

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

Case numbers: NCT/2807 & 2806/2011/101(1)(P)CPA

In the matter between:

BMW SA (PTY) LTD

1st APPLICANT

JSN MOTORS (PTY) LTD

2nd APPLICANT

AND

MR W D BONN

1st RESPONDENT

NATIONAL CONSUMER COMMISSION

2nd RESPONDENT

**REASONS FOR JUDGEMENT:
APPLICATION FOR REVIEW OF A COMPLIANCE NOTICE**

INTRODUCTION

1. This is an application for review of a compliance notice issued in terms of section 100 of the Consumer Protection Act ("the Act").
2. This matter consists of two separate applications that were filed with the Tribunal but has since been consolidated by the order of the Tribunal dated 12 July 2012.

THE PARTIES

3. The 1st Applicant is BMW South Africa (Pty) Ltd, conducting business at 1 Bavaria Avenue, Randjiespark, Extension 17, Midrand. The Founding Affidavit was deposed to by Mr. J.P.

Fegbeutel, Director of Legal Services of the 1st Applicant (**"BMW"**).

4. The 2nd Applicant is JSN Motors (Pty) Ltd conducting business at 43 Ormonde Street, Bryanston. The Founding Affidavit was deposed to by Mr. S.J. Neophitou, a director of the 2nd Respondent (**"JSN"**).
5. The 1st Respondent is Mr. W.D. Bonn, an adult male residing at 16 Lola Street, Pierneef Park, Gauteng. Mr. Bonn was the complainant in the matter but did not oppose the application and will therefore be referred to as **"the Complainant"**.
6. The 2nd Respondent is the National Consumer Commission, an organ of state within the public administration established in terms of section 85 of the Consumer Protection Act (**"the CPA"**) with physical address at Berkley Office Park, 08 Bauhinia Street, Highveld, Techno Park, Centurion (hereinafter **"the Commission"**). The Answering Affidavit filed in BMW's application by the Commission is deposed to by Mr. Thupayatlase, Senior Legal Adviser of the the Commission

BACKGROUND

7. On 8 December 2010 the Complainant purchased a BMW E82 135i Coupe motor vehicle from JSN. The Complainant took delivery of the said vehicle on 12 January 2011(**"the Transaction"**).
8. Soon after taking delivery of the vehicle the Complainant discovered that the insulation rubber was coming off and the left front bumper was not aligned to the body of the vehicle.
9. On 17 March 2011 the vehicle had a mechanical failure and was subsequently towed by BMW to Jo'burg City Auto. On 30 March 2011 the Complainant received a quote from JSN amounting to R13,747.25. He subsequently received a quotation for R 25,397.46 which, in the Commission's view, suggested that the vehicle required extensive repairs. The Commission indicated in the Compliance Notice that the defects were not consistent with a brand new vehicle.

10. From 24 March 2011 to 19 May 2011 the Complainant incurred certain further costs while the vehicle was in JSN's possession.
11. On 05 May 2011 the Complainant filed a complaint with the Commission in terms of section 71 of the CPA, against both BMW and JSN, alleging that they have acted in a manner inconsistent with the provisions of the CPA (**"the Complaint"**).
12. The Commission submits that it forwarded the Complaint to BMW and JSN on 10 June 2011. The Commission submits that it granted BMW and JSN an opportunity to respond to the complaint by 21 June 2011. BMW responded to the complaint on 20 June 2011. In its response BMW stated that there is no evidence of the vehicle being involved in any collision or impact from its production stages, and was not used prior to its delivery to JSN .
13. The Commission sets out in the Compliance Notice that a conciliation meeting was arranged to take place on 31 May 2011 and that BMW and JSN did not attend this meeting. The Commission furthermore submits that an attempt was made to contact BMW and JSN to arrange a teleconference but without success.
14. The Commission submits that despite attempts to engage with JSN, JSN has not been forthcoming and did not display any effort to address the issues presented to it.
15. On 2 September 2011 the Commission issued a Compliance Notice in terms of section 100 of the CPA, wherein the Commission requested that certain demands be adhered to by 19 September 2011.

CONDONATION

16. The Commission applies for condonation for the late filing of its answering affidavit, which was delivered four business days late. It submits that it was not able to file the affidavit within the prescribed time period due to circumstances beyond its control which includes:
 - 16.1. The Commission's legal team had to conduct extensive research and had to evaluate the prospects of the Commission's success in the matter ;

- 16.2. The Commission, due to the complexity of this matter, had to engage the services of an external law firm to conduct extensive research ;
 - 16.3. This is the first matter of this nature and the factor of diligence on both research and consultation had to be allowed to take its course ;
 - 16.4. The Commission's legal team had to consult with external parties ;
 - 16.5. The Commission submits that BMW did not suffer any prejudice as a result of the late filing of the Answering Affidavit and that the Commission will suffer severe prejudice if the affidavit is not accepted by the Tribunal ;
 - 16.6. The Commission submits that the acceptance of the request for condonation would find favour with fairness, equality and public interest.
17. The Commission makes the following observations regarding BMW's papers, and raises *in limine* points as follows:
- 17.1. That BMW's application was filed out of time ;
 - 17.2. That the Applicant failed to comply with Rule 4(1) and the requirements in Table 2 ;
 - 17.3. That the Applicant failed to file Form TI 60(3) and 101 CPA together with an affidavit setting out its grounds of objection.
18. Upon close scrutiny of the papers and the evidence presented before the Tribunal, it appears that the points raised by the Commission are unrelated to BMW, but relates only to JSN's default application. During the hearing the Commission admitted that it had no submission to make on the JSN matter insofar as it related to the default application. The *in limine* points raised by the Commission, to the extent that they are misdirected, cannot be upheld.
19. In terms of Rule 13, the Commission was required to file its answering affidavit within 15 business days of the date of the application.
20. The Commission filed its answering affidavit four business days later, after the required time period, accompanied by an application to the Tribunal to condone its non-compliance with Rule 13.
21. Rule 34(1) of the Rules provides that a party may apply to the Tribunal for condonation for non-

compliance with the Rules of the Tribunal and the Tribunal may grant such an order on "good cause shown".¹

22. The Rules provide the Tribunal with a discretion to grant condonation on "good cause shown".
23. The discretion to condone non-compliance with rules on the basis of "good cause" has been dealt with in numerous court decisions. In *Mofokeng v Attorney General*,² for example, the court had to consider the meaning of "good cause" in Rule 94(1) of the Rules of Court and held that this meant substantially the same as "sufficient cause" in Rule 12 of the Appellate Division, (now the Supreme Court of Appeal)
24. The Tribunal must consider the facts of the condonation application; act fairly to both parties and take a number of factors into consideration including *inter alia* the degree of lateness, the explanation therefore and the prospects of success regarding the merits of the matter.³
25. These factors are interrelated and should not be considered separately.⁴ The Rules do not circumscribe the Tribunal's discretion and therefore the Tribunal has a wide discretion in these matters. The *onus* however, rests with the applicant for condonation, in this regards, the Commission, to show that it is entitled to condonation.⁵

¹ Rule 34(2) of the Rules.

² OFS 1958 (4) SA (O).

³ See *Mbutuma v Xhosa Development Corporation Ltd*, 1978 1 SA 681 (A) where the Appellate Division held that condonation could be granted under the Rules of the Appellate Division if the applicant satisfied the Court that sufficient cause had been established for granting him relief from the operation of the Rules; and, in deciding whether sufficient cause had been shown, the Court would consider all the relevant facts and circumstances of the particular case, such as the degree of non-compliance with the Rules, for example, the length of the delay, the explanation therefor, the importance of the case, the prospects of success, the respondent's interests in the finality of his judgment and the avoidance of unnecessary delay in the administration of justice. In *Nedcor Investment Bank Ltd v Visser* NO2002 (4) SA 588 (T) at 591 Patel AJ (as he then was) referred to rule 27(3) which requires 'good cause' to be shown by the plaintiff and stated that the Court has a wide discretion. See also *C Du Plooy v Anwes Motors (Edms) Bpk* 1983 (4) SA 212 (O) at 216H-217A.

⁴ *Melane v Santam Insurance Company Limited* 1962(4) SA 531 (A).

⁵ See for example *Cairns' Executors v Gaam* 1912 AD 181.

26. In *Cairns' Executors v Gaarn*⁶ the court stated that the applicant for condonation must show something which entitles him to ask for the indulgence of the court and what that something is, depends on the circumstances of each particular application.
27. The Tribunal has considered the following factors: *the degree of lateness; the explanation therefor; and the prospects of success*
28. In *Independent Municipal & Allied Trade Union obo Zungu v SA Local Government Bargaining Council & Other*,⁷ the court held that in explaining the reason for delay it is necessary for the party seeking condonation to fully explain the reason for the delay in order for the court to be in a proper position to assess whether or not the explanation is a good one.
29. The court in *General Accident Insurance Co SA Ltd v Zampelli*⁸ held that the "circumstances or 'cause' must be such that a valid and justifiable reason exists why compliance did not occur and why non-compliance can be condoned" and in *Standard General Insurance Co Ltd v Eversafe (Pty) Ltd*⁹ the court stated that:
- "It is well established that an applicant for any relief in terms of Rule 27 has the burden of actually proving, as opposed to merely alleging, the good cause that is stated in Rule 27(1) as a jurisdictional prerequisite to the exercise of the court's discretion. Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) at 352G"*
30. In this particular matter, the Tribunal can forgive the Commission on the aspect of lateness. Four days' lateness is not excessive. However the entire application must be considered *in toto* taking cognisance of the other factors as a composite entity for justification. The Respondent may not succeed on one forgivable reason. However, the Respondent's other reasons need consideration too.

⁶ 1912 AD 181 at 186.

⁷ (2010)31 ILJ 1314(LC) para 13.

⁸ 1988 (4) SA 407(C) at 410I-J

⁹ 2002 (3) SA 87 (W) at 93. See also *Sanford v Haley* NO 2004 (3) SA 296 © at 302. *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SCA) [2002] 4 B All SA at [6]

31. In the *Melane* - case the court stated that even if a good explanation for the delay is provided, an application for condonation should be refused in circumstances where there are no prospects of success.¹⁰
32. It is also important to note that when dealing with prospects of success it is necessary for the Tribunal to consider the merits of the matter.
33. In *Penrice v Dickinson*,¹¹ for example, the Appellate Division held that in an application for condonation the merits of the appeal may in some cases be an important factor and that if there is sufficient information before the court to enable it to decide whether the appeal has or has not a reasonable prospect of success, it had to decide the question because if the appeal is hopeless, the "great expense of prosecuting it would be a mere waste of money". This view was reiterated in *Melane v Santam Insurance Co Ltd*¹² where the court stated that "if there are no prospects of success there would be no point in granting condonation"
34. Although this matter is about an application to review and cancel a compliance notice, the Tribunal is of the view that the same principles relating to prospects of success can be applied.
35. In this particular matter, it is common cause that the conduct which forms the subject matter of the compliance notice took place prior to the commencement of the CPA, the general effective date of which was 31 March 2011.
36. The Commission stated that it does not deny the fact that the transaction arose prior to the general effective date of the CPA, however, contended that this does not bar the Commission from entertaining matters prior to that date because of Item 8 of schedule II of the Act. Item 8 of schedule II provides as follows:

"Despite the repeal of repealed laws, for a period of three years after the general effective date the Commission may exercise any power in terms of such repealed law to

¹⁰ See also *Immelman v Loubser and Another* 1974 (3) SA 816 (A) where the court, in dealing with the failure to note an appeal timeously, stated that a reasonable prospect of success on appeal is also an important consideration.

¹¹ 1945 AD 6

¹² Footnote 4 above.

investigate any breach of that law that occurred during the period of three years immediately before the general effective date ..."

37. The repealed law which the Commission referred to in order to find jurisdiction over this matter is the Unfair Business Practices Act, 71 of 1988.¹³ This Act makes provision for the control of unfair business practices.
38. The interpretation of Item 8 schedule 2 was dealt with by the Tribunal in the case of *Johannesburg City Council v National Consumer Commission*, a judgment handed down by this Tribunal in March 2012. In this case the Tribunal explained that the Consumer Affairs (Unfair Business Practices Act) was an enabling Act which did not, on its own, prohibit anything. Unfair business practices *per se* were not prohibited. A particular business practice was only declared to be an unfair business practice after it had been identified and investigated by the committee.
39. As stated above, the interpretation of item 8 schedule 2 (and how it applies to matters which arose prior to the general effective date of the CPA) has already been pronounced upon by the Tribunal in *City of Johannesburg v NCC*¹⁴. This judgment is binding on the Commission.
40. Turning to the reason for the delay alleged by the Commission that: the issues arising in the matter had to be properly investigated: This reason cannot find favour with the Tribunal's assessment of good enough a reason for condonation. In any case the law requires that any matter before the Commission needs proper investigation before the issuing of a compliance notice. The Commission has to make out a proper case for it to be forgiven.
41. The Tribunal is of the view that there was a slight delay. However, the explanation for the delay is unsatisfactory and unsubstantiated. Assuming that the delay was not unreasonable and the reasons provided therefor were satisfactory, the fact remains that the Commission, in opposing the application for review and cancellation of the compliance notice, has very little prospect of success

¹³ the Consumer Affairs (Unfair Business Practices) Act.

¹⁴ (NCT/2667/2011/101(1)(P), NCT/2081/2011/101(1)(P)) [2012] ZANCT 6 (30 March 2012)

42. Accordingly the Commission's application for condonation *fails*.

APPLICATION FOR DEFAULT JUDGMENT

43. It is important to note that the answering affidavit filed by the Commission was only filed in respect of the BMW- matter. JSN has therefore, prior to the consolidation of the matters, filed an application for default judgment.
44. The Tribunal allowed JSN to address it on the default application in order for the Commission to reply thereto. The Commission's representative indicated to the Tribunal that he had no submissions to make in response to the default application and that he has no knowledge whether or not the answering affidavit was filed.
45. The submissions made in JSN's application for default judgment have however now become irrelevant as the matters are consolidated and a full hearing will determine the outcome of the matter at hand. The Tribunal decided to proceed to hear all the parties in the main application in order to arrive at a decision

JURISDICTION OF THE COMMISSION

46. In its founding affidavit JSN submits that the Act is not applicable to the goods or the agreement and that the Commission therefore has no jurisdiction to entertain the complaint and should not have entertained the complaint and issued a Compliance Notice.
47. JSN submits that the Commission has no legal standing in terms of the CPA to enforce the complaint against JSN or to subject to any enquiry or to refer this matter to the Tribunal or to a court of law.
48. JSN requests that the decision made by the Commission be reviewed; the Compliance Notice be withdrawn with immediate effect and that a Notice of Withdrawal of Compliance Notice be handed over to JSN.

COMPLIANCE NOTICE AND ACTION BY THE COMMISSION

49. JSN submits that the action taken by the Commission was *ultra vires* (outside the scope of its legal mandate as determined by the Act and its Regulations) in that the Act is not applicable to the goods or the agreement nor does the Act have any retrospective application to the transaction and/or agreement or on the delivery of the goods.
50. JSN submits that the Commission (and the Tribunal) is a creature of statute with no inherent powers, it cannot by its own ruling or decision confer a jurisdiction upon itself which it does not in law possess.
51. JSN submits that the Commission, by Issuing the Notice on 10 June 2010 (notice in which the complaint was forwarded to the Applicants) and the Compliance Notice on 03 September 2011:
- 51.1. Acted *ultra vires*, schedule 2 and section 121(3), of the Act ; and
 - 51.2. Acted *ultra vires* the Commission's powers under the empowering statute under the Act and that the complaint and the 2 Notices are a nullity and of no force and effect.
52. The Commission did not submit an answering affidavit to JSN's founding affidavit and more specifically to the issues canvassed by JSN as set out above.

BMW'S GROUNDS FOR OBJECTION

53. BMW submits that it is not clear from a perusal of the Compliance Notice whether BMW is in fact a respondent in terms thereof and if so, which conduct of BMW, if any, constitutes a cause for the complaint, what the grounds for investigation by the Commission are and what the basis is for the penalty to be imposed by the Tribunal.

BMW's grounds for objection are the following:

- 53.1. That the Transaction does not fall within the general ambit of the CPA in light thereof that the Transaction occurred and the Complainant took delivery of the vehicle before the effective date of the CPA being 01 April 2011 and that the Transaction does not fall within the ambit of the CPA's retrospective applicability ;

53.2. That the Commission erred in its adjudication of the Complaint

53.3. That the Compliance Notice is defective, vague and embarrassing ;

53.4. Inability of BMW to object to the merits of the complaint.

THE TRANSACTION DOES NOT FALL WITHIN THE AMBIT OF THE CPA:

54. BMW refers to the CPA in which a transaction is defined as follows:

"transaction means-

1. 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; or

(iii) The performance by, or at the direction of, that person of any services for or at the direction of a consumer for consideration; or

2. An interaction contemplated in section 5(6) irrespective of whether it falls within paragraph (a)."

55. BMW submits that the Transaction on face value falls within the definition of a transaction as aforesaid.

56. However, BMW submits that as the general effective date of the Act was 01 April 2011 and seeing the Transaction took place approximately two and a half months prior to this date, the Transaction is excluded from the application of the CPA by Item 3(1) of Schedule 2 which provides as follows:

"Except to the extent expressly set out in this Item, this Act does not apply to-

(a) The marketing of goods or services before the general effective date ;

(b) Any transaction concluded, or agreement entered into, before the general effective date;

or

(c) Any goods supplied, or services provided, to a consumer before the general effective date."

57. With regards to the retrospective applicability of the CPA, BMW submits that the Transaction is not a fixed term agreement in terms whereof the Complainant and BMW at the time of concluding same, contemplated that they would be bound to it for a period of two years after the effective date of the CPA.

58. BMW refers to Item 3(2) of Schedule 2 which provides that the CPA only applies retrospectively to a pre-existing agreement in circumstances where such pre-existing agreement:

(1) Would have been subject to the CPA if it had been in effect at the time the agreement was concluded ; and

(2) Contemplates that the parties to it will be bound for a fixed terms until a date that is on or after the second anniversary of the General Effective Date.

59. BMW submits that, even if the transaction did fall within the ambit of Item 3(2) of Schedule II of the CPA, the relevant provisions of the CPA in terms of which the Compliance Notice was issued, being sections 54(1)(b) and 55(2)(b) and sections 56(2)(a) and (b), only apply retrospectively to the extent that goods and services were supplied to a consumer on or after the general effective date. BMW reiterates that the vehicle was delivered on 12 January 2011.

60. BMW concludes that the CPA does not apply retrospectively to the transaction and the Commission does not have jurisdiction to investigate and adjudicate the complaint in terms of the CPA.

COMMISSION'S SUBMISSIONS IN ANSWERING AFFIDAVIT:

61. In light of the fact that the Tribunal refused to condone the late filing of the answering affidavit filed by the Commission, the Tribunal will not deal with the submissions made by the Commission as this matter is dealt with on a default judgment basis.

THE COMMISSION'S CONDUCT IS PROCEDURALLY UNFAIR:

62. In its founding affidavit, BMW submits that the Commission had sufficient information regarding the essence of the complaint at the time that it was lodged. It alleges further that the Commission ought to have known that the CPA is not applicable to the complaint.
63. BMW submits that, on 10 June 2011, the Commission directed a letter to it advising it that the Commission engages in terms of section 72(1)(d) and 99(f) of the CPA. BMW responded to the complaint on 20 June 2011 and made it clear that it was of the view that:
- 63.1. the transaction does not fall within the ambit of the CPA
- 63.2. It already addressed the issues resulting from the Complaint.
64. BMW submits that, when a teleconference was held on 23 June 2011, it welcomed the Commission's suggestion to appoint a technical expert. The Commission did not want to accept BMW's request that such a technician must be a BMW accredited technician and as such no agreement could be reached on this aspect.
65. The Commission once again requested BMW to attend conciliation on 7 and 12 July 2011. BMW once again, by way of written correspondence explained its view as to the applicability of the CPA to the Commission. The Commission failed to respond thereto and proceeded to issue the Compliance Notice.
66. BMW submits that, in terms of section 72(1)(a)(i) of the CPA, the Commission may, upon receiving a complaint, issue a notice of non-referral to the Complainant should the complaint not allege any facts which would constitute grounds for a remedy under the CPA.
67. BMW submits further that:
- 67.1. The CPA is not applicable to the transaction as set out above ;
- 67.2. The Commission, during its investigation, was duly informed by BMW that it is of the view that the CPA is not applicable ;

- 67.3. The Commission did not allege that it was authorised by any legal instrument other than the CPA to conduct an investigation ;
 - 67.4. BMW's pro-active approach to resolve the complaint was ignored ;
 - 67.5. The Commission did not properly reply to BMW's correspondence ;
 - 67.6. The Commission exercised its discretion to issue a Compliance Notice under section 100 whilst it should have exercised its discretion to issue a notice of non-referral in terms of section 72(1)(a)(ii).
68. BMW submits that the Commission has erred in its adjudication of the complaint which is the direct cause of the issuance of the Compliance Notice.

THAT THE COMPLIANCE NOTICE IS DEFECTIVE:

69. BMW goes further to say that, in terms of section 100(3), a Compliance Notice must set out:
- 69.1. The person or association to whom the notice applies ;
 - 69.2. The provisions of the CPA that has not been complied with ;
 - 69.3. Details of the nature and extent of the non-compliance ;
 - 69.4. Any steps that are required to be taken and the period within which those steps must be taken ; and
 - 69.5. Any penalty that may be imposed in terms of the CPA if those steps are not taken.
70. Further that the Compliance Notice, on face value, indicates that it is applicable to both BMW and JSN and that it can be construed as inferring that BMW has acted in a manner that constitutes a contravention of the particular sections of the CPA. The "respondent" to the Compliance Notice is however the party whose conduct is the cause of the complaint; who was investigated by the Commission and who, through their conduct was the reason for the Commission issuing the Compliance Notice.
71. BMW submits that the Compliance Notice only sets out the provisions of the CPA which JSN allegedly contravened: Further,
- 71.1. that it sets out only the conduct of JSN that constitutes a contravention; - that it only states that JSN acted in a manner that contravenes the CPA and ;
 - 71.2. that only JSN is required to adhere to the requests by the Commission to take the

steps required.

72. Further that it is clear that the Commission intended only to cite JSN as respondent in the Compliance Notice as it distinguishes clearly between BMW and a "respondent" to the Compliance Notice by referring to "BMW SA".
73. That JSN is regarded as the sole "respondent" in terms of the Compliance Notice.
74. That the Compliance Notice insofar as it is directed to BMW, is vague and embarrassing as it does not properly, adequately, sufficiently or at all:
 - 74.1. Set out the basis on which the Commission infers that the CPA is applicable to the transaction ;
 - 74.2. Set out any basis upon which BMW can be regarded as a party whose conduct constituted a contravention of the CPA ;
 - 74.3. Set out the basis upon which the Commission avers that the Compliance Notice is or should be applicable to BMW ;
 - 74.4. Set out the provisions of the CPA which the Commission believes BMW has contravened ;
 - 74.5. Set out the specific conduct of BMW which the Commission regards and avers to constitute a contravention of the CPA ;
 - 74.6. Neither set out the detail, nature or extent of any conduct of BMW that the Commission regards a contravention of the CPA ;
 - 74.7. Neither set out steps required from BMW nor the period within which to take such steps ;
 - 74.8. Set out a penalty to be imposed if BMW does not adhere to the demands.
75. BMW submits that the Commission unlawfully and unilaterally expanded its authority and jurisdiction beyond what is provided for under the CPA by issuing a Compliance Notice that is unfair, unjust and in conflict with the CPA.
76. BMW submits that the defect of the Compliance Notice strikes to the core and purpose thereof and renders it void in its entirety in so far as it relates to BMW and that by reason of the afore-

going, no case has therefore been made out against BMW.

BMW'S INABILITY TO DEAL WITH THE MERITS:

77. BMW submits that it is not in a position to adequately assess, consider and address the merits of the complaint and the contents of the Compliance Notice unless it receives further documents and information.
78. BMW alleges that:
- 78.1. Various factual issues are indicative of the vehicle having *inter alia* sustained impact damage on or about 25 February 2011 and/or 11 March 2011 and/or 17 March 2011. If the Complainant is responsible for having caused such damage no liability can be attributed to either JSN or BMW for the consequences thereof, even if the CPA is applicable to the Transaction ; and
- 78.2. The nature of the Complaint and issues flowing therefrom are of such a technical nature that BMW would only be in a position to properly respond to the averments contained in the Compliance Notice once:
- 78.2.1. It has had an opportunity to have the motor vehicle extensively inspected by the required experts ; and
- 78.2.2. It has had an opportunity to submit the motor vehicle for extensive testing by its laboratory and other testing stations; and
- 78.2.3. It has conducted all further investigations flowing from the above inspection and tests that are reasonable required to be able to answer to the merits of the Complaint ; and
- 78.2.4. It has had a reasonable opportunity to obtain expert advice on the technical to the issues raised by the Complainant and Commission.
79. BMW submits that, even though it had the opportunity to inspect the motor vehicle on or about 08 March 2011, such inspection was done prior to the issuance of the Compliance Notice. Accordingly, BMW was not aware of the specific averments which constitute the Complaint.

80. BMW submits that various factual issues are indicative that BMW will only be in a position to address the merits of the Complaint once the motor vehicle has undergone specific specialized testing by qualified experts from BMW at its laboratories, testing stations and through the use of specialised equipment. BMW did not deem this necessary when it first inspected the motor vehicle, in light thereof that the salient facts had not been disclosed to it. It was furthermore not yet required at that stage to respond to a Compliance Notice. BMW did not and could not perform a comprehensive assessment of the motor vehicle at that stage.
81. BMW also deemed it essential that the Complainant provided it with the following documentation:
- 81.1. Skye Tracker Records for the period 11 March 2011 to 31 May 2011;
 - 81.2. Particulars of the persons who towed the vehicle on 25 February 2011, 11 March 2011 and 17 March 2011;
 - 81.3. Reasons for the vehicle being towed on such date plus substantiating documentation;
 - 81.4. Copies of the Complainant's and his father's bank statements for the period from 12 January 2011 to 31 March 2011.
82. BMW submits that, should it be required to address the merits without having been granted the aforesaid requests and documents, it would be severely prejudiced.

JSN'S GROUNDS FOR OBJECTION

83. JSN raises the following legal points:
84. The Commission did not comply with certain legal prescripts of the NCA. JSN argues that the Complainant might be a consumer as envisaged in the Consumer Protection Act, but denies that he is a "complainant" as envisaged in terms of section 71 of the Act for the following reasons:
- 84.1. section 71(1) of the CPA states that any person may file a complaint concerning a matter contemplated in section 69(1) (c) (ii) or (2) (b) with the Commission in the prescribed manner and form, alleging that a person has acted in a manner inconsistent with the Act ; and

- 84.2 section 71 of the CPA refers to section 69 (1) (c) (ii) and (2) (b) of the CPA. The CPA in its current promulgated form has no section 69 (1) (b) (ii) or a subsection (2) (b). To this extent, JSN submits, it is unconstitutional. The Complainant, in view of the foregoing has no *locus standi* in terms of section 71 of the CPA.
85. Further that the complaint lodged by the Complainant and the subsequent issuing of the compliance notice by the Commission is invalid, alternatively, falls to be reviewed and set aside under the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") because:
- 85.1. the compliance notice was issued in a manner ultra vires sections 69; 71; 72; 73 and 99 of the CPA, and
 - 85.2. The compliance notice was issued in a manner that was procedurally unfair and inconsistent with section 33(1) of the Constitution and sections 3 and 4 of PAJA
 - 85.3. PAJA governs all administrative actions in general and all decision makers who are entrusted with the authority to make administrative decisions by any statute are therefore required to do so in a manner that is and should be consistent with PAJA.
 - 85.4. The Commission failed to conduct a proper investigation into the alleged complaint and, in terms of the CPA read with PAJA, a person (JSN *in casu*) under investigation is entitled to be informed of the nature of the investigation and is entitled to make representations (*in casu* to the Commission) before the Commission can take action or issue a Compliance Notice.
86. The administrative action by the Commission is inconsistent with PAJA and with the CPA in that the Commission failed to give JSN:
- 86.1. adequate notice of the nature and purpose of the administrative action;
 - 86.2. a reasonable opportunity to make representations;
 - 86.3. a clear statement of the administrative action;
 - 86.4. adequate notice of any right of review or internal appeal where applicable; and
 - 86.5. adequate notice of the right to request reasons for the administrative actions by the Commission
87. JSN argues that if all the sections of the CPA and PAJA are read together, it is clear that the legislature intended that a compliance notice should be issued after an investigation was

completed, and not before. JSN further submits that only after having conducted an investigation, can an investigator have reasonable grounds for believing that a prohibited conduct is involved. If an investigation is not conducted, then a compliance notice will be based on unsubstantiated allegations and assumptions. In that regard, it will be procedurally unfair and irrational in that the provisions of sections 72, 73 and 99 would not have been complied with.

APPLICATION OF ACT TO PRE-EXISTING TRANSACTIONS AND AGREEMENTS

88. JSN submits that the Act does not apply to:
- 88.1. *any transaction concluded, or agreement entered into, before the general effective date; or*
 - 88.2. *any goods supplied to a consumer before the general effective date.*
89. Further that: the general effective date of the CPA is 01 April 2011 ;
- 89.1. the Act is not retrospectively enforceable, except as provided for
 - 89.2. the Act is not retrospectively enforceable on the Transaction ;
 - 89.3. the transaction was concluded and/or the agreement entered into on 8 December 2010 ;
 - 89.4. the transaction was concluded and/or the agreement entered into before the general effective date of the CPA.
90. For these reasons the CPA does not apply to the Transaction. The vehicle was supplied to the Complainant on 12 January 2011, which is before the general effective date of the CPA and therefore the Act does not apply. The pre-existing agreement as entered into between JSN and the Complainant does not fall under the pre-existing agreements as contemplated in Schedule 2(2) of the CPA

JURISDICTION

91. JSN proceeds further to make the following submissions:
- 91.1. The Tribunal, like the Commission is a creature of statute and, unlike the High Court does not have inherent jurisdiction. The Tribunal derives its jurisdiction from the legislative measures which accords it its existence and therefore possesses no

jurisdiction beyond that conferred upon it by the statute creating it.

- 91.2. The Tribunal has to determine whether the matter lies within the competence of the Tribunal before it can embark to decide any other issue or the facts of the complaint. For the Tribunal to have jurisdiction to adjudicate on the dispute between the Applicant and the Commission the CPA has to be applicable to the complaint, the complainant and/or the transaction.
92. It would appear that the Tribunal does not have any powers beyond those expressly provided for in the CPA or in the Rules as far as powers relating to substantive matters are concerned. The Applicant submits that this viewpoint is supported by Rule 10 which provides as follows:

" a person wishing to bring before the Tribunal a matter which is not listed in Rule 3, or otherwise provided for in these Rules, must first apply to the High Court for a declaratory order confirming the Tribunal's jurisdiction to deal with the matter"

93. There was no such declaratory order from the High Court vesting the Tribunal with jurisdiction and in the premises, the Tribunal has no jurisdiction other than to set aside the compliance notice

RELIEF SOUGHT BY JSN

94. JSN seeks the following relief:
95. An order stating that:
- 95.1. the Commission and the Complainant have no *locus standi* in terms of the CPA ; and
 - 95.2. the Tribunal has no jurisdiction to pronounce on the complaint as set out in the compliance notice except to declare that the compliance notice does not comply with the CPA and PAJA, and to set aside or cancel the compliance notice ; and
 - 95.3. the Tribunal does not have jurisdiction to pronounce on an agreement that did not apply at the time the conduct complained of took place ; and
 - 95.4. the Commission's actions or inactions are inconsistent with the provisions of the CPA and PAJA and are unlawful and invalid

COSTS

96. JSN submits that the Commission should be ordered to pay the costs of this application, given the previous conduct and/or lack of conduct in other cases before the Tribunal and in this case relating to facts similar and/or exactly the same and also given the conduct and/or lack of conduct displayed by the Commission.

APPLICATION OF THE LAW TO THE FACTS

97. This review application is brought in terms of section 101(1) of the CPA. The review was occasioned by the Commission issuing a compliance notice in terms of section 100 of the CPA. Section 101 (1) provides as follows:

"any person issued with a notice in terms of section 100 may apply to the Tribunal in the prescribed manner and form to review that notice..."

98. It is common cause that the conduct of the Commission in issuing a compliance notice in terms of section 100 of the CPA constitutes administrative action as defined in the Promotion of Administrative Justice Act 3 of 2000 (PAJA). See *Vodacom v NCC*¹⁵ and *City of Johannesburg v NCC*¹⁶.
99. Section 101(2) read with section 100(4)(a) empowers the Tribunal to "confirm, modify or cancel all or part of a notice" pursuant to an objection lodged in terms of section 101(1). The Tribunal therefore is empowered under section 101(1) to exercise its powers to review a compliance notice after considering an application presented before it.
100. For the purposes of this judgment, BMW and JSN have raised substantially the same legal arguments arising from substantially the same facts. The two matters have since been consolidated in the judgment issued by this Tribunal on 12 July 2012. At the hearing, JSN asked the Tribunal to first consider its default application lodged previously, before the consolidation application could be heard. While the Tribunal afforded JSN the opportunity to

¹⁵ (NCT/2793/2011/101 (1)(P)) [2012] ZANCT 9 (8 June 2012)

¹⁶ (NCT/2667/2011/101(1)(P), NCT/2081/2011/101(1)(P)) [2012] ZANCT 6 (30 March 2012)

present its argument on the default application, the Tribunal considered such a move to be an academic exercise, regard being had to the fact that all the parties were now present before the Tribunal, and that the matters had now become consolidated. The Commission had no submissions to make as no answering affidavit to JSN's papers was filed with the Tribunal, and the Tribunal refused to grant the Commission condonation for the late filing of its answering affidavit in the BMW - matter'.

DOES THE TRANSACTION FALL WITHIN THE GENERAL OR RETROSPECTIVE AMBIT OF THE CPA?

101. The transaction which forms the basis of the Complainant's complaint was concluded more than two and a half months, [*that is*, 12 January 2010] prior the general effective date of the CPA. The General Effective Date of the CPA is 31 March 2011.

102. Item 3 of Schedule 2 of the Act deals with the Transitional Provisions of the Act and provides as follows:

3. *Application of Act to pre-existing transactions and agreements*

(1) *Except to the extent expressly set out in this item, this Act does not apply to-*

- (a) *the marketing of any goods or services before the general effective date;*
- (b) *any transaction concluded, or agreement entered into, before the general effective date; or*
- (c) *any goods supplied, or services provided, to a consumer before the general effective date.*

(2) *The sections of this Act listed in the first column of the following table apply, to the extent indicated in the second column, to a pre-existing agreement between a supplier and a consumer, if the pre-existing agreement –*

- (a) *would have been subject to this Act if this Act had been in effect at the time the agreement was made; and*
- (b) *contemplates that the parties to it will be bound for a fixed term*

until a date that is on or after the second anniversary of the general effective date:

Section of Act	Extent of application to pre-existing agreement
14	<i>Only subsections (1)(b) to (d) and (2) apply with respect to the expiry and possible renewal of the agreement, or after the general effective date.</i>
18 to 21	<i>Apply only with respect to goods that are deliverable or delivered to the consumer in terms of the agreement, or after the general effective date.</i>
22	<i>Applies only to a notice, document or visual representation that is required to be produced, provided or displayed to the consumer, on or after the general effective date.</i>
25	<i>Applies only with respect to any goods supplied to the consumer in terms of the agreement, on or after the general effective date.</i>
26	<i>Applies only with respect to any transactions occurring in terms of the agreement, on or after the general effective date.</i>
31	<i>Applies only to a purported amendment to the agreement made, on or after the general effective date.</i>
44	<i>Applies only with respect to any goods supplied to the consumer in terms of the agreement, on or after the general effective date.</i>
53 to 58	<i>Apply only with respect to any goods or services supplied to the consumer in terms of the agreement, on or after the general effective date.</i>
64(1) and (2)	<i>Apply only to an amount paid or payable by the consumer in terms of the agreement, on or after the general effective date.</i>
64(3) and (4)	<i>Apply only with respect to any closure of a facility contemplated in those provisions, it will occur on or after the effective date.</i>
65	<i>Applies only with respect to an amount paid or payable to the consumer, or to property that comes into the possession of the supplier, on or after the general effective date.</i>

103. It is therefore evident that on the basis of the table above and the provisions of Item 3 (1) and 3(2) (a) and (b) of the Schedule to the Act, the CPA does not apply to the transaction in question in that the requirements necessary to render the relevant provisions of the Act, insofar as pre-existing agreements are concerned, also do not apply in this matter. The relevant provisions of the CPA on which the compliance notice is issued, only apply

retrospectively to goods and services which were supplied *on or after* the General Effective Date.

104. As required by section 100(3) of the CPA, the Compliance Notice sets out the sections of the CPA that have been contravened. The Respondent bases the Compliance Notice on contraventions of section 54(1) (a) and (c); and 55(2)(c) and 56 (2) (b) of the Act.
105. These particular sections only apply with respect to goods or services supplied to the consumer in terms of the agreement, *on or after* the general effective date. The vehicle was supplied prior to the effective date. The table in Item 3 of schedule II provides that sections 53 to 58 of the CPA only apply in respect of goods and services supplied to the consumer in terms of the agreement on or after the general effective date. It is undisputed that sections 54, 55 and 56 are part of the sections alluded to above and came into force on 31 March 2011. To this end, these sections do not apply to any agreement concluded before 31 March 2011, unless the goods supplied to the consumer in terms of the agreement were delivered on or after 31 March 2011. The parties in this matter all agree that the compliance notice explains that the complainant took delivery of the vehicle on 12 January 2011.
106. BMW and JSN, in their respective submissions for the review applications have articulated extensively their arguments that the Commission's adjudication of the complaint was procedurally unfair and inconsistent with the provisions of both the CPA and PAJA. The Tribunal has previously found that the conduct by the Commission insofar as the issuing of a compliance notice is concerned, constitutes administrative action regulated by the provisions of PAJA, and that all the relevant provisions pursuant to the exercise of administrative action have to be adhered to. It is not necessary to repeat the provision of PAJA as extensively canvassed in the body of the judgment.

IS THERE A CASE THAT BMW IS ANSWERABLE TO?

107. The Compliance Notice has been addressed to BMW notwithstanding the fact that JSN is cited as the '*respondent*'. The notice focuses on the conduct of JSN as the basis for the complaint. During the hearing, the Tribunal asked the Commission if it would not have been appropriate to issue two compliance notices, considering the fact that BMW cannot respond to allegations

made against it, in clear and explicit terms. The Commission conceded this assertion by the Tribunal when the latter had this to say:

"The difficulty the Tribunal faces is that we have one compliance notice issued against two parties and we need to deal with that entire compliance notice and that is why the parties are here".¹⁷

108. The notice therefore does not disclose any grounds whatsoever that entail a liability or accountability that BMW holds towards the Complainant and the Commission. The Commission remarked as follows in response:

"....the only difference is that one was delivered to BMW and the other one was actually delivered to JSN Motors but I really get your point and take your point that the compliance notice perhaps should have been specific in terms of which particular item which party has to actually perform on"¹⁸

109. In terms of section 100(3) of the CPA, a Compliance Notice must satisfy the following requirements:

100 (3) "A compliance notice contemplated in subsection (1) must set out:

- (a) The person or association to whom the notice applies ;*
- (b) The provisions of the Act that has not been complied with ;*
- (c) Details of the nature and extent of non-compliance ;*
- (d) Any steps that are required to be taken and the period within which those steps must be taken ; and*
- (e) Any penalty that may be imposed in terms of this Act if those steps are not taken.*

110. If one was to follow the above arguments, it is clear that the Compliance Notice does not set out all of the required information, specifically relating to BMW. Therefore, should the Tribunal find that the Compliance Notice does not meet the above requirements (*even if only in respect of one of the Applicants*) the notice falls to be cancelled. A proper case may not have been made against the respondent to which such a notice is issued. BMW is therefore not in a position to object to the merits of this complaint as a proper case has not been made against it,

¹⁷ Transcript p18, line 7 – line 9

¹⁸ Transcript p64, line 12 – line 16

to answer.

111. It is important to note that the Compliance Notice would in such circumstances have to be set aside in its entirety, and not only in respect of BMW. *See the judgment and reasons in the matter between Auction Alliance and the NCC¹⁹*.
112. Coming to the issue whether or not BMW and JSN contravened section 54(1) of the CPA, the following needs to be considered:

Section 54(1) of the CPA provides as follows:

"54 Consumer's rights to demand quality service

- (1) *When a supplier undertakes to perform any services for or on behalf of a consumer, the consumer has a right to –*
- (a) ...
- (b) *The performance of the services in a manner and quality that persons are generally entitled to expect..."*

113. In order to consider this provision, it is necessary to consider the following relevant definitions included in section 1 of the CPA:

A "consumer", in respect of any particular goods or services, means-

- (a) A person to whom those particular goods or services are marketed in the ordinary course of the suppliers business;
- (b) A person who has entered into a transaction with a supplier in the ordinary course of the suppliers business, unless the transaction is exempt from the application of this Act by section 5(2) or in terms of section 5(3);
- (c) If the context so requires or permits, a user of those particular goods or a recipient or beneficiary of those particular services, irrespective of whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those particular goods or services; and
- (d) A franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5(6)(b) to (e)

¹⁹Murray NO and Others v National Consumer Commission and Others, Auction Alliance (Pty) Ltd v National Consumer Commission and Others (NCT/4454/2012/101(1)(P)CPA, NCT/4570/2012/101(1)(P)CPA) [2012] ZANCT 17 (30 July 2012)

A **"supplier"** means a person who markets any goods or services

"Supply", when used as a verb-

- (a) In relation to goods, includes sell, rent, exchange and hire in the ordinary course of business for consideration; or
- (b) In relation to services, means to sell the services, or to perform or cause them to be performed or provided, or to grant access to any premises, event, activity or facility in the ordinary course of business for consideration.

"Supply chain" with respect to particular goods or services, means the collectivity of all suppliers who directly or indirectly contribute in turn to the ultimate supply of those goods or services to a consumer, whether as a producer, importer, distributor or retailer of goods, or as a service provider.

"Agreement" means an arrangement or understanding between or among two or more parties that purport to establish a relationship in law between or among them.

"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; or
 - (iii) The performance by, or at the direction of, that person of any services for or at the direction of a consumer for consideration; or
- (b) An interaction contemplated in section 5(6), irrespective of whether it falls within paragraph (a).

"Consumer agreement" means an agreement between a supplier and a consumer other than a franchise agreement.

114. From the definition of a consumer above, two relevant factors need further consideration:

114.1. It is a person to whom those particular goods or services are marketed in the ordinary course of the supplier's business

- 114.2. It is a person who has entered into a transaction with a supplier in the ordinary course of the supplier's business
115. BMW did not market the vehicle to the consumer, JSN did. Furthermore, a transaction needs to be entered into between the consumer and the supplier.
116. The requirements of a transaction is:
- 116.1. an agreement between two persons for the supply of goods;
 - 116.2. the supply of such goods;
 - 116.3. the performance of any services at the direction of a consumer.
117. An "Agreement" is an arrangement or understanding between or among two or more parties that purports to establish a relationship in law between or among them.
118. A "Consumer agreement" means an agreement between a supplier and a consumer other than a franchise agreement
119. The Agreement of Sale was entered into between the Complainant and JSN. No agreement exists between BMW and the Complainant and as such, no transaction was entered into between them and no relationship in law is established between them. BMW can also only be a "supplier" if it markets goods or services.
120. Considering the definition of 'supply chain' it is evident that the legislature cast the net wider to include *"the collectivity of all suppliers who directly or indirectly contribute in turn to the ultimate supply of those goods or services to a consumer, whether as a producer, importer, distributor or retailer of goods"*. From the definition it is evident that a supply chain extends the definition of supplier to include not only persons who market goods or services, but also all the parties contributing to the ultimate supply of goods or services to the consumer, be it the producer, importer, distributor or retailer or service provider.
121. When considering the specific provisions of section 54(1) (b) it appears that services had to be performed or undertaken to be performed by the supplier. It would appear that BMW was not the supplier in this matter, but that it was JSN who supplied the vehicle and conducted the repairs to the vehicle.

122. During the hearing, oral submissions were made by the parties as follows:
- 122.1. BMW conceded that it is without doubt the subject of this compliance notice and that is of course the reason it is here at the hearing. However the point is made that if the rest of the compliance notice other than the heading is considered, there is nothing there at all that suggests that BMW should be at the hearing or BMW should be the subject of the complaint.
123. The vehicle is a composite of a mechanical and an electronically composition to which reasonably a consumer who is supplied with that particular item would have a legitimate expectation that it should serve him for an average reasonable period in which the manufacturer promises that the warranty of the vehicle should serve a consumer for a specific period of time, alternatively a specific extent of mileages that the vehicle would have to make.
124. In this particular context the defects happened shortly after the delivery was made. It was hardly within a year of its delivery to the consumer that problems started to show. The parties entered into this agreement with an understanding that the manufacturer in this case would be bound by the service agreement of this vehicle over a period that would extend beyond 1 April 2013.
125. The Tribunal has to determine whether or not the conduct of BMW and JSN constituted a contravention of section 55(2)(c). The Tribunal has considered the fact that these sections have little or no applicability in the *ex post facto* effect of certain provisions of the CPA.
126. The Compliance Notice refers to section 55(2)(c) which provides as follows:
- "...every consumer has a right to receive goods that –*
- (c) *Will be useable and durable for a reasonable period of time, having regard to the use to which they would normally be put and to all the surrounding circumstances of their supply."*
127. To consider this aspect, the Tribunal would first have to obtain evidence from an expert witness that clarifies the nature of the damage sustained to the vehicle. Should the damage be the result of an impact to the vehicle BMW and JSN will only be liable if the damage occurred

prior to the delivery of the vehicle to the complainant.

128. The Tribunal is not in a position to make a finding on this aspect based on the evidence that is before it at this stage.
129. The application of section 56(2)(a) can also only be considered once the nature of the damage had been established.

CONCLUSION

130. The Tribunal is faced with the consideration and determination of the retrospective applicability of the Act to the transaction and specifically the sections relied on by BMW and JSN and the Commissions opposition thereto.
131. The Tribunal would then have to decide whether or not the Issuing of the Compliance Notice by the Commission satisfies the requirements of section 100(3) of the CPA and PAJA.
132. The Tribunal also has to determine if the Commission has made out a case against BMW and whether the Commission has successfully articulated its case to meet the requirements of sections 54, 55 and 56 of the CPA.
133. If the Tribunal would not pronounce on the above legal questions, it may become necessary to require expert evidence to be led on the issue of the nature of the damages allegedly sustained to the vehicle. The matter would then have to be adjourned to have the necessary inspection done and expert reports compiled. The arguments submitted by BMW and JSN are overwhelmingly nugatory to this approach, and therefore unnecessary to adjourn the matter. The Commission has not met any of the requirements above.
134. Accordingly, the Tribunal, having heard counsels' argument and submissions on the papers, makes the following ruling:
 - 134.1. The compliance notice is hereby *cancelled*.
 - 134.2. No order is made as to costs.

Dated this 5th day of December 2012

[SIGNED]

ADV. FK MANAMELA

PRESIDING MEMBER

MS. P. BECK (MEMBER) AND ADV. N. SEPHOTI (MEMBER) CONCURRING

Authorised for issue by the National Consumer Tribunal

Case number _____

Date: 26/12/16
ccyy / mm / dd

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