

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

Case number: **NCT/4659/2012/101(1)**

In the matter between:

**CARS 'R' US**

**APPLICANT**

And

**NATIONAL CONSUMER COMMISSION**

**RESPONDENT**

Coram:

Ms P Beck – Presiding Member

Adv. N. Sephoti – Member

Prof J Maseko – Member

Date of Hearing – 6 August 2013

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**JUDGMENT AND REASONS**

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**APPLICANT**

1. The Applicant in this matter is Cars "R" Us ("the Applicant") a used car dealership with its principal place of business situated in Newlands, Johannesburg, Gauteng.
2. The Applicant's Founding Affidavit is deposed to by Mr Werner Potgieter who was a partner in the Applicant's business. Mr Potgieter submitted as such on page 2 of his founding affidavit – page 17 of case File ("Potgieter").

3. At the hearing of 6 August 2013, the Applicant was represented by Mr Donn Bruwer of Donn E. Bruwer Attorneys.

## RESPONDENT

4. The 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") ("the Respondent").
5. At the hearing of 6 August 2013, the Respondent did not attend and nor was it represented.

## THE COMPLAINANT

6. The Complainant is mentioned in the Compliance Notice as Mr N Harwood (at page 7 of case file) an adult male residing in Maraisburg, Roodepoort ("the Complainant"). And while the Compliance Notice referred to a Mr. N. Harwood, the Certificate of Registration on page 38 of the Case File, refers to a Mr. P. Haywood.
7. It was the contention of the Applicant that it had entered into a transaction with Mr. Pieter Haywood and not Mr. N. Harwood. In its unopposed submissions, the Applicant stated that while it had entered into the agreement with Mr. P Haywood, Mr. N. Haywood (correct citation) was the son of Mr. P. Haywood and had no *locus standi* in the matter. And based on this fact alone, the Compliance Notice forming subject of this application should be set aside.

## JURISDICTION OF THE TRIBUNAL

8. This Tribunal derives jurisdiction to adjudicate on this matter from section 101(1) of the CPA. The Applicant has applied for the *review and setting aside*<sup>1</sup>, of a compliance notice issued by the Respondent to the Applicant in terms of Section 100 (1) of the CPA.

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<sup>1</sup> At page 33 of case file.

## BACKGROUND

9. On 7 March 2012, the Respondent issued a Compliance Notice to the Applicant. The Compliance Notice, dated 7 March 2012, was received by the Applicant per email on 14 May 2012.
10. On 30 May 2012, the Applicant lodged an application objecting to the Compliance Notice and requested that it be reviewed and set aside in terms of Section 101(1) of the CPA.

## EVENTS LEADING UP TO THE ISSUING OF THE COMPLIANCE NOTICE

11. It appears true and correct that on or about 1 September 2010 Mr P. Haywood purchased a used 2008 Toyota Quantum minibus ("the vehicle") from the Applicant.
12. On 31 May 2011 the Applicant received a letter from the Respondent advising that the Complainant had referred a complaint to the Respondent with regard to the vehicle. Upon receiving the abovementioned letter the Applicant referred the matter to his attorney, Bruwer who replied to the Respondent's letter. Bruwer in his letter stated that:
  - 12.1 The vehicle was purchased by "Haywood" and not by "Harwood" as reflected in the Compliance Notice and as such the named Complainant did not have *locus standi* to have referred the complaint to the Respondent; and
  - 12.2 As the vehicle was purchased on 1 September 2010, before the effective date of the CPA, the Act was not applicable to the transaction.
13. On 20 June 2011 Mr Modiba from the Respondent's offices contacted Bruwer and advised him that irrespective of when the transaction was concluded or whether the Complainant had *locus standi*, the Applicant was required to **amicably resolve** the matter. Bruwer was requested to formally reply to the Respondent's letter of 31 May 2011. Bruwer had replied stating that:
  - (a) The vehicle had apparently broken down during December 2010, more than 3 (three) months after purchase of the vehicle and after the vehicle had travelled about 20 000 km.

- (b) The vehicle was then taken to Toyota, Melrose Arch, who allegedly changed the vehicle's computer box, as it was believed to be the fault. The repairs were covered by the warranty on the vehicle.
  - (c) After the vehicle was repaired by Toyota the vehicle could still not be started and was subsequently towed to Fosters Toyota who diagnosed certain defects as shown in an estimate, which is annexed to the Applicant's founding affidavit as Annexure "B5".
  - (d) The Complainant attempted to use the warranty to pay for the repairs to the vehicle but Fosters Toyota declined to accept liability and stated that the vehicle showed the same problems as when it arrived from Toyota, Melrose Arch, and as such Toyota, Melrose Arch should effect the repairs.
14. In light of the aforesaid Bruwer was of the opinion that the Applicant was not liable to repair the vehicle.
15. The Complainant was not satisfied with the Applicant's response and a telephonic conciliation was agreed to and set down for 21 July 2011. At the outset of the conciliation Bruwer contended that, firstly, the Complainant did not have the necessary *locus standi*, and, secondly, the Respondent did not have jurisdiction in the matter as the transaction had been concluded before the effective date of the CPA. The conciliation failed and Bruwer was advised by the Respondent that the matter will be referred to the National Consumer Tribunal ("the Tribunal") for hearing.
16. No further correspondence between the Respondent and Bruwer took place until 14 May 2012 when the Respondent served the Applicant with a Compliance Notice.
17. On 30 May 2012 the Applicant submitted the present application in terms of Section 101(1) for the following orders to be made:
- (a) Setting aside the Compliance Notice; and
  - (b) Costs on an Attorney and Client scale.

## THE LAW ON THE MATTER

18. Section 4<sup>2</sup> of the CPA *inter alia* allows for , a person acting on his or her own behalf to bring a matter before the Tribunal or a court, in terms of the CPA, and alleging that his or her rights have been infringed, impaired or threatened or that prohibited conduct has occurred or is occurring.
19. Section 54 of the CPA also provides, in summary, that when a supplier undertakes to perform any services for or on behalf of a consumer, the consumer has a right to -
- (a) The timely performance and completion of those services and the timely notice of any unavoidable delay in the performance of the services.
  - (b) The performance of services in a manner and quality that persons are generally entitled to expect.
20. Section 56 of the CPA, on the other hand, provides in summary that within 6 months after the delivery of goods to a consumer, the consumer may return the goods to the supplier, without penalty. This return must also be at the supplier's expense, if the goods fail to satisfy the requirements and standards contemplated in section 55 of the CPA. This section also provides that the supplier must, at the direction of the consumer, either:
- (a) Repair or replace the failed, unsafe or defective goods; or
  - (b) Refund the consumer the price paid by the consumer, for the goods.
21. The section in the CPA, dealing with Compliance Notices is section 100. Section 100 provides, *inter alia* for a discretion to the Commission to issue a **compliance notice** in the prescribed form to a person or an association of persons whom the Commission on reasonable grounds believes has engaged in prohibited conduct. However, before issuing a notice in terms of subsection (1) to a regulated entity, the Commission **must** consult with the regulatory authority that issued a license to that regulated entity.

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<sup>2</sup> Section 4(1)(a)

22. The section further provides the details that the Compliance Notice must set out. And these include:
- (a) The person or association to whom the notice applies;
  - (b) The provision of this Act that has not been complied with;
  - (c) Details of the nature and extent of the 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.
23. Section 100(4)(a) of the CPA also provides the grounds on which the Tribunal may set it aside. It also provides that '**a Compliance Notice remains in force, however, until set aside by a court or the Tribunal**'. A Compliance Notice may also be discharged by the NCC issuing a Compliance Certificate in terms of section 100(4)(b) of the CPA.

#### **ISSUES TO BE DECIDED**

24. The issues to be decided by this Tribunal in this case are twofold:

##### **Application for default judgment**

- 24.1 The Respondent does not oppose the application. The Respondent's time period within which to file its opposing affidavit had lapsed before the date of the hearing.
- 24.2 Applicant had subsequently filed an application in terms of Rule 25(2) for a default order. The application for a default judgment was served on the Respondent on 25 July 2012.

## The Main Application

24.3 With regard to the main issue in this case, the Tribunal must determine whether the Applicant has made out a case for the setting aside of the compliance notice; and

24.4 If so, then, the Tribunal had initially also had to consider whether to grant or dismiss the Applicant's request for costs on an Attorney and Client scale. However at the hearing of 6 August 2013, the Applicant expressly abandoned the prayer for a cost order against the Respondent. This prayer therefore remains abandoned and has fallen off the issues to be determined.

## THE CASE OF THE APPLICANT

25 The Applicant submitted that the Complainant does not have the necessary *locus standi* in terms of Section 4(1) of the CPA to refer the matter to the Respondent. The Applicant alleged that the vehicle was purchased by P. Harwood and not by the Complainant N. Harwood. Further that P. Harwood is the registered owner of the vehicle. As a result, the Complainant had no contractual nexus with the Applicant. A quick glance at the evidence on file shows that this is correct, despite the fact that the matter was also not opposed.

26 The Applicant contended that, as the transaction was concluded prior to the general effective date of the CPA, the Respondent did not have the jurisdiction to entertain the Complainant's referral under the CPA. The contract between P. Harwood and the Applicant was concluded on 1 September 2010, being prior to the general effective date of the CPA.

### The compliance notice

27 The Applicant, in its Founding Affidavit, responded to the averments as set out in the Compliance Notice. The Applicant made submissions regarding the steps to be taken and the penalty to be imposed as follows:

27.3 The Respondent issued a Compliance Notice dealing with a Mr. N. Harwood, while the Applicant only has a relationship with a Mr. P. Harwood. As already pointed out above,

this assertion is correct as it is backed up by tangible evidence on file. And the Respondent did not attend or submit any papers clarifying this discrepancy or justifying it.

27.4 Since there is no contractual nexus between the Respondent and the alleged N. Harwood, then the Compliance notice is not applicable in the matter at hand (at least in summary). This Tribunal concurs with this point.

27.5 A proper investigation with reference to the vehicle's registration certificate would have revealed to the Respondent that there was no relationship between the Respondent and the alleged complainant (N. Harwood). This is evident, in summary, that the Respondent had not even discharged its duty to **investigate** in terms of section 99(d) of the CPA, before issuing a Compliance Notice in terms of this Act.

27.6 It has also already been indicated above that section 100(2) of the CPA requires the Respondent to also consult with a regulatory authority before issuing a compliance notice to a regulated entity. However, at the hearing, and when this question was put to the Applicant, it transpired that the Applicant was not a regulated entity at any time relevant to this application.

28 Clause 1.2.1 of the Compliance Notice states, in part, that:

*"... the complainant purchased a Quantum from Car B Us for the amount of R180 000.00(One hundred and eighty thousand Rands), and three months down the line the vehicle start showing some defects. The dealership refused to take responsibility for the defective products or vehicle claiming that it is not their responsibility fix the vehicle."*

29 The Applicant submitted that the Compliance Notice did not state the details of the alleged defects. Further that no investigation was conducted into the alleged defects from which it could have been concluded that the Applicant was obliged in terms of the CPA to repair the alleged defects.

30 The Applicant submitted further that no consideration was given to the following:



- (a) the model of the vehicle;
- (b) the second hand nature of the vehicle;
- (c) the commencement odometer reading of 120 677 km of the vehicle;
- (d) that the Complainant had used the vehicle for more than 20 000 km when the alleged defects arose in such a short period of time;
- (e) no mention of what would constitute reasonable distances travelled with a vehicle of that nature, premised on expert opinion in a three month period;
- (f) no mention as to whether the vehicle was serviced regularly and as prescribed once in the possession of the Complainant;
- (g) no investigation of possible abusive use of the vehicle; and
- (h) That the vehicle was repaired by Toyota Melrose Arch under a warranty purchased by the Complainant. The repairs were made prior to the complainant having raised the complaint and no recourse was sought against Toyota Melrose Arch under the Act for such defective repairs.

31 Clause 1.2.2 of the Compliance Notice provided that:

*“... the respondent failed to render quality services and the respondent keep being arrogant when the complainant trying to make contact in order to resolve the matter”*

However, the Applicant denied rendering any services to the Complainant, either as alleged or at all. The Applicant further submitted that he does not understand on what basis the Complainant alleged that the Applicant “[kept] being arrogant”.

32 Under steps taken, Clause 1.3.2 of the Compliance Notice provided that:

*"The respondent was given seven (7) working days to respond to the complaint and failed to respond."*

- (a) The Applicant denied this allegation. The Applicant submitted that the contrary is evident by the emails sent by the Applicant before the conciliation hearing was held. The Applicant denied this allegation as being not only spurious (false) but also vexatious (annoying; irritating) considering that the Respondent advised the Applicant that it would have its "day in court" after the conciliation failed. No such opportunity was afforded the Applicant.
- (b) The Applicant submitted further that the doctrine of *audi alteram partem* does not appear to be practiced by the Respondent. As a result the Applicant has been deprived of its Constitutional right to a fair hearing, whilst being threatened with draconic fines based solely on the *ex parte* representations of the Complainant without any proper investigation having been concluded by the Respondent.

33 Clause 1.4 of the Compliance Notice stated with regard to Schedule 2 Item 8 (1) of the Act that:

*"Despite the repeal of the repealed laws for a period of three years after the general effective date the Respondent may exercise any power in terms of any such repealed law to investigate any breach of law that occurred during the period of three years immediately before the general effective date."*

The Applicant denied the alleged contravention of Item 8(1) of Schedule 2 of the CPA as Item 8(1) of Schedule 2 does not contain an infringement provision.

34 The Applicant denied the alleged contravention of Section 54(1) (a) and (b) of the CPA. The Applicant submitted that it never undertook to perform, or performed, any services for the Complainant. Meantime, it has already been pointed out above that section 56 (2) of the Act provides that:

*"Within six months after the delivery of any goods to a consumer, the consumer may return the goods to the supplier, without penalty at the suppliers risk and expense, if the goods fail to satisfy the requirements and standards contemplated in section 55, and the supplier must, at the direction of the consumer, either-*

- (a) *Repair or replace the failed, unsafe or defective goods; or*
- (b) *Refund the consumer the price paid by the consumer, for the goods."*

The Applicant denied the alleged contravention of Section 56(2) of the Act for the aforesaid reasons, namely, that it never undertook to perform any services for the Complainant.

- 35 The Applicant denied the alleged contravention of Section 56(3) of the CPA as far as it relates to the Applicant not repairing the vehicle. That section provides that:

*"If a supplier repairs any particular goods or any component of any such goods, and within three months after that repair, the failure, defect or unsafe feature has not been remedied, or a further failure, defects or unsafe feature is discovered, the supplier must-*

- (a) *Replace the goods;*
- (b) *Refund the consumer the price paid by the consumer for the goods."*

- 36 The other clauses in the Compliance Notice are a matter of the record. But rehashing them here would have served a good purpose only if the case was opposed by the Respondent. Only then would it have been necessary to detail the analysis of the merits of either argument to that detail.

## ISSUES IN AGREEMENT

- 37 Due to the fact that the matter was not opposed there is no explicit agreement on any issue between the parties. The application of Rule 13(5) of the Rules for the Conduct of Matters before the Tribunal however renders the entire application to have been admitted.

## LEGAL QUESTIONS

- 38 For the purposes of deciding this case, the legal questions that have been identified from the issues raised are:

- 38.1 May the Tribunal grant the order on the basis of a default application as contemplated in Rule 25(2) of the Rules of the Tribunal?

- 38.2 Does the Complainant have the *locus standi* in terms of the CPA to refer the matter to the Respondent?
- 38.3 Does the CPA apply retrospectively in this matter?
- 38.4 Did the Respondent comply with the requirements of section 100(3) of the CPA? A compliance notice must set out-
- (a) The person or association to whom the notice applies. In this case, while the Applicant as the party to comply with it, is correctly stated, the Complainant was not.
  - (b) The provision of this Act that has not been complied with. Since the first point above is not answered in the affirmative, none of the remaining questions can rescue the issue.
  - (c) details of the nature and extent of the non-compliance;
  - (d) Any steps that are required to be taken and the period within which those steps must be taken; and any penalty that may be imposed in terms of this Act if those steps are not taken.
- 38.5 What is the effect of the absence of an allegation that a consultation in terms of Section 100(2) of the CPA was not held? The effect of such an allegation or finding, amounts to the Compliance Notice being issued prematurely, even if it had been directed at the correct complainant.
- 38.6 May the Tribunal grant a cost order in favour of the Applicant, on an Attorney and Client scale. As already pointed out above, this prayer was subsequently abandoned by the Applicant at the hearing. This judgment will therefore not deal with this aspect of the case any further.

## ANALYSIS OF THE FACTS AND THE LAW

39 This section will deal with each of the legal questions separately as they relate to the facts:

### Factors to be taken into consideration in the default application

40 The Applicant served the Respondent with the application which was deemed complete on 3 July 2012 and, in terms of the provisions of Rule 13 of the Tribunal Rules, the Respondent was supposed to file its response by 24 July 2012. However it failed to do so. The Applicant subsequently filed an application in terms of Rule 25(2) for default judgment on 15 August 2012.

41 Rule 3(2)(v)(vi) of the Tribunal Rules provided that the Tribunal may consider applications for default judgment in terms of Rule 25. The said Rule 25(3) provided as follows:

*“(3) The Tribunal may make a default order –*

*(a) After it has considered or heard any necessary evidence; and*

*(b) If it is satisfied that the application documents were adequately served.*

This formulates the test for an application for default judgment before the Tribunal. The Applicant has placed sufficient evidence before the Tribunal to make a determination on the matter and this Tribunal is satisfied that the main application documents were adequately served.

**Does the Complainant have the *locus standi* in terms of the Act to have referred the matter to the Respondent?**

42 The Applicant relies on the fact that the Complainant is cited as “*N Harwood*” and not “*P Haywood*”, Pieter Haywood being the name in which the vehicle is registered. The vehicle's Certificate of Registration is annexed to the application and marked Annexure “B2”. It reflects P Haywood as the registered owner of the vehicle.

43 Section 4(1)(a) of the CPA provides that a person acting on his own behalf may approach the Respondent to allege that his rights in terms of the Act have been infringed, impaired or threatened, or that prohibited conduct has or is occurring.

It is uncertain as to why Pieter Haywood is not the complainant, but one Nathan Harwood. Considering that this is a default application, this issue is of academic nature. If the matter was opposed however, this may have been a relevant consideration for the Tribunal.

#### Does the CPA apply retrospectively in this matter?

44 The application of the CPA to pre-existing transactions and agreements are limited to the extent provided for in Schedule 2, Item 3. This provision states, in brief, that the CPA does not find application to pre-existing transactions and agreements, with exceptions.

45 Schedule 2, Item 3 of the CPA provides that certain sections of the CPA, as listed in the first column of the provided table, apply to a pre-existing agreement between a supplier and a consumer, to the extent indicated in the second column, as if that pre-existing agreement would have been subject to the CPA if the CPA had been in effect at the time the agreement was made.

46 The extent of the CPA's application to pre-existing agreements is *inter alia* the following:

- 46.1 Goods that are deliverable or delivered to the consumer in terms of the agreement, on or after the general effective date;
- 46.2 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;
- 46.3 Goods supplied to the consumer in terms of the agreement, on or after the general effective date;
- 46.4 Any transactions occurring in terms of the agreement, on or after the general effective date;
- 46.5 Any purported amendment to the agreement made, on or after the general effective date;
- 46.6 Goods or services supplied to the consumer in terms of the agreement, on or after the general effective date; or

- 46.7 An amount paid or payable by the consumer in terms of the agreement, on or after the general effective date.
- 47 The **would be** Complainant purchased the vehicle from the Applicant on or about 1 September 2010, evidently before the effective date of the CPA, the effective date being 31 March 2011. The CPA clearly does not apply to the purchase of the vehicle.
- 48 However, in accordance with Schedule 2, Item 3 of the CPA, goods or services supplied to the consumer in terms of the pre-existing agreement, will fall within the ambit of the CPA. As sections 54 and 56 (the sections relied upon by the Respondent) require goods or services to have been supplied to the consumer on or after the general effective date of the CPA, these sections clearly do not apply to the Applicant. The Applicant did not deliver any subsequent service to the Complainant.

**Did the Respondent comply with the requirements of section 100(3) of the CPA?**

- 49 A compliance notice, in terms of Section 100(3) of the CPA, must set out the person or association to whom the notice applies. In this case, the compliance notice does set out to whom the compliance notice applies. The compliance notice therefore does comply with this requirement in terms of the CPA. But this does not cure the major defect in the Compliance which is where it refers to a wrong complainant.
- 50 The provisions of the CPA have also not been complied with. The Respondent in its compliance notice states that the Applicant's conduct amounts to a contravention of the following provisions of the Act:
- 50.1 Schedule 2, Item 8(1);
- 50.2 Section 54(1)(a) and (b); and
- 50.3 Section 56(2)(a) and (b), 3(a) and (b).
- 51 It must be noted that the Respondent in its compliance notice did not rely on a specific repealed law. The Respondent merely alleged that the Applicant contravened Schedule 2, Item 8(1) of

the CPA. The compliance notice, in terms of this requirement, has to set out the details of the nature and extent of the non-compliance.

52 Without reference to the repealed law that has been allegedly contravened by the Applicant the Tribunal would not be able to determine whether and which repealed law, if any, has been contravened and the Compliance Notice would thus not comply with the provisions of Section 100(3).

53 In the *Volkswagen* case<sup>3</sup> it was held that in order for the Respondent to rely on the continued application of repealed laws, it must show which law it is relying on. It also had to demonstrate exactly the applicability to the situation and proof of the alleged contraventions to the extent required in terms of that law. *Schedule 2, Item 8 cannot be contravened as it is an enabling provision. The provision/s of the repealed laws can however be contravened.*<sup>4</sup>

On the papers it is evident that the Applicant did not perform any services 'for or on behalf of the stated Complainant (N. Harwood); and that the purchase agreements was concluded prior to the effective date. . The repairs done to the vehicle do qualify as services and do qualify for the application of section 54 in terms of Item 3 of Schedule 2. These services were however provided by Toyota Melrose Arch and not the Applicant.

54 The Respondent is clearly relying on the incorrect Section of the CPA as it does not find application.

**Any penalty that may be imposed in terms of this Act if those steps are not taken**

55 The compliance notice directs that an administrative fine in the amount of R500 000.00 would be sought from the Tribunal if the Applicant fails to implement the directive Compliance Notice. There has been no motivation for such a fine in this case as the matter has not been opposed by the Respondent, let alone be accompanied by such a motivation. This issue then falls away.

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<sup>3</sup> *Volkswagen South Africa v National Consumer Commission* NCT/3913/2012/101(1)(P)CPA

<sup>4</sup> *City of Johannesburg v National Consumer Commission* NCT/2667/2011/101(1)(P), NCT/2081/2011/101(1)(P)



**What is the effect of the absence of an allegation that a consultation in terms of Section 100(2) was not held when this is not raised by the parties at all?**

56 The Respondent made no allegations as to whether the Applicant is regulated by a regulatory authority and whether a consultation took place with such regulatory authority (if it exists). At the hearing the Applicant indicated that it was a regulated entity. This then closes that question off in this consideration.

57 With regard to the main issue in this case, the Tribunal had to determine whether the Applicant has made out a case for the setting aside of the compliance notice. And based on the facts canvassed above, the applicable law and the analysis woven into section above, the order below is being made.

**ORDER**

58 The Compliance Notice issued by the Respondent against the Applicant, dated 7 March 2012, is hereby cancelled in its entirety in terms of section 101(2) of the CPA.

Thus done and handed down at Centurion this 25<sup>th</sup> Day of September 2013.

{signed}

**Prof. J. M. Maseko**  
**Tribunal Member**

Authorised for issue by the National Consumer Tribunal

Case number NCT/4659/2012/101(1)

Date: 2013 / 10 / 28  
Cyy / mm / dd

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Ms. P. Beck (Presiding Member) and Adv . N. Sephoti (Tribunal Member) concurring.