

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

Case number: **NCT/6570/2012/75(1)(P)(CPA)**

In the matter between:

DIETRICH VIVIER

APPLICANT

and

TOWBARS CAPE CC

FIRST RESPONDENT

and

THE NATIONAL CONSUMER COMISSION

SECOND RESPONDENT

Coram:

Prof J Maseko – Presiding member
Ms. P. Beck – Member
Adv N. Sephoti – Member

Date of Hearing – 4 December 2013

RULING ON POINTS IN LIMINE AND REASONS

APPLICANT

1. The Applicant in this matter is Dietrich Vivier, a major male residing in Kuilsrivier, Western Cape (hereinafter referred to as "the Applicant").
2. The Applicant's founding affidavit was deposed to by himself.
3. At the hearing of 4 December 2013, the Applicant appeared unassisted via Skype from Cape Town.

RESPONDENTS

4. The First Respondent is cited as Towbars Cape CC. No details as to the registration of the entity are available and it therefore cannot be determined whether it is a company or close corporation. It is conducting business from Motor City, Western Cape (hereinafter referred to as "the First Respondent").
5. The First Respondent opposed the application and filed an answering affidavit – P178 of the case file. However, at the hearing, the First Respondent also raised five (5) points *in limine* that resulted in this ruling.
6. At the hearing of 4 December 2013, the First Respondent appeared represented by Zameer Dawjee, assisted by Messrs Uys Marais and Marius Naude of SEESA (legal representatives).
7. The Second Respondent is the National Consumer Commission ("the NCC").
8. The Second Respondent did not attend the hearing and nor filed any papers opposing the matter.

JURISDICTION OF THE TRIBUNAL

9. The Tribunal is mandated to conduct a hearing in the main matter in terms of Section 75 of the Consumer Protection Act, Act 68 of 2008 ("the Act" or "the CPA"). A Notice of complete filing was issued by the Tribunal on 30 November 2012.
10. However, for the Tribunal to entertain an application under section 75(1) of the CPA, there has to be a Notice of Non-referral issued by the Second Respondent. There was no such notice in this case. This brings to question the issue of whether this Tribunal may entertain the matter in the absence of a Notice of Non-referral. And this indeed was also one of the *points in limine* alluded to in paragraph 5 above.

APPLICATION TYPE

11. This is an application in terms of Section 75(1)(b) of the CPA, referred to the Tribunal in terms of the provisions of that section, on the 29th October 2012. After a notice of incomplete filing

from the Tribunal, the Applicant resubmitted another version of his application dated 13 November 2012.

12. The Applicant sets out the purpose of the application which was for this Tribunal to order the First Respondent to effect certain payments claimed. These belong in the domain of the merits of the case and this ruling does not deal with the merits of the main case at this point.
13. The information relating to the steps taken by the NCC is however relevant in order to consider whether the Tribunal should be granting the Applicant leave to refer in terms of Section 75(1)(b) of the Act.

BACKGROUND

14. On 23 January 2012 the Applicant bought a new Hyundai i-10 vehicle from Hyundai Tyger Valley. The latter referred him to have a tow bar fitted at the First Respondent.
15. On 16 February 2012, the Applicant went to the First Respondent to have the tow bar fitted on the vehicle. After enquiring about various types of tow bars, he was referred to the owner of the First Respondent. The owner informed him in the presence of the sales manager of the First Respondent that there is only one type of tow bar locally available in South Africa for Hyundai i-10.
16. Under the impression of the response from the owner of the First Respondent, the Applicant had then bought the so called "Hyundai approved tow bar". The tow bar was fitted on the same day while he waited. He then later paid and collected his car from the workshop of the First Respondent on receiving the invoice and being informed that the vehicle was ready.
17. While the Applicant was on his way home from the First Respondent, he had noticed:
 - 17.1 A rattling noise from the rear end of his vehicle;
 - 17.2 On inspecting the rattling sound, that the bumper was loose and fitted crookedly;
 - 17.3 The First Respondent had fitted the tow bar in such a way that it protruded through the bumper in which a large hole had been made to fit the tow bar;

- 17.4 A wrong tow bar had been fitted – per picture in pages 160 and 161 of case file;
- 17.5 There was a rubber fitment around the edge of the hole that had been cut in the bumper, and the rubber fitment was partly loose;
- 17.6 Some black spray-paint had been spilt on the silver bumper; and
- 17.7 It was already too late in the day to return to the First Respondent to have these problems rectified on the same day. He had then only returned on the following day to lodge a complaint.
18. On subsequently reporting the above problems to the Managing Director of the First Respondent, one Mr. Zameer Dawjee. The latter had acknowledged that this was shoddy work and below their normal work standards. The assertion was of course denied by the First Respondent. Dawjee even asked the Applicant how he would propose that the matter be resolved. This was also denied by the First Respondent.
19. The Applicant had informed the First Respondent that he had preferred a full refund of the tow bar. However, Dawjee had told him that he was prepared only to replace the tow bar with another tow bar of Applicant's choice; and flatly refused to refund him.
20. When Applicant asked the First Respondent to bring back his vehicle to the state in which it was when he had brought it, with respect to the bumper, the First Respondent offered to have the hole in the bumper fixed by "plastic welding." The First Respondent had then flatly refused to replace the bumper.
21. On 21 February 2012, the Applicant had after failing once more to get the matter resolved, obtained a report from Hyundai, at the cost of R245.10, stating that¹:
- 21.1 There was an incorrect tow bar fitted;
- 21.2 The bumper had been incorrectly cut;
- 21.3 The Bumper grommets were missing; and
- 21.4 Wiring connections had not been tapped up.

¹ Page 162 of Case file.

22. After another failed attempt to resolve the matter with the first Respondent on 27 February 2012, the Applicant had approached Hyundai Belville, to replace the tow bar fitted by the First Respondent with one approved according to the standards of Hyundai.²
23. The Applicant also authorised Hyundai Belville, to fit a new bumper at the cost of R1247.10 for the bumper and at the cost of R1710.00 for the spray-painting of the replacement bumper.
24. Pertaining to the Second Respondent, the Applicant had lodged a complaint about the First Respondent to the NCC (Second Respondent). The latter acknowledged receipt of such a complaint on 27 March 2012. Then:
- 24.1 On 9 July 2012 the Applicant received an email from the NCC to which was attached a copy of a letter³ to the First Respondent asking for a response to the complaint.
- 24.2 The Applicant never received a copy of any response from the First Respondent on the complaint via NCC.
- 24.3 The Applicant received no further correspondence from the NCC.
- 24.4 When the Tribunal advised the Applicant to request a notice of non-referral from the NCC, the Applicant had done so on 4 October 2012.
- 24.5 On 17 October 2012, the Applicant approached the Tribunal again for further advice due to the non- response from the NCC. The case management desk advised the Applicant to then approach the Tribunal.
- 24.6 On 30 October 2012, the Applicant had submitted an application to the Tribunal. And to this application, he received a notice of incomplete filing.
- 24.7 Then on 13 November 2012, the Applicant submitted a revised application to the Tribunal. And on this occasion, the affidavit had been typed as opposed to the brief hand written version dated 30 October 2012.
- 24.8 The Tribunal issued the Applicant with a notice of complete filing on 30 November 2012.

² Page 165 of case file.

³ Page 169 of the Case file.

POINTS IN LIMINE

25. At the hearing, the First Respondent raised the five *points in limine* referred earlier. These points were, in summary that:

25.1 Whilst the Applicant made certain averments about a tow bar that he had purchased from the First Respondent, he had failed to explain which right under the Consumer protection Act (CPA) was infringed. And as such, the Applicant had not disclosed a cause of action to be heard by the Tribunal. The response of the Applicant to this point was to reiterate the assertions already made in the summary, which were also part of his application and accompanying affidavit. These will, therefore, not be repeated in this part of the ruling. However, in responding to this point, the Applicant further highlighted the provisions of:

25.1.1 Section 18 of the CPA which provides the right of a consumer to choose and examine goods to ensure that goods correspond with what he had been entitle to;

25.1.2 Section 19(5) of the CPA which deals with the need for a supplier to allow a consumer on request, to examine goods. He reiterated that he had been prevented from exercising these rights;

25.1.3 Section 20 of the CPA which deals with the right to return goods. On the day of returning the tow bar; there had been no policy shown to him on how complaints should be handled internally. But he had wanted to return the tow bar for a refund, which was refused by the First Respondent;

25.1.4 Section 54(1) of the CPA, which deals with the right to demand quality service. Whilst on this, he referred the hearing to page 6 and paragraph 2.10 of his affidavit, to show shoddy work done. He asserted further on this point that the work was not up to the standard that is to be expected on such work.

- 25.2 The applicant did not explore all avenues of redress, before lodging the complaint with the Tribunal. And in the alternative, the Applicant had not lodged the application in this case with leave of the Tribunal in terms of section 75 of the CPA. Responding to this point, the Applicant reiterated the efforts made in referring the matter to the First Respondent on about three occasions in vain, when he approached the NCC, as well as the Tribunal. These are already a matter of the record and will not be repeated herein.
- 25.3 The Applicant did not receive a Notice of Non-referral from the NCC in line with section 75 of the CPA before applying to the Tribunal. And, in the light of the amount that the Applicant was claiming, there was no justification for the costs incurred. The response of the Applicant to this point was that he had made all the effort to obtain the Notice of Non-referral from the NCC as he had been correctly advised by officials of the Tribunal, but all these efforts were in vain. He however conceded that he indeed did not obtain the requisite Notice of Non-referral.
- 25.4 The First Respondent had only received the application via non-accepted means of service, and the Applicant had not complied with the formal requirements as prescribed by the Tribunal in its Rule 30. Reference was also made to a case of Sebola v Standard Bank (no full citation), and the assertion that Applicant should also ensure that not only is the service sent but also received by the other party. Regarding this point, the response of the Applicant was that he had been guided in effecting service of the papers by officials of the Tribunal.
- 25.5 Although the Tribunal operates on an informal basis, the rules of the Tribunal only provides for a witness to testify via video-conferencing in a pre-hearing conference. The Applicant was to be then regarded by the Tribunal as not properly before the Tribunal by appearing via Skype. This Tribunal elected to deal first with this last *point in limine*. The reason for this was that it had to be decided upfront whether the Applicant could continue to participate via Skype when dealing with the remainder of the *points in limine* or be regarded as not being properly before the Tribunal.
26. After hearing both arguments on the last point above, Tribunal ruled, that the Applicant was properly before the Tribunal. The reason for this was that this is a sole determination of the

Chairperson of the Tribunal in terms of Regulation 37(1)(c) and 37(2) (of the Regulations for Matters Relating to the Functions of the Tribunal and Rules for the Conduct of matters before the National Consumer Tribunal, 2007).⁴ This Tribunal made this ruling *ex tempore*, to allow the parties to address the Tribunal on the remaining four *points in limine*. That leaves this ruling to address the other four *points in limine* still not yet determined.

27. Any one of the *points in limine* is sufficient to determine whether the matter should proceed to the merits aspect of the case or not. Should all the points raised fail, then the merits of the case would be canvassed. But in the event that even a single point succeeds, then the matter would have to be stopped and not proceed to hear the merits.

RULING ON POINTS IN LIMINE

28. Section 75(1) of the CPA allows an Applicant to refer the matter directly to the Tribunal as follows:

"If the Commission issues a notice of non-referral in response to a complaint, other than on the grounds contemplated in section 116, the complainant may refer the matter directly to-

- (a) the consumer court, if any, in the province within which the complainant resides, or in which the respondent has its principle place of business in the Republic, subject to that consumer court; or*
- (b) the Tribunal, with leave of the Tribunal."*

29. The Tribunal has considered the law and the Regulations and the Rules and case law. There is no bases upon which the Tribunal, as a creature of Statute, may exempt an Application from being made without the Notice of Non-referral or leave from the Tribunal.
30. In the result, the Tribunal cannot proceed to hear the application without this prerequisite notice of non-referral. And in the result, the other *points in limine* fall away and will no longer be considered any further.
31. The application is therefore dismissed for lack of jurisdiction by the Tribunal over the matter in its current form. This does not say anything about the merits of the matter.

⁴ Published under GN 789 in GG 30225 of 28 August 2007 as amended by GenN 428 in GG 34405 of 29 June 2011.

32. The Second Respondent is required by law, to provide a notice of non-referral and failure to do so has rendered this matter out of the jurisdiction of the Tribunal as the notice is mandatory for the Tribunal to be able to entertain the matter. Where the Second Respondent is unwilling to issue a notice, the Applicant is advised to seek redress hereon from the relevant authorities vested with powers to ensure that the Second Respondent fulfils its duties and obligations as set out in the Act. ⁵

DATED ON THIS 6th day of December 2013.

Prof. J. M. Maseko
PRESIDING MEMBER

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

Authorised for issue by the National Consumer Tribunal

Case number

Date 20 / 12 / 2013
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⁵ Contribution by Adv. N. Sephoti