

IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case Number: NCT/17829/2014/ 75 (1) (b)

In the matter between:

BANDERA TRADING AND PROJECTS CC

APPLICANT

and

KIA MOTORS SOUTH AFRICA (PTY) LTD T/A KIA THE GLEN

RESPONDENT

*Coram:*

Adv. J. Simpson - Presiding Member  
Prof. J. Maseko - Tribunal Member  
Ms. H. Devraj - Tribunal Member

Date of 1<sup>st</sup> Hearing: - 27 October 2016  
Date of 2<sup>nd</sup> Hearing - 21 November 2016  
Date of 3<sup>rd</sup> Hearing - 24 January 2017

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JUDGMENT AND REASONS

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**APPLICANT**

1. The Applicant in this matter is Bandera Trading and Projects CC<sup>1</sup> (the Applicant") a close corporation with registration number 2010/015950/23. The Applicant, therefore, is a juristic person. And in order to qualify as a consumer under the Consumer Protection Act, 2008 (CPA) it must have an annual turnover or asset value which is under R2 million.<sup>2</sup> Proof of such turnover has been placed in evidence during the condonation phase of the matter on pages 190 – 191 of the case bundle.
2. Rule 4(3) of the Rules also states the following - *"If the Applicant is a company or other corporate entity, the officer signing the application must append a copy of the board resolution or other proof*

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<sup>1</sup> As observed in from the Condonation Ruling by Prof. T. Woker, dated 13th day of February 2016

<sup>2</sup> See section 5 (2) (b) of the Consumer Protection Act, 2008 read with section 6. The Minister of Trade and Industry has determined the monetary threshold applicable to the size of the juristic person to be less than R2 million.

of *authority to act on behalf of that company or entity*. It is also trite law that where a juristic person has commenced legal proceedings it is necessary for the person who has bought those proceedings on behalf of the juristic person to show that it has been fully authorized by the juristic person to do so. The purpose of this rule is to ensure that certain members of the juristic person do not engage on a "*frolic of their own*". There appears to be a resolution authorizing the two members of the Close Corporation (CC) to act for the CC in this matter.

3. At the hearing of the 27<sup>th</sup> October 2016, the Applicant was represented by both Dino Martin Zackey and Samson Freddy Zackey. The same Representatives appeared for the Applicant also on both the hearings of the 21<sup>st</sup> November 2016 and the 24<sup>th</sup> January 2017.
4. At the hearing of the 24<sup>th</sup> January 2017, the Applicant's representatives arrived at 11h17, when the matter had been set down for 10h00. The Applicant Representatives indicated that while they had been aware since November 2016 of the date of set down, they had been distracted from remembering the date because one of them was suffering ill health. They had been prompted to arrive (late as it was) by a telephone enquiry from the Office of the Registrar (of the Tribunal) when it had appeared that they were not arriving for the hearing.

## RESPONDENT

5. The Respondent is Kia Motors South Africa (Pty) Ltd t/a Kia the Glen.
6. At the hearing of the 27<sup>th</sup> October 2016, the Respondent had not been represented. Instead, the representative of the Respondent, at about 8h00, on the date of the hearing, set down for 10h00; the Tribunal had received an email from the Respondent, stating that the representative could not attend as she had to attend to a family emergency that had occurred that morning. Said Representative was indicated as Ms Natasha Foster, Legal Advisor and Property Administrator.
7. Ms Natasha Foster continued to appear for the Respondent also on both the 21<sup>st</sup> November 2016, as well as the 24<sup>th</sup> January 2017.

## APPLICATION TYPE

8. This is an application in terms of Section 75(1) (b) of the Consumer Protection Act 68 of 2008 (CPA) (the Act), wherein the Applicant seeks leave to refer a matter directly to the Tribunal.

9. The matter that the Applicant wishes to refer to the Tribunal is dealt with under the “background” section below.

## JURISDICTION

10. The National Consumer Tribunal (Tribunal) has jurisdiction to hear this matter in terms of section 27 of the National Credit Act read with section 75(1) (b) of the Consumer Protection Act. Section 75 of the CPA provides:

*“If the Commission issues a notice of non-referral in response to a complaint, other than on the grounds contemplated in section 116, the complainant concerned may refer the matter directly to...the Tribunal, with leave of the Tribunal.”*

11. The Tribunal is a creature of statute and can only act in accordance with the powers given to it in terms of its founding legislation and other applicable legislation. This legislation is the National Credit Act of 2005 (NCA) and the CPA. The Tribunal's main role is to adjudicate on matters relating to prohibited conduct or required conduct as set out in the legislation.
12. Our colleague, Prof, Woker has already held in the Condonation Ruling<sup>3</sup> that the Tribunal has no jurisdiction to deal with complaints against the other Respondents that had been cited in the earlier application on this matter. These Respondents which were excluded consisted of:
- (a) Wesbank, a Division of First National Bank Limited;
  - (b) Short-Term Insurance Ombudsman<sup>4</sup>; and
  - (c) The Public Protector.

13. The reason for excluding the above entities was that the Tribunal does not have jurisdiction over those entities such as Motor Industry Ombudsman of South Africa (MIOSA).<sup>5</sup> And in the case of Wesbank, they had not really been implicated in the dispute between the Applicant and the Respondent.

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<sup>3</sup> dated 13 February 2016

<sup>4</sup> Which turned out to be a colloquial reference to the Motor Industry Ombudsman of South Africa (MIOSA)

<sup>5</sup> See section 26 (1) (d) of the National Credit Act of 2005

## BACKGROUND

14. This matter could not proceed on the first two dates set down for its hearing. Case Reports have been placed on the record regarding this, by the Presiding Officer. This matter appears to have been referred to Parliament, the Department of Trade and Industry (**the dti**) , National Treasury, the Public Protector; NCC, and now the Tribunal.
15. At the hearing of the 21<sup>st</sup> November 2016; this matter was postponed because, Ms Natasha Foster; the Internal Legal Counsel for the Respondent; submitted that she still had not received a complete bundle comprised of the documents and pleadings filed by the Applicant. She had requested these documents from the then attorney<sup>6</sup> of the Applicant in May and June 2016; but had never received them. She had therefore requested the postponement to be placed in possession of a complete bundle of this case. She subsequently received the bundle of documents from the Registrar and the matter could proceed.
16. It must be noted from the outset that the Applicant's pleadings were very difficult to understand and interpret due to the manner in which they had been drafted and presented. The Tribunal had significant difficulties in understanding the nature of the application and the merits of the claim. The Tribunal mentioned this difficulty on numerous occasions to the Applicants on each postponement of the matter and encouraged the Applicants to try and read the relevant sections of the CPA and to try and present their evidence in a manner which could assist the Tribunal in reaching a conclusion.
17. The Tribunal posed numerous questions to the Applicant's representatives during the hearing to try and determine the facts and merits of the claim. They were however unable to provide clear answers on simple issues such as when the car was in fact purchased. While the Tribunal understands that the Applicant's representatives are not required to be legally trained, they must at least understand their own application and be in a position to provide accurate and coherent information when requested by the Tribunal.
18. From file contents, the Applicant purchased a motor vehicle from the Respondent on or about 17 October 2011. There appears to have been problems with the vehicle and according to the Applicant it was returned to the Respondent on a number of occasions.

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<sup>6</sup> This attorney was said to be one Tyrone Maseko – *no elations to this writer*.

19. At the hearing of the 24<sup>th</sup> January 2017, the Applicant's representatives were adamant; even after many probing by the panel, that, while they had bought the vehicle in question from the Respondent on the 17<sup>th</sup> October 2011; the vehicle had undergone various repairs prior to this date, being 2010. Although this aspect is unclear, It appears they were then, by implication, alleging that the vehicle had in fact been delivered to them prior to 2011. The investigation report of the Respondent at page 91 of the case file also seems to corroborate the 30<sup>th</sup> January 2010. We deal with this in the findings section of this judgment.
  
20. The vehicle was finally returned to the Respondent on 28 May 2012 when it was found that the engine had seized. The Respondent alleges that the engine seized because the Applicant had failed to have the vehicle serviced. But the Applicant submitted that it could not have known the service schedule as the vehicle had not come with a service maintenance guide.
  
21. The Applicant then laid a complaint with, it appears, MIOSA. In this application the Applicant has referred to MIOSA as the Short Term Insurance Ombud. However; it seems that the Ombud which dealt with the complaint was in fact the MIOSA.
  
22. At another point in the hearing of 24<sup>th</sup> January 2017, the Applicant submitted that it had purchased the vehicle in question on the 11<sup>th</sup> of October 2011.
  
23. The engine of the vehicle "packed up" in May 2012. This "packing up" was said to involve excessive smoke coming out of the engine. But the vehicle could still be driven to the premises of the Respondent, despite "packing up".
  
24. At some point when the Applicant went to collect the vehicle from the Respondent after having driven it there, and after it had "packed up", the Respondent had quoted for the Applicant to pay R37 500.00 for repairs, alleging that the Applicant had driven the vehicle without servicing it at the correct mileages. The Applicant had refused to have the vehicle repaired at this expense and instead referred the complaint to the MIOSA.
  
25. When MIOSA had attempted to mediate the dispute between the parties, they had been offered to have the vehicle repaired by the Respondent for R6500.00, through MIOSA. But they had refused this proposal, partly because they had not seen the actual written offer.

26. The MIOSA concluded that the engine of the vehicle had seized because the Applicant had failed to service the vehicle and so it found in favour of the Respondent. It is noted that the Applicant has numerous complaints about the manner in which the MIOSA handled the matter and as a result has filed a number of complaints with different entities such as the Department of Trade and Industry, the Public Protector as well as certain media organizations. However, as already stated above, this Tribunal does not have jurisdiction to adjudicate actions and conduct of MIOSA, among others.
27. On the 25<sup>th</sup> June 2013, in an explanatory letter, the Public Protector declined to deal with the complaint and advised the Applicant to approach an attorney of its choice or the NCC.
28. The Applicant then lodged a complaint with the NCC on 3 September 2013. The NCC issued a notice of non-referral on the 23 July 2014<sup>7</sup> on the basis that the Applicant did not allege any facts which, if true, would constitute grounds for a remedy under the CPA. This application was made under the hands of **Samson Freddy Zackey** and **Dinno Martin Zackey** who signed as "Directors" of the Close Corporation. The Tribunal notes that the language of the Close Corporations Act that establishes such corporations is to refer to the equivalent of directors under the Companies Act, as "Members".
29. Having received a notice of non-referral the Applicant may in terms of section 75 (b) of the CPA refer the matter directly to the National Consumer Tribunal (the Tribunal), with the leave of the Tribunal. Such application must be done within the prescribed time and in the prescribed manner and form.
30. The Applicant alleges that it was sold a defective motor vehicle and that it has been in dispute with the Respondent for nearly 5 years. The Applicant has nearly completed all its installments under the credit agreement entered into with the Respondent and yet it only had use of the motor vehicle for the first 5 months. During that time, the Applicant alleges, the motor vehicle was returned to the Respondent on a number of occasions. At present the motor vehicle is in storage having been sent there by the Respondent after the matter was dealt with by the MIOSA who found in favour of the Respondent. It appears that the storage fees owed by the Applicant are in the region of R200 000.00 and increasing every day.

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<sup>7</sup> At page 5 of the case file

31. The Applicant, avers; in the main claim, that their main case against the Respondent is that:

- (1) The 1<sup>st</sup> Respondent sold the Applicant a vehicle that has never been legally roadworthy, unlicensed for about 5 months; had a constant engine problem from inception (lack of power & oil, overheating & smoking) and that despite numerous returns of the said vehicle, to Kia the Glen, the problems had never been sorted out.
- (2) The conduct of the Respondent resulted in the delays of sorting the matter out. This was compounded by the one year and five months stay of the vehicle at the premises of the MIOSA.
- (3) The vehicle has since been vandalised, while the Respondent wants the Applicant to pay the escalating storage costs which would, by the last day of the hearing, have exceeded the R200 000.00 mark expressed in 2016.

32. When the NCC issued its notice of non-referral it stated that it declined to refer the matter to the Tribunal because the facts which, even if they were true, would not allow the Applicant a remedy under the Act. The Applicant has alleged that it bought a defective motor vehicle from the Respondent and that this motor vehicle has been in storage for years thus leading to an extremely high storage bill. The Applicant alleges that it did not authorize the storage of the motor vehicle and that when it attempted to collect the motor vehicle it found the vehicle in a dilapidated state. The Respondent in its reply to the NCC disputed that the motor vehicle was defective when it was sold to the Applicant. The Respondent remained adamant that the cause of the problems was the fact that the Applicant had failed to service the motor vehicle when service was due. And, at the hearing of 24<sup>th</sup> January 2017; it was common cause between the parties that a diesel engine has to be serviced every 10000 km.

33. The Applicant brought an application, dated 26 September 2014 before Tribunal, for leave to directly refer the matter to the Tribunal in terms of section 75(1) (b) of the Consumer Protection Act.

34. There was an "answering" (but which was actually a condonation application) of the Respondent deposed by **Natasha Foster**, its Legal Advisor and Property Administrator. It was dated 18 May 2016. That affidavit appears to have only been motivating for a condonation application to file its

papers late. The contents of that affidavit do not bear any relevance to this judgment at this stage – beyond the condonation stage – which has already been dealt with.

35. The real answering affidavit of the Respondent dated 17 May 2016, was adduced by Ralf Schaffernicht, its Dealer Principal. And in that affidavit, Schaffernicht, averred, in summary, that:

Regarding defects in the Application:

- (4) On or about the 25<sup>th</sup> February 2016, the Tribunal granted the application for condonation for the late filing of the application to the Applicant.
- (5) While in that ruling, the Tribunal had ordered the Applicant to produce an affidavit detailing the annual turnover or asset value in order for the Tribunal to establish whether the Applicant is a consumer under the CPA. The Applicant submitted such proof as contained on pages 190-191 of the case bundle.
- (6) While the Applicant had also been ordered to indicate the complaint that it had against the Respondent and the sections contravened in the CPA, the Applicant also failed to provide same.

Regarding the Defence of the Respondent

- (7) The Applicant purchased a Kia K2700 Bakkie with Registration letter and numbers YWT 026 GP from the Respondent.
- (8) It was common cause that the vehicle was returned to the Respondent on or about the 28<sup>th</sup> May 2012 as a result of the seized engine.
- (9) The Applicant had a right to return the goods (vehicle) to the Respondent within 6 months in the advent that it failed to satisfy the requirements and standards as contemplated in section 55 of the CPA – per section 56 of that Act. The right to return goods in this light are not absolute as it excludes situations where goods were used in a manner contrary to the manufacturer's specifications.
- (10) According to the records of the Respondent, the vehicle was not serviced in accordance with the requirements of the Warranty.



(11) The Applicant breached the terms of the Warranty, knowing full well that it had the onus to ensure compliance with that Warranty. Also failure to honour the requirements and obligations under that Warranty would result in the service plan and warranty being cancelled.

(12) The Respondent had not acted *contra bonis mores* with regard to its numerous requests to Applicant to collect its vehicle from the premises of the Respondent. This was after the ruling of the Motor Industry Ombudsman, and the subsequent removal of the vehicle by the Respondent.

(13) The Respondent cannot be held responsible for any loss or damage that resulted from the failure by the Applicant to collect its vehicle from the premises of the Respondent.

36. Section 1 of the CPA defines a *consumer* as:

*"A person who has entered into a transaction with a supplier in the ordinary course of the supplier's business, unless the transaction is exempt from the application of this Act by section 5(2) or in terms of section 5(3)."*

## ISSUES TO BE DECIDED

37. The Tribunal has to decide on the following issues:

- (1) whether or not, under the circumstances, the Applicant should be granted leave to refer the complaint directly to the Tribunal;
- (2) whether or not the Applicant is a consumer as defined in terms of section 1 and section 5(2)(b) the CPA and is entitled to approach the Tribunal;
- (3) Whether or not the Tribunal has jurisdiction to hear this matter.

## ANALYSIS OF PROVISIONS OF THE CPA APPLIED TO THE FACTS

38. Section 1 of the CPA defines a consumer, in respect of any particular goods or services, as

- (a) *A person to whom those particular goods or services are marketed in the ordinary course of the supplier's business; (and)*

(b) *A person who has entered into a transaction with a supplier in the ordinary course of the supplier's business, unless the transaction is exempt from the application of this Act by section 5(2) or in terms of section 5(3);*

39. The question of whether an application for leave is a separate step in a section 75(1)(b) application has been considered in many previous Tribunal cases<sup>8</sup>. Section 75(1)(b) of the CPA stipulates that the Applicant may, in the event of the issuing of a Notice of non-referral by the NCC, refer the matter directly to the Tribunal, with the leave of the Tribunal. In the matter of *Westinghouse Brake and Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd*<sup>9</sup>, the following was held:

*"... that, if possible, a statutory provision must be construed in such a way that effect is given to every word or phrase in it.... The reason is, of course, that the lawgiver, it must be supposed, will choose its words carefully in order to express its intention correctly, and will therefore not use any words that are superfluous, 'meaningless or otherwise otiose "(per TROLLIP JA in Sv Weinbem 1979 (3) SA 89 (A), at p 98 E-F)<sup>10</sup>*

40. In determining whether the Applicant should be granted leave to refer the matter to the Tribunal, the Tribunal must consider the requirements for the granting of "leave". A similar application can be found in the High Court practice, where an Applicant applies for leave to appeal a judgment. It was held in the *Westinghouse Brake and Equipment (Ply) Ltd* - matter, as cited above, that-

*"in applications for leave to appeal properly brought before the appropriate court in terms of the old sec 20, read with sec 21 as it then was, the only relevant criteria were whether the applicant had reasonable prospects of success on appeal and whether or not the case was of substantial*

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<sup>8</sup> Refer to *MV Chauke v Standard Bank et al* TRIBUNAU4658/20121141 (1)(P) and *Coertze and Burger v Young* TRIBUNAU714212012173(3)&75(1)(b) CPA

<sup>9</sup> 3 1986 (2) SA 555 (A) at par 15.

<sup>10</sup> *Barrett, N .O. v Macquet*, 1947 (2) SA 1001 (AD) at p 1012; *Port Elizabeth Municipal Council v Port Elizabeth Electric Tramway Co Ltd* 1947 (2) SA 1269 (AD) at p 1279.

*importance to the applicant or to both him and the respondent."*

41. The Tribunal will therefore, when considering whether to grant the Applicant leave to refer or not, use the same test as applied in the High Court for applications for "leave" and will therefore consider:

- (1) Whether the matter is of substantial importance to the Applicant or Respondent; and
- (2) The Applicant's reasonable prospects of success with the referral.

42. In the matter of *Coertze and Burger v Young* [NCT1714212012173(3)&75(1)(b)] the Tribunal stated that a refund is defined as returning money to somebody, usually because he or she paid too much or did not receive what was paid for, and "pay back (money), typically to a customer who is not satisfied with goods or services bought." It was also confirmed by the Tribunal in the *Coertze matter* that the Tribunal may in terms of Section 75(4)(b) of the CPA make any applicable order contemplated in the CPA or in section 150 or 151 of the Act.

43. Regarding the first question to be answered, the matter is clearly of substantial importance to the Applicant or Respondent. But regarding the second question, there appears to be some challenges in the case of the Applicant. These challenges, in summary cover:

(3) The Applicant representatives were adamant; even after much probing by the panel, that, while they had bought the vehicle in question from the Respondent on the **17<sup>th</sup> October 2011**; the vehicle had been repaired and then, by implication, delivered to them at some date prior to this, on the **30<sup>th</sup> January 2010**. The investigation report of the Respondent at page 91 of the case file also seems to corroborate the 30<sup>th</sup> January 2010. The Tribunal was however unable to obtain any clarity from the Applicant in this regard.

(4) The Applicant had a right to return the goods (vehicle) to the Respondent within 6 months in the advent that it failed to satisfy the requirements and standards as contemplated in section 55 of the CPA – per section 56 of that Act. The right to return goods in this light are not absolute as it excludes situations where goods were used in a manner contrary to the manufacturer's specifications.

- (5) By its admission, and given the time frames canvassed, the period between 30 January 2010 or that between 17 October 2011 and the date on which the vehicle was returned (using the date as mentioned in Par 23 as May 2012), is in excess of the 6 months within which a purchased good should be returned under section 56 of the Act. This means, therefore, that the prospects of success, even if leave was granted for the Applicant to refer the matter directly to the Tribunal, are non-existent.
- (6) It appears that the vehicle may have been returned for certain repairs within the six month period, however the nature of these repairs and whether they rendered the vehicle defective are unknown. For example, it appears a missing or damaged mudflap was in issue at one of the repairs, which would not render the vehicle defective.
- (7) Despite the Tribunal's efforts to interpret the Applicant's claim and obtain clarity from the Applicant's representatives, the Tribunal is simply unable to find that there is any reasonable prospect of the claim succeeding.

## ORDER

44. On the basis of the afore-going, the Tribunal makes the following order:

- (8) The application for leave to refer a complaint directly to the Tribunal is hereby **refused**; and
- (9) There is no order as to costs and none were requested.

Thus done and handed down in **Centurion** this 25<sup>th</sup> Day of **January 2017**,

**Prof. J.M. Maseko**  
TRIBUNAL MEMBER

With **Adv. J. Simpson** (Presiding Member) and **Ms. H. Devraj** (Tribunal Member) concurring.