

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

Case number: **NCT/78117/2017/75(1)(b)**

In the matter between:

SURE MPOFU

APPLICANT

and

TERRY'S AUTO

RESPONDENT

Coram:

Adv. J Simpson – Presiding member

Prof. J Maseko – Member

Mrs H Devraj – Member

Date of Hearing – 29 June 2017

JUDGMENT AND REASONS

APPLICANT

1. The Applicant in this matter is Mr Sure Mpofu, a major male (hereinafter referred to as “the Applicant”). Mr Mpofu was not present at the hearing but was assisted throughout the application process and represented at the hearing by Mr Glen Nel and Mrs Debra Nel. Mr and Mrs Nel are not legal representatives. Their exact relationship to Mr Mpofu and why they are representing him in this matter is unknown. They did however submit a contract, ostensibly signed by Mr Mpofu, providing them with the authority to represent him in these proceedings.

RESPONDENT

2. The Respondent is Terry's Auto, a dealer in used vehicles (Hereinafter referred to as "the Respondent"). At the hearing the Respondent was represented by its owner (the sole proprietor), Mr Terry Pappalardo.

APPLICATION TYPE

3. This is an application in terms of Section 75(1)(b) of the Consumer Protection Act 68 of 2008 ("the CPA").
4. Section 75(1)(b) of the CPA states the following –

Referral to Tribunal

75. (1) If the Commission issues a notice of non-referral in response to a complaint, other than on the grounds contemplated in section 116, the complainant concerned may refer the matter directly to—

(a) the consumer court, if any, in the province within which the complainant resides, or in which the respondent has its principle place of business in the Republic, subject to the provincial legislation governing the operation of that consumer court; or

(b) the Tribunal, with leave of the Tribunal.

5. In an application of this nature the Tribunal must therefore first consider whether it will grant the Applicant leave to hear the matter. If the leave is granted then the Tribunal will consider the main merits of the Application.

BACKGROUND

6. The parties provided very little information to the Tribunal by means of the application and the answering affidavit. From what the Tribunal can piece together, Mr Mpofu purchased a 2000 model Opel Astra motor vehicle from the Respondent on 15 November 2012. The vehicle had

certain unknown defects. The Respondent refused to repair the defects and Mr Mpofu had the vehicle repaired by another party being Auto Mate Green. No further material information was provided.

7. The Applicant lodged a complaint with the NCC in February 2013. They were notified by the NCC on 1 February 2014 that the matter was referred to the Motor Industry Ombudsman (MIO). The MIO issued a ruling in May 2016 finding in the Applicant's favour. The Respondent refused to comply with the ruling. In March 2017 the NCC issued a letter stating that it would not be referring the matter further and it was closing its file.
8. The application before the Tribunal was filed in March 2017.

APPLICATION FOR LEAVE

9. Section 75(1) of the Act requires that the National Consumer Commission (NCC) issues a notice of non-referral in response to a complaint as a pre-requisite for a referral in terms of that section to the Tribunal.
10. The letter of non-referral by the NCC is dated 8 March 2017 and states the following –

The National Consumer Commission has assessed your complaint and determined that the Commission does not have the jurisdiction to pursue matters involving claims for compensation for damages. Furthermore, the incident in dispute has occurred more than four years ago and as a result has prescribed. Further to that, this Office determined that you had your vehicle repaired by a third party other than Terry's Auto. As a result you have waived your right to recourse. We advise that you appoint an attorney to lodge a civil claim with a Court of Law.

Regrettably, we therefore have to issue you with a notice of non-referral and advise that we are closing the file.

11. The formal Notice of Non-referral states that the claim is older than three years and will therefore not be referred.
12. In the matter of *Coertze and Burger v Young*¹ the Tribunal considered the factors which must be evaluated regarding leave. The Tribunal held that the following two factors should be considered:
 - 12.1 The Applicant's reasonable prospects of success with the referral; and
 - 12.2 Whether the matter is of substantial importance to the Applicant or the Respondent.
13. It is firstly very clear that the matter is of substantial importance to the Applicant. He has gone to a great deal of effort to lodge the complaint with various entities including the NCC and the Motor Industry Ombudsman and then to pursue it further with the Tribunal.
14. The prospects of success however require more extensive consideration.

Prescription

15. The parties both raised the issue of prescription as per the letter from the NCC.
16. Section 116 of the CPA states the following –

Limitations of bringing action

116.

(1) A complaint in terms of this Act may not be referred or made to the Tribunal or to a consumer court more than three years after—

- (a) the act or omission that is the cause of the complaint; or
- (b) in the case of a course of conduct or continuing practice, the date that the conduct or practice ceased.

¹ NCT/7142/2012/75(1)(b)&(2).

17. On the face of it, the Applicant's claim has prescribed. It is however clear from the time lines provided in paragraph 7 above that the complaint was lodged in good time with the NCC. The dispute was then being handled by the NCC over a number of years which resulted in the Applicant only being able to proceed to the next step of the process, being the Tribunal, more than three years after the original cause of action arose.
18. The Tribunal has been confronted with this type of issue previously² and has provided clear guidance to the NCC in this regard, which the NCC appears not to have taken note of. It would be unreasonable and not in accordance with the aims of the CPA to hold a consumer responsible for the delays arising from having followed the complaint process as required by the CPA.
19. The period from when the complaint was lodged with the NCC (February 2013) until it issued a non-referral letter (March 2017) is regarded as having interrupted the prescription period of three years. The Applicant's claim has therefore not prescribed.

Prospects of success on the merits

20. The Applicant placed the information, mentioned in paragraphs 6 and 7 above, before the Tribunal and nothing else of any material nature. The Applicant then requested the Tribunal to make an order enforcing the ruling by the MIO and to award Mr Mpofu an amount of R25 000.00 plus interest for expenses incurred. A copy of this ruling by the MIO, did not form part of the Applicant's pleadings. The Applicant also did not provide any information or substantiation for the claim of R25 000.00 or any further information regarding the defects on the vehicle or the costs to repair it.
21. The Tribunal is therefore faced with a situation where it has no material information whatsoever on which to assess whether there are any reasonable prospects of success. The Tribunal would in any event never simply make an order enforcing a ruling by the MIO or make an award for R25 000.00.

² See NCT/36112/2016/ Lazarus and Sarkin v RBD Project Management and Vicostone

22. Although the Tribunal follows an inquisitorial approach, it has to fiercely guard against any perception of bias and must be independent at all times³. It cannot be seen to assist parties to such a degree that results in the perception that it will provide legal advice to parties in preparing and presenting their case to the Tribunal. The parties have to at least provide some logical and clear basis on which the Tribunal can assess the reasonable prospects of success. A cursory consideration of the CPA and the past judgments the Tribunal has issued would easily provide the necessary guidance to parties in this regard. It can even be said that a logical consideration of what should be placed before the Tribunal would be sufficient.
23. The Tribunal can only assess the prospects of success against the relevant provisions of the CPA which it must apply to any dispute placed before it. The Applicant has not placed any, or at least sufficient information, for the Tribunal to assess whether the Applicant has any prospect of succeeding with his claim against the Respondent.
24. Further, it can be noted that the CPA does not provide for any process whereby the Tribunal can refer the matter back to the NCC for investigation.

CONCLUSION

25. The Applicant is unable to show that it has a reasonable prospect of succeeding in its claim against the Respondent.

ORDER

26. Accordingly, the Tribunal makes the following order –
- 26.1 The Applicant's application for leave to refer the matter directly to the Tribunal is refused.
- 26.2 There is no order as to costs.

³ See NCT 12505/2014 Tshwale v Faitzan Properties

DATED ON THIS 3RD DAY OF JULY 2017

[signed]

Adv J Simpson

Presiding Member

Prof. J Maseko (member) and Ms H Devraj (member) concurring.