria Gauteng. At the hearing, the Applicant was represented by its legal advisor, Mr Joseph Selolo.
 2. The Respondent is **ISMACUBE (PTY) LIMITED**, trading as ISMEGA (BetaTrader), with company registration number 2014/239219/07, hereinafter referred to as “the Respondent” or “ISMEGA”.
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3. The Respondent is involved in the sale of software that monitors the share performance of a companies listed on the Johannesburg Stock Exchange (JSE) for a fee of R21 950.00, which comes with a device, 7-inch tablet, and is inclusive of training rendered to clients. The Respondent's principal business address is at 52 Voortrekker Road, Bellville, Cape Town in the Western Cape province.
4. The Respondent filed an answering affidavit to oppose this application, however, it did not appear at the hearing.

NATURE OF THE APPLICATION

5. The application brought before the National Consumer Tribunal ("the Tribunal") is in terms of section 73(2)(b) of the Act, wherein the Commission, upon concluding its investigation, has referred the complaint to the Tribunal.
6. The Commission believes that the Respondent has engaged in prohibited conduct and requires the Tribunal to determine the correctness of its belief as contained in its founding affidavit and supporting documents.
7. This judgment is based on the documents before the Tribunal as well as submissions made by the parties at the hearing held virtually via MICROSOFT TEAMS on 13 May 2021.

RELIEF SOUGHT

8. In the event that the Respondent is found to have contravened the provisions of the Act, the Applicant requires the Tribunal to make the following order:
 - 1) Declare that the Respondent contravened section 16(4)(a)(ii) of the Act by failing to refund payment received from consumers within fifteen (15) business days;
 - 2) Direct the Respondent to refund the amounts paid by the consumers who duly cancelled the transactions within the prescribed 5 day cooling off-period in compliance with section 16(3) of the Act;

- 3) Declare that the Respondent contravened section 20(2)(a) in the alternative to section 16(3)(b) read with section 16(4)(a)(ii) of the Act;
- 4) Declare that the Respondent contravened section 51(1)(b)(i) of the Act;
- 5) Declare that the Respondent contravened section 20(5) of the Act;
- 6) Declare that the Respondent imposed unfair and unreasonable terms and conditions in the sales agreements in contravention of section 48(1)(a)(ii), 48(2) of the Act;
- 7) Declare that the Respondent contravened section 54(1)(b) of the Act by taking away consumers' right to demand quality service and by excluding rights to warranty; The Commission contends that such conduct also limits consumers' right to receive goods that are fit for purpose in contravention of section 55(2)(a) and (b) of the Act;
- 8) The Respondent pay a fine of not more than R1 000 000.00 or 10% of its revenue; and
- 9) Make any other appropriate order contemplated in section 4(2)(b)(ii) of the Act.

BRIEF BACKGROUND

9. On 16 August 2016, the Applicant initiated an investigation against the Respondent following complaints from various consumers alleging that the Respondent:
 - i. is involved in direct marketing wherein its consultants, acting as agents, approach consumers inducing them to buy an analytic JSE monitoring software ("the software") which comes with a 7-inch tablet;
 - ii. refuses to accept the cancellation and return of these goods even though consumers adhered to the five (5) days cooling-off period prescribed in section 16(3) of the Act;
 - iii. proceeded to register the personal details of consumers affected into its software that monitors the share performance of JSE listed companies despite it being informed of cancellation and demand for refund; and

- iv. imposed unfair and unreasonable terms which invalidate consumers' rights enshrined in the Act.
10. The Applicant asserts that the period in which the Respondent engaged in this conduct is from April 2016 to December 2017. It furnished emails and other documents pertaining to individual consumers' transactions entered into with the Respondent. According to the Applicant, despite numerous attempts by the eight consumers mentioned in the founding affidavit and investigation report ("the consumers") to return the goods, the Respondent has not accepted them stating that registration of such goods has been effected under each consumer's name. It is alleged that the Respondent informed the consumers that, in terms of condition 6.1 of the Sale Transaction's standard terms and conditions, any cancellation is subject to the Copyright Act no. 98 of 1978 and ensuring that the goods are intact.
11. As part of the transaction, the consumers are allegedly entitled to training on the use of the software, strictly following instructions of the Respondent for a period of six (6) months, termed the simulation period¹. According to the Applicant, no such training was provided. The Applicant asserts that the consumers exercised their rights of cancelling the transactions within 5 days of signing the contracts. They informed the Respondent of their intention to cancel and return the goods, and turned away technical agents of the Respondents who visited their premises to open the devices and install the software, and demonstrate how to make use of the software.
12. It is further alleged that the Respondent informed the consumers that within a period of six months, they would benefit from guaranteed average returns of 25% of their contributions, and if the monitoring done through the software did not yield the desired results, the consumers would receive their entire contributions back. This undertaking is on condition that the consumers played on a daily basis following step by step instructions and guidance given by the Respondent.
13. It is alleged that none of the consumers mentioned in the Applicant's founding affidavit have activated or made use of this software and 7-inch tablet to do the monitoring, nor did they receive training as part of the transaction. The Applicant asserts that the

¹ The Respondent stated in the signed contracts that the simulation period is meant for consumers to get to know the stock market and understand the program, page 59 Annexure A1.

consumers made payments varying from R17000.00 to R21 950.00 as initial upfront payments in order to secure the software and the 7-inch tablet.

14. The Respondent was responsible for registering the details of all consumers who purchased the software and 7-inch tablet before monitoring could commence. The Applicant also asserts that the Respondent required the consumers to provide it with their credit card details from which it would deduct an upfront payment of R21 950.00 and monthly fees ranging from R205.00 to R305.00 for a period of six months from the date of signing of the sale transaction.
15. The Applicant stated that although the consumers never made use of the software and the 7-inch tablet following cancellation, their money deducted from their credit cards was not refunded. According to the Applicant, the consumers suffered financial harm to the amount of approximately R129 300.00. The Applicant also contends that the consumers could have earned interest for their money from the time they paid until they filed complaints with the provincial consumer authorities, then with the Applicant.
16. Having investigated these allegations, the Applicant believed that the Respondent contravened the various provisions of the Act as set out more fully below. On 29 August 2019, the Applicant filed an application with the Tribunal, wherein it made various allegations against the Respondent, and requested the Tribunal to determine that the Respondent has engaged in prohibited conduct in violation of section 16(3), 16(4)(a)(ii), 14(4)(ii), 20(2)(a), 20(5), 48(1)(a)(ii), 48(2), 54(1)(b) and 55(2) of the Act.

APPLICABLE LAW

17. Section 1 of the Act defines “goods” to include

“(c) any literature, music, photograph, motion pictures, game, information, data, software, code or other intangible product written or encoded on any medium, or a licence to use any such intangible product.”

18. The software including the tablet, be it a laptop, 7-inch Android or tablet, that are the subject of the transaction in question falls within this definition.

19. Section 16(3) of the Act provides

“A consumer may rescind a transaction resulting from any direct marketing without reason or penalty, by notice to the supplier in writing or another recorded manner and form within five business days after the later of the date on which-

(a) The transaction or agreement was concluded; or

(b) The goods that were the subject of the transaction were delivered to the consumer”.

20. The Applicant furnished evidence demonstrating the dates when the consumers entered into the transactions with the Respondent, record of notification sent to the Respondent concerning cancellation within five days of conclusion of such transactions. The Respondent has confirmed in writing that it is involved in direct marketing, and that cancellation is subject to condition 6 of its Standard Terms and Conditions contained in the agreements signed with these consumers, of which condition is regulated by cooling-off provisions of the Act and the Copyright Act no.98 of 1978 (“the Copyright Act”).

21. Section 16(4)(a) of the Act provides

“A supplier must return any payment received from the consumer in terms of the transaction within 15 business days after -

(i) Receiving notice of the rescission, if no goods had been delivered to the consumer in terms of the transaction; or

(ii) Receiving from the consumer any consumer any goods supplied in terms of the transaction.”

22. The Applicant asserts that the Respondent refuses to accept cancellation and therefore failed to return payment to the consumers it concluded transactions with.

23. Section 20(2) of the Act provides that *“the consumer may return goods to the supplier, and receive a full refund of any consideration paid for those goods, if the supplier delivered-*

(a) Goods to the consumer in terms of an agreement arising out of direct marketing, and the consumer has rescinded that agreement during the cooling-off period, in accordance with section 16”.

24. The Respondent has, in the signed agreements, indicated that it embarks on direct marketing in the sale of its software programme together with the tablet (7 inch, through use of marketing agents who approach consumers and offer products and explain the positive benefits arising from it.

25. Section 20(5) of the Act provides

“Upon return of goods in terms of this section, the supplier must refund to the consumer the price paid for the goods, less any amount that may be charged in terms of subsection (6).

26. Subsection 20(6) of the Act deals with the rights of the supplier to impose a charge depending on whether the returned goods were in their original condition, consumed or depleted by use whilst in the consumer’s possession.

27. Section 48(1)(a)(ii) of the Act prohibits a supplier from offering to supply or enter into an agreement to supply, any goods or services-

“on terms that are unfair, or unreasonable or unjust.”

28. The Applicant contends that the Respondent’s terms and conditions are unfair as they favour the Respondent at the expense of consumers who purchased the goods and services.

29. Furthermore, section 48(2) of the Act provides

“.....a transition or agreement, a term or condition of a transaction or agreement or a notice to which a term or condition is purportedly subject, is unfair, unreasonable or unjust if-

(a) It is excessively one-sided in favour of any person other than the consumer or other person to whom goods or services are to be supplied;

- (b) The terms of the transaction or agreement are so adverse to the consumer as to be inequitable;*
- (c) The consumer relied upon a false, misleading or deceptive representation, as contemplated in section 41 or a statement of opinion provided by or on behalf of the supplier, to the detriment of the consumer”.*

30. Section 54(1)(b) of the Act provides

“When a supplier undertakes to perform any services for or on behalf of the consumer, the consumer has a right to-

- (b) The performance of the services in a manner and quality that persons are generally entitles to expect”.*

31. Section 55(2) of the Act provides that every consumer has a right to receive goods that-

- “(a) are reasonably suitable for the purposes for which they are generally intended;*
- (b) are of good quality, in good working order and free of any defects”.*

A THE HEARING

- 32. The Respondent was not represented at the hearing. However, it had filed its answering affidavit on 3 December 2019, albeit late and outside the timelines prescribed in Rule 13(2) of the Tribunal’s Rules. Although the Respondent was ordered to file a condonation application on 3 December 2019, it failed to do so. Instead, the Respondent lodged its condonation application with the Tribunal on 31 January 2020. The Tribunal granted condonation of the Respondent’s late answering affidavit on 29 June 2020.
- 33. Upon verification with the Tribunal’s Registrar, the panel was satisfied that the Respondent was properly served with the notice of set down through the email, being the method of service it consented to in terms of Rule 30 of the Tribunal’s Rules.
- 34. The Applicant apprised the panel that it was ready to argue its case, as this matter was previously postponed, on 19 November 2019, to enable the Respondent to file its answering affidavit and a condonation application. At that stage, the Applicant asserts

that it had applied for default proceedings in terms of Rule 25(3), due to the Respondent's failure to comply with the Rules.

35. In view of the above, the panel proceeded to hear the merits.

Applicant's Submission

36. At the commencement of its arguments, the Applicant contended that the Respondent's answering affidavit was filed late and ought not to have been considered by the Tribunal. Upon being made aware that the lateness was condoned, the Applicant contended that the Tribunal had not afforded it the opportunity to respond to the allegations made against it in the Respondent's answering affidavit. The Applicant argued that its replying affidavit was filed late, due to relocation of the Respondent to Cape Town. The Applicant relied on the *"Plascon Evans Paints v Van Riebeeck Paints matter"*² in arguing that allegations contained in the answering affidavit, and not disputed although not formally admitted, cannot be denied and may be regarded as admitted. It further stated that there are statements made in the Respondent's affidavit on which it wishes to respond and rely on in its submissions.

37. Upon the Tribunal panel drawing the Applicant's attention to Rule 14(4) of the Tribunal's Rules of Proceedings, the Applicant agreed to proceed with the merits on the understanding that it denied any new issues and points of law raised in the answering affidavit.

38. Rule 14(4) provides

"If the Applicant does not file a replying affidavit, the Applicant will be deemed to have denied each new issue raised in the answering affidavit and each allegation of fact relevant to each of those issues."

39. The Applicant asserts that the Respondent is involved in direct marketing of the software through the use of marketing agents who approach consumers with the intention to sell them the software. The software known as Beta Trader software is sold together with a 7-inch tablet. The Respondent registers the software and installs it into the tablet given

² The 1984 decision of the Supreme Court of Appeal in *Plascon Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd*, which guides the courts in determining which party's version should prevail when disputes of fact are found in motion proceedings.

to the consumer as part of the sale transaction. The Applicant asserts that, in addition, the Respondent provides training on stock trading using this software, over a six month-period, known as the simulation period. For this, the consumer is required to pay a subscription fee of R305.00 payable on a monthly basis over seventy two (72) months.

40. A purchase price of R21 950.00 is deducted from the consumer's credit card soon after the consumer signed the contract.
41. The transaction arises from direct marketing, and a cooling-off period of five business days prescribed in section 16 of the Act, upon rescission of the transaction or agreement. Such rescission is a unilateral act of the consumer and does not require the Respondent's agreement.
42. The following consumers entered into individual transactions with the Respondent since April 2016:
 - a. **Mr Marcus van der Merwe** – signed an agreement on 6 December 2016, and cancelled it, by email, on 12 December 2016, which was within the prescribed 5 days cooling off period.
 - b. **Mr J Lourens** – signed the contract on 24 August 2016, and rescinded it on 24 August 2016 by email sent to the Respondent's email addresses given to this consumer. The Respondent proceeded to deduct R21 950.00 on 25 August 2016. Mr Lourens contacted the Respondent telephonically to follow up on his emails on cancellation of the contract. The Respondent's employee, Lizelle, apprised him that the relevant salesperson, Francois, has not handed over the email. On 26 August 2016, the Respondent replied to the emails and asked for reasons for cancellation. On 29 August 2016, Mr Lourens drove to the Respondent's office to deliver the products, but they allegedly refused to see him. On 30 August 2016, the Respondent sent an email to Mr Lourens informing him that it makes use of direct marketing and that the products were already registered on his name on 24 August 2016.
 - c. **Mr Nico Geldenhuys** – signed the contract on 3 November 2016. On 7 November 2016, he sent an email to Marcel (the Respondent's agent) complaining about the amount of R21 950.00 deducted on his credit card and apprised him that he will

return the tablet to the Respondent's office. On the same day, he was visited by the Respondent's technician, Jacques, to set up the tablet but Mr Geldenhuys informed him not to and should leave since he is negotiating cancellation. On 9 November 2016, the Respondent replied to his email asking him to provide reasons for cancellation.

- d. **Mr Louis de Jager** – signed the contract on 24 November 2016 and an amount of R21 950.00 was deducted from his credit card account on 25 November 2016 despite notice of cancellation given in writing on 24 November 2016.
- e. **Mr de Lange** - signed the contract on 9 December 2016, and paid R21 950.00 for the software and 7-inch tablet, as well as R275.00 for administrative service.
- f. **Mr Walter Kleu** – signed the contract on 5 April 2016 following a call from Stefan of the Respondent. Amounts of R21 950.00 and R275.00 were deducted from his credit card account. The total amount deducted as alleged is R24 900.00. On 6 April 2016, he contacted Stefan to inform him about his intention to cancel the transaction, which notice was also sent by WhatsApp messaging. Since the consumer resides in Despatch, near Port Elizabeth, the Respondent's representative, Stefan, informed him that he had already left Port Elizabeth.
- g. **Mr Trevor Momberg** - signed the contract on 2 December 2016, and paid R21 950.00 which was deducted on the same day from his credit card account. He contacted the Respondent telephonically on 5, 6 and 7 December 2016 and notified it about his wish to cancel the transaction. On 7 and 8 December 2016, he sent emails wherein he cancelled the contract. On 13 December 2016, the Respondent's representative, Chris Swart, sent an email to Mr Momberg requesting him to withdraw his statement on Hello Peter and the complaint with the Applicant, as the matter can be resolved amicably. The email also confirmed that this consumer followed correct cancellation proceedings that complied with its cancellation clauses and the Act. The Applicant advised that this consumer successfully returned the goods and received a full refund.
- h. **Mr Isaiah Solomon Jina** – signed the contract on 8 August 2016 and paid R17 000.00 on the same day. He sent an email to cancel the contract on 10 August 2016.

43. The Respondent's contention of infringement of the Copyright Act, has not been substantiated with any evidence, and even if there was, it is a civil matter that the Respondent ought to have pursued. No action was taken by the Respondent in terms of sections 24 and 27 of the Copyright Act. This argument must be dismissed.
44. The terms and conditions contained in the Respondent's contracts override consumers' rights conferred in several provisions of the Act.

Respondent's Submission in its Answering Affidavit

45. The Respondent submitted that section 16 of the Act does not apply to the transactions in question. Instead, these transactions are governed by the provisions of the Electronic Communications and Transactions Act, 2002 ("the ECT Act").
46. The Respondent also contends that these transactions cannot be rescinded because the goods have been registered under the consumers' names, who had access to the content which is the intellectual property of the Respondent. Based on this, the consumers breached condition 6 of the Respondent's standard terms and conditions which subject cancellation on avoidance of the Copyright Act's infringement.
47. Section 55 of the Act is not applicable as no facts argued by these consumers on suitability and safety of these goods. The Respondent contends that the Applicant's Investigator overplayed his powers.
48. The Respondent contends that allegations based on section 54 of the Act concerning quality of service have never been raised by the consumers. It also rejects allegations made in relation to violations of section 48(1) and 48(2) of the Act.

ANALYSIS OF EVIDENCE

Cooling-off period in terms of section 16(3) of the Act

49. The Respondent made an unsubstantiated contention that section 44 of the ECT Act applies to the transactions entered into with the consumers.

“The Applicant blatantly ignored Section 16(1) of the CPA which clearly states that this section 16(1) does not apply to transactions if section 44 of the Electronic Communications and Transactions Act (“the ECT Act”) applies to that transaction.”

“.....it is clear that the consumers, although the transactions fall under the ambit of the ECT Act, ignored that consumers were never entitled to return the goods as the goods were opened”³.

50. The Applicant rejects the above unsubstantiated assertions on the basis that these goods fall within the ambit of section 1 of the Act, which fulfill the definition of goods. Furthermore, the ECT Act regulates electronic transactions and data messaging. The Applicant argues that the Respondent does not hold a licence granted in terms of the ECT Act, which authorises it to provide electronic transactions. The sale transactions in question arose from direct marketing of software and a 7-inch tablet supplied to consumers for a price of R21 950.00. The transactions entail training on how to use the software to engage in fictitious stock trading with additional monthly payments of R305.00. These sale transactions fit well within the definition of transaction in section 1 of the Act, which provides:

“a transaction means –

(a) In respect of a person acting in the ordinary course of business –

- (i) An agreement between or among that person and one or more other persons for the supply or potential supply of any goods or services in exchange for consideration; or*
- (ii) The supply by that person of any goods to or at the direction of a consumer for consideration.”*

51. The consumers did not enter into an electronic transaction as contemplated in the ECT Act⁴. Furthermore, the Respondent does not dispute that the Act is applicable in regulating these transactions, as it states in paragraph 93 of its answering affidavit:

³ Paragraphs 92 and 94 of the Answering Affidavit.

⁴ Section 2(1) provides “The objects of the ECT Act are to enable and facilitate electronic communications and transactions in the public interest”. Section 1 defines - Electronic communication means communication by means of data messages. Transaction means a transaction of either a commercial or non-commercial nature, and includes the provision of information and e-government services.

“The Applicant further failed, refused and/or neglected to read Section 16(4)(a)(ii) together with Section 20(4)(a) wherein it is clearly stated that in the event that goods are returnable, the goods must be returned at the consumer’s risk and expense.”

52. It clearly references to the provisions of the Act relating to the cooling-off period and conditions of return of consumers’ payments. The Respondent’s condition 6.1 of its standard terms and conditions imposed on these transactions subjects cancellations of the transactions to the provisions of the Act.
53. In view of the above, the Respondent’s assertion stated above is rejected.
54. The Respondent failed to furnish the Tribunal with evidence demonstrating that the elements of section 16(3) of the Act were not fulfilled for purposes of lawful cancellation of the transactions.
55. All the above-mentioned transactions entered into between the consumers and the Respondents resulted from direct marketing. These consumers were contacted telephonically by various representatives of the Respondent who requested meetings with each of them and offered the software and the 7-inch tablet.
56. The Respondent also confirmed in all its correspondences with the consumers and the Applicant that it makes use of direct marketing. In response to the questionnaire sent by the Applicant, the Respondent clarified that its software does not speculate stock trading but provides a charting platform on market indices. It went on to explain that:

“as per Consumer Protection 68 of 2008 we make use of direct marketing. Therefore, and also stated in our agreement’s terms & conditions, a consumer may rescind from the agreement within 5 business days from signing the agreement”.
57. Evidence of rescission of the transactions and amounts paid by each consumer has been furnished to the Tribunal, and demonstrates that cancellation was done in writing within the prescribed 5 business days. The Respondent did not refute evidence of cancellation, except to merely deny allegations throughout its answering affidavit

without providing facts to refute specific evidence at the Tribunal's disposal and as contained in the Applicant's Investigation Report⁵.

".....it is denied that all complainants duly made payments, that each complainant tendered return of the software and that the cooling-off period was applicable to each of the complainants".⁶

58. The Respondent failed to furnish evidence to support the above statement. The Respondent also failed to provide particulars on how each consumer failed to comply with the cooling-off period and refute evidence of payment presented to the Tribunal.
59. The above transactions complied with section 16(3) of the Act.
60. However, to prove the contravention of section 16(4) and to compel the Respondent to return payments made by consumers, the Applicant must prove that the goods supplied to the consumers were received by the Respondent.
61. Evidence presented before the Tribunal evinced that the Respondent received from:
- 62.1 Mr Momberg - The Respondent confirmed by email and in its answering affidavit that this consumer's cancellation was successful, and the goods were received. It also stated that the consumer's payment was refunded. The Applicant also confirmed this and stated that this part of the referral not be pursued further; and
- 62.2 Mr Geldenhuys – the Respondent confirmed the meeting held with this consumer on 9 November 2016 regarding cancellation and sent an email asking about the reasons for cancellation. On 11 November 2016⁷, the Respondent confirmed receipt of cancellation and indicated that it is finalising processing the refund *"within 15 days in conclusion of the proceedings. We hope this finds your approval and hope to hear from you shortly so that we may finalise this matter swiftly"*. On 15 November 2016, this consumer travelled from Somerset West to

⁵ Report is annexed to the Applicant's Founding Affidavit.

⁶ Refer to par 26 of the Answering affidavit.

⁷ Email sent from support@ismega.co.za; signed by ISMEGA Management – ISMEGA Client & Support Team.

Bellville to hand deliver the 7-inch tablet as arranged with the Respondent but was advised by the receptionist that only Mr Jaco Swanepoel is allowed to accept the tablet. He expressed his disquiet about this and waste of travel expenses. The Respondent's representative, Mr Swanepoel failed to avail himself again on 16 November 2016 despite having been called by the Respondent's receptionist. He undertook to collect the device from the consumer in Somerset West but never did.

62. Other consumers made efforts to return the goods to the Respondent. However, a lack of cooperation and failure to respond to their requests impeded them from successfully returning the goods. It must be born in mind that some consumers reside outside of the Western Cape and will have to rely on cooperation of the Respondent to return the goods. Specific circumstances surrounding the return of the goods are discussed hereunder.
63. Mr van der Merwe was unable to return the device and the software purchased because the Respondent apprised him that the goods are registered on his name. He informed them in writing that the goods are not tampered with, still in the original condition and sealed. Return of the goods was unsuccessful due to the Respondent's refusal to comply with condition 6.1 of its standard terms and conditions.
64. Mr Lourens drove to the Respondent's offices in Bellville to deliver the tablet, but the Respondent refused to see him. Instead, it sent him an email on 30 August 2016 asking about the reason for cancellation and informed him that it strives to meet the provisions of the Act hence feedback is crucial. The consumer incurred travel expenses to deliver the tablet but the supplier refused to meet him to collect the goods.
65. The Respondent contends in its answering affidavit that Mr de Jager's complaint be dismissed on the basis that the Applicant's investigation certificate does not cover the period when Mr de Jager signed the contract, namely, April 2016. The Respondent does not provide any legal provision or argument upon which it relies for this assertion. An inspector appointed and issued with a certificate in terms of section 88(1) of the Act is not limited to considering information on transactions entered into from the date in which his or her appointment was made. Conversely, no limitations were imposed on the inspector except due consideration of section 116 of the Act, which prohibits a referral

to the Tribunal if such referral is made more than three years after the omission that is the cause of the complaint.

66. The other consumers were unsuccessful in returning the tablets to the Respondent because:
- i. The Respondent apprised them they are “*not entitled to cancel their contracts*” as the software and the tablet are registered in their names; and
 - ii. They may have “*opened and altered the tablet*”, and gained access to its intellectual property.
67. There was no evidence of such tampering with the goods and undue access to the Respondent’s intellectual property. The affected consumers confirmed in writing within the cooling-off period that the goods were in the original condition. Furthermore, the Respondent directed consumers to charge the tablets while waiting for its technicians to visit them for installation and training. None of these consumers allowed technicians to install the software or provide training because they all contacted the Respondent’s representatives within hours and/or a day after signing of the contract that they decided to cancel. These cancellations were mainly fuelled by huge amounts of R21 950.00 debited at once, from their credit card accounts contrary to their understanding based on the Respondent’s offer.
68. Notwithstanding the above, the Respondent cannot be found to have contravened section 16(4)(a)(ii) as it has not received the 7-inch tablets delivered to the consumers.
69. Furthermore, two consumers, Mr J Lourens and Mr de Lange served cancellations, by email, on the Respondent within hours of signing the contracts as alleged by the Applicant. Such cancellations were valid in terms of section 16(3). Rescissions contemplated in section 16(3) do not require mutual agreement. However, as argued above, the Respondent ignored the written cancellations and proceeded to collect the huge amounts from these consumers in violation of section 16(4)⁸, which provides:

“A supplier must not –

⁸ Refer to the Applicant’s Founding Affidavit where it asked the Tribunal to make any order appropriate in terms of section 4(2)(b)(ii) of the Act.

(b) Attempt to collect any payment in terms of the rescinded transaction, except as permitted in terms of section 20(6).

70. The Applicant asserts that the conduct of the Respondent is also in violation of section 20(2)(a). Under this section, the consumer is expected to return the goods to the supplier and obtain a full refund if the agreement is rescinded in compliance with section 16. The question that arises is whether the consumer is under an obligation to return the goods before it can get a full refund.
71. Given the reasons advanced and the actions displayed by the Respondent, the consumers would not have succeeded to return the goods. This is evident by those consumers who took the risks and incurred expenses by travelling to the Respondent's offices in Bellville, namely, Mr Lourens and Mr Geldenhuys, to hand deliver the goods. They did not succeed, as employees of the Respondent refused to accept receipt of the goods. The Respondent informed these consumers that they are not entitled to rescind the transactions. Consequently, the consumers were prevented from returning the goods and claiming their refunds.
72. The actions of the Respondent impeded the consumers from exercising their rights conferred in section 16(3) and 20(2)(a) of the Act. The exercise of consumers' rights in the latter is subject to subsection 20(4)(a) which requires that the return of goods be at the consumer's risk and expense.

".....it is clear that the consumers, although the transactions fall under the ambit of the ECT Act, ignored that consumers were never entitled to return the goods as the goods were opened"⁹.

73. The Respondent contracted out of its obligations stated in condition 6.1 which allows consumers to cancel or rescind transactions if such rescission complies with section 16(3) of the Act. All these consumers contacted the Respondent telephonically and in writing to cancel the transaction and make arrangement for returning the tablet. Some drove to the physical offices of the Respondent to hand deliver the goods. The Respondent required reasons for cancellation using the provisions of the Act, which clearly place no obligation on the consumer to explain the reason for cancellation.

⁹ Paragraphs 92 and 94 of the Respondent's Answering Affidavit.

74. The Respondent's responses to the Applicant contradict its practice. This is evidenced by its response to the questionnaire¹⁰:

"2.82. If a consumer requests his cancellation within basis of the Cancellation proceedings of the agreements and guidelines as per the CPA 68 of 2008 we accept them. As stated 2.81. about 10% of our new clients request cancellation".

Evidence of section 14(4)(ii) of the Act

75. The Applicant failed to make a case on how these transactions should be interpreted as fixed term agreements. The Respondent refutes the application of this section, as it characterises its transactions as "sale agreements" and that it *"does not deal with fixed-term agreements"*.¹¹ This allegation is dismissed.

Evidence of violation of Section 55(2) of the Act

76. The Applicant failed to deduce compelling evidence on the applicability of section 55(2) of the Act and how it has been contravened. The Respondent contends that no consumer complained about the suitability or safety of its products, and the allegation is misplaced or misunderstood. No further particulars were given by the Applicant on how this section was violated. The allegation is, therefore, dismissed.

Evidence of violation of Section 54(1)(b) of the Act

77. There was no evidence showing that the Respondent failed to provide service of a standard and quality expected by the consumer. The Applicant seems to argue that the Respondent required consumers to sign terms and conditions that are unfair. These are also raised under section 48 of the Act below.
78. These consumers have not allowed the Respondent to provide training which was part of the transaction because they rescinded the agreements in terms of section 16(3) of the Act. This allegation is dismissed.

¹⁰ Response to the questionnaire filed with the Applicant during its investigation.

¹¹ Paragraph 51 of the Answering Affidavit.

Evidence of violation of section 48 (1)(a)(i) and 48(2) of the Act

79. The Applicant contends that certain terms and conditions of the agreements signed between the Respondent and the consumers are one sided and in favour of the Respondent. In particular, condition 8.1 gives the Respondent unfettered discretion to vary services to be rendered to the consumer without consulting a consumer. Furthermore, Condition 9.1.1 gives the Respondent the discretion to terminate services if unable to offer such services without notifying the consumer.
80. The Respondent contends that the allegation lacks particularity and failed to comprehend them. In support of this, the Respondent argues that the Applicant does not specify which agreement contains such clauses, and what specific allegations made by these consumers in relation to contract terms. It also stated that its terms and conditions are not one sided.
81. The question that arises is whether the Applicant may add particulars to the complaints lodged by the complainants, or it needs to initiate an investigation of its own accord to focus on new issues uncovered during the investigation. This is what the Respondent seems to be challenging although it was not explicit.
82. The Constitutional Court clarified the question of validity of a referral made by the Competition Commission to the Competition Tribunal, wherein the referral goes wider than the complaint on which it is based. The Constitutional Court stated that¹² –
- “The Commission is entitled to refer the prohibited practices that it uncovers during its investigation. It is unnecessary for it to amend the initiating complaint or prepare a new initiating complaint each time it discovers new prohibited practices.”*
83. In line with this principle, the Applicant is entitled to add new particulars to a complaint submitted by a third party without having to initiate a new complaint.
84. In determining whether these conditions referred to above are unfair and unreasonable insofar as they do not balance discretion between the parties, it appears to be so. If

¹² Paragraph 48.3 in *The Competition Commission v Yara SA (Pty) Ltd, Omnia Fertiliser Ltd and Sasol Chemical Industries (Pty) Ltd*, Case no: CCT 81/11.

these conditions were to be implemented as they are, the consumer may be prejudiced or harmed by the actions of the Respondent as articulated in these conditions.

85. Consequently, the offending conditions must be removed to ameliorate potential harm to consumers. The said conditions are not consistent with the objectives of the Act and the provisions of section 48 of the Act.

Evidence of violation of section 51(1)(b)(i) of the Act

86. The Applicant asserts that the Respondent violated this section on the basis of condition 3.1 of the Standard Terms and Conditions signed by the consumers. To support this claim, the Applicant contends that this condition “*exonerates the Respondent from providing services of good quality*”. The essence of its allegation is that the Respondent contracts out of its obligation. Therefore, the offending terms and conditions must be removed or amended. The Respondent rejects this concern.
87. The Applicant argues this again under section 48 of the Act, stating that this clause exonerates the Respondent from “*providing services or demand by the consumer to provide services of good quality*”.
88. It appears the Applicant is concerned about the future performance of service by the Respondent. Since the Respondent is involved in the sale of the software and the tablet to which the software must be installed, it is not clear how section 51 is contravened. If the goods do not perform as expected or training rendered is not up to standard, then the consumer may lodge a complaint in terms of section 55 or 54 of the Act to enforce its rights. This allegation is dismissed.

CONCLUSION

89. In view of the above, the Respondent appears to have contravened section 16(4)(b) of the Act¹³ by collecting payments of R21 950.00 from Mr J Lourens and Mr de Lange despite them having rescinded their transactions in line with section 16(3) of the Act.
90. The Respondent contracted out of its obligation stated in condition 6.1 of its standard terms and conditions, which allows consumers to cancel or rescind transactions if such rescission complies with section 16(3) of the Act. The breach is evident by it registering

¹³ As pleaded by the Applicant based on section 4(2)(b)(ii) of the Act.

all those consumers mentioned in this judgment, ignoring lawful rescissions and stating in its answering affidavit that the consumers are not entitled to return the goods. This impeded these consumers' rights provided in section 16(3) and 20(2)(a) of the Act.

ADMINISTRATIVE FINE

91. The Applicant requested the Tribunal to impose an administrative fine of R1 000 000.00 or 10% of the Respondent's revenue. It justified this quantum based on:
- i. Huge amounts involved in the transactions that the Respondent enters into with consumers;
 - ii. Financial harm suffered by consumers who could have earned interest on their money that is with the Respondent;
 - iii. The period of the conduct, which covered 2014 until 2017. Evidence deduced only covers April 2016 until December 2016; and
 - iv. Potential widespread of the Respondent's conduct, some of which not formally reported or could not meet the legal requirements due to limitations in bringing action.
92. Having considered that it is the first time the Respondent contravened the Act, the administrative fine requested by the Applicant is quite excessive. The Applicant did not furnish evidence of revenue earned from this business activity to ascertain whether such amount is possible and if the Respondent can afford it. Furthermore, the Respondent cooperated with the Applicant if one considers responses provided to questions raised by the Applicant during investigation. The Applicant has not made a case of lack of cooperation by the Respondent except the delay in providing its response. The Respondent also contended in its Answering Affidavit that the fine is too high and harsh considering the allegations and its responses. The Applicant had furnished no additional facts to justify a maximum administrative fine in line with all the factors stipulated in section 112(3) of the Act.
93. I therefore deem it appropriate for the Tribunal to impose an administrative fine of R500,000.00.

ORDER

94. Accordingly, the Tribunal makes the following order:

94.1 The Applicant's allegations concerning contraventions of sections 14(4)(ii), 16(4)(a)(ii), 20(5), 51(1)(b)(i), 54(1)(b) and 55(2)(a) of the Act are dismissed;

94.2 The Respondent contravened the following provisions of the Act:

94.2.1 Sections 16(3) read with section 20(2)(a);

94.2.2 Section 16(4)(b); and

94.2.3 Section 48(1) and 48(2).

94.3 The Respondent must reimburse each of the following consumers the money each paid for the software and 7-inch tablet, within four (4) months from the date of issue of this order:

94.3.1 Mr Marcus van der Merwe – an amount of R21 950.00 paid on 6 December 2016;

94.3.2 Mr Nico Geldenhuys – an amount of R21 950.00 paid on 7 November 2016;

94.3.3 Mr Johan de Lange – an amount of R21 950.00 paid on 9 December 2016;

94.3.4 Mr Jacobus Johannes Lourens – an amount of R21 950.00 paid on 25 August 2016.

94.3.5 Mr de Jager - an amount of R21 950.00 paid on 25 November 2016;

94.3.6 Mr Walter Steward Kleu – amount of R24 900.00 paid on 5 April 2016;
and

94.3.7 Mr Solomon Jina – an amount of R17 000 paid on 8 August 2016.

94.4 In terms of section 112 of the Act, and having considered all the circumstances of this case, the Tribunal imposes an administrative fine of R500 000.00 (Five Hundred Thousand Rand), payable within six months from the date of this order.

The fine is payable to the National Revenue Fund with the following banking details:

Account Holder: The Department of Trade and Industry

Bank Name: Standard Bank

Account Number: 370650026

Account Type: Business Current Account

Branch: Sunnyside

Branch Code: 051001 (electronic payments), alternatively Code: 010645

94.5 The Respondent is interdicted from any further breaches of the Act; and

94.6 There is no order made as to costs.

THUS DONE IN CENTURION ON THIS 22nd DAY OF AUGUST 2021

[signed]

Ms N. Maseti

Presiding Tribunal Member

Prof B Dumisa and Mr T Bailey concurring.

Authorised for issue by The National Consumer Tribunal

National Consumer Tribunal

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