

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

Case No: NCT/4057/2012/101(1)(P)CPA

In the matter between:

**ASSOCIATED MOTOR HOLDINGS (PTY) LTD
t/a CHERY ISANDO**

APPLICANT

and

THE NATIONAL CONSUMER COMMISSION

RESPONDENT

Coram:

Prof T Woker	-	Presiding Member
Ms D Terblance	-	Chairperson and Member
Adv N Sephoti	-	Member

Date of Hearing: 4 October 2012

JUDGMENT

INTRODUCTION

1. The Applicant is Associated Motor Holdings (Pty) Ltd t/a Chery Isando, a Limited Liability Company incorporated in South Africa.
2. The Respondent is the National Consumer Commission a public entity established in terms of section 85 of the Consumer Protection Act No. 68 of 2008 (“CPA”).

3. Chery Isando brought an application in terms of section 101(1) of the CPA to the National Consumer Tribunal (the Tribunal) for the review and cancellation of a compliance notice issued against it by the Commission.
4. The Tribunal has jurisdiction to hear this matter in terms of section 101(1) of the CPA. This section provides that a person issued with a compliance notice in terms of section 100 may apply to the Tribunal in the prescribed manner and form for its review.
5. Prior to the hearing The Commission applied for condonation for the late filing of its answering affidavit. This condonation application was decided by the Tribunal on 15 August 2012. Condonation was refused for the reasons set out in that judgement.¹
6. This judgment follows the hearing of this matter held on 4 October 2012 at the offices of the Tribunal in Centurion. The judgment is based largely on written submissions by the Applicant as well as oral arguments presented by the Applicant at the hearing. The Respondent did not attend the hearing.

BACKGROUND

7. A consumer/complainant purchased a Chery Tiggo from the Applicant, trading as Chery Randburg on 2 October 2010. On 7 October 2010 the consumer complained that a transmission light came on in the vehicle. On 8 October 2010, a representative of Chery Randburg collected the vehicle and took it to Chery Randburg's workshop for repairs.
8. Various communications between the consumer and the Applicant took place from the period 8 October 2010 to February 2011. The matter was complicated by the fact that Chery Randburg had closed down and the outstanding matters were taken over by Chery Isando.
9. The repairs to the vehicle were completed during February 2011 and the consumer was informed that the vehicle was ready for collection. The job card regarding the repairs was dated 11 February 2011.²

¹ Condonation Ruling by Prof T Woker dated 15 August 2012 under case number NCT/4057/2012/101(1)(P)CPA

10. The consumer informed the Applicant that she did not want the vehicle anymore and she filed a complaint with the Respondent.
11. On 19 April 2011, the Complaints Handling Unit of the Respondent served the complaint on the Applicant.
12. Negotiations took place during which the parties attempted to resolve the matter. As part of the negotiations the Applicant offered to replace the original vehicle with a new 2011 vehicle which would include a new service plan and a new warranty at no extra cost.
13. The consumer did not accept this replacement vehicle and instead purchased a new vehicle from another seller. She then informed the Applicant that she could not afford two vehicles.
14. Further attempts were made to resolve the issue amicably during which negotiations (referred to as conciliations by the Respondent) the Applicant informed the Respondent that it was of the view that the CPA did not apply to the dispute because the sale took place prior to the general affective date of the Act.³
15. The Respondent however insisted that the Applicant comply with the consumer's demands for a full refund of the purchase price together with interest, failing which a compliance notice would be issued.
16. On 27 January 2012 a compliance notice was issued. In terms of this compliance notice, the Applicant was ordered to refund the complainant "the amount paid to date" and "settle the account with the Motor Finance Corporation", failing which the Respondent would call upon the Tribunal to impose a fine of R500 000,00.
17. The Applicant brought its application for cancellation of the compliance notice on the following grounds:

² See F8 of the Applicant's founding affidavit.

³ See FA15 of the Applicant's founding affidavit.

- (1) The conduct which forms the subject matter of the compliance notice took place prior to the commencement of the CPA and therefore falls outside the Respondent's jurisdiction.
- (2) The Respondent did not conclude an investigation in respect of the complaints, as is mandatory by virtue of the provisions of section 72 of the Act and could therefore not have issued a compliance notice in terms of section 100.
- (3) The compliance notice constitutes directions to the Applicant that fall outside the Respondent's powers since the Applicant did not transgress any provisions of the CPA and specifically not those sections relied on and referred to in the compliance notice.

ISSUE TO BE DECIDED BY THE TRIBUNAL

18. Before any further matters can be considered by the Tribunal, the Tribunal must establish whether the CPA applies to the conduct which forms the subject matter of the compliance notice.
19. If it is established that the CPA does not apply to this conduct, then the Respondent had no jurisdiction to issue a compliance notice and so the compliance notice must be cancelled.
20. This judgment will therefore focus on whether the CPA applies to the conduct which forms the subject of the compliance notice.
21. The compliance notice alleged that the Applicant failed to comply with the following provisions of the CPA:
 - a. Section 20 (2) (d);
 - b. Section 40 (1) (a) (b) and (c);
 - c. Section 55 (2) (b) and (c); and
 - d. Section 56 (2) (a) and (b).

LEGAL PRINCIPLES

22. The date of commencement of the CPA was 31 March 2011.

23. The CPA does not have retrospective effect except in very limited circumstances.
24. Schedule 2 item 3 provides as follows:
- (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 customer before the general effective date.*
25. Schedule 2 item 3 (2) governs the extent to which certain provisions of the CPA apply to pre-existing agreements. It specifically provides that section 20 will apply only with respect to any goods that are deliverable or delivered to the consumer in terms of the agreement *on or after the general effective date* (our emphasis). Sections 55 and 56 will apply only in respect to any goods or services supplied to the consumer in terms of the agreement, *on or after the general effective date* (our emphasis) and there is no provision for any retrospective application of section 40.
26. In circumstances where the conduct took place prior to the introduction of the CPA, the Commission may rely also on item 8 of schedule 2. This 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 investigate any breach of that law that occurred during the period of three years immediately before the general effective date ...*
27. The Respondent contended that it had jurisdiction over the matter by virtue of the provisions of the now-repealed Consumer Affairs (Unfair Business Practices) Act 71 of 1988 read with Schedule 2 item 8 of the CPA.

28. The interpretation of Item 8 schedule 2 was dealt with by the Tribunal in the case of *City of Johannesburg v National Consumer Commission*⁴ a judgment handed down by the Tribunal on 30 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 Consumer Affairs Committee, a recommendation by the Committee had been referred to the Minister of Trade and Industry and the Minister of Trade and Industry had promulgated regulations relating to that particular practice.⁵ Therefore, the Tribunal held, before the Commission can rely on the now-repealed Consumer Affairs (Unfair Business Practices) Act, it must identify the particular regulations under which a particular business practice had been declared unfair.
29. Further, the Tribunal held in the above *City of Johannesburg* matter that where it was necessary to rely on the transitional provision because the conduct arose before the Act came into operation, the Commission must, in the compliance notice, identify which section of which repealed Act it was relying upon. Then in the section of the compliance notice headed, nature and extent of the non-compliance, it should set out the details regarding how the Applicant had contravened the section of the repealed law.

ASSESSMENT

30. 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. All the relevant conduct took place between 2 October 2010 and 9 March 2011. As stated above, the general effective date of the CPA was 31 March 2011. Therefore, the sections referred to in the compliance notice do not apply to the Applicant's conduct.

⁴ *City of Johannesburg v National Consumer Commission* (NCT/2667/2011/101(1)(P), NCT/2081/2011/101(1)(P)) [2012] ZANCT 6 (30 March 2012)

⁵ The Consumer Affairs Act empowered the Consumer Affairs Committee (Cafcom) to investigate unfair business practices and to make recommendations to the Minister.

31. In addition, the compliance notice makes no reference to the Consumer Affairs (Unfair Business Practice) Act at all, neither is there any reference to any other legislation or regulation which has been repealed by the CPA.

CONCLUSION

32. The conduct which forms the subject matter of the compliance notice took place prior to the commencement of the CPA and the provisions of the CPA which have retrospective effect do not apply.
33. The Respondent therefore had no jurisdiction to issue a compliance notice and so the compliance notice must be cancelled.
34. In the circumstances it is not necessary for the Tribunal to deal with the other grounds on which the Applicant based its application for cancellation.

ORDER OF THE TRIBUNAL

The compliance notice is hereby cancelled.

Dated this 9th day of October 2012.

[signed]

T WOKER

PRESIDING MEMBER

Ms D Terblanche (Chairperson and Member) and Adv N Sephoti concurring.