

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

Case Number: **NCT/189254/2021/75(1)(b) CPA – Rule 34**

In the matter between:

ETIENNE DE VILLIERS

APPLICANT

and

DONFORD (PTY) LTD

Trading as BMW STELLENBOSCH

RESPONDENT

Coram:

Adv J Simpson – Presiding Tribunal member

Date of Hearing (in chambers) - 2 December 2021

Date of Judgment - 2 December 2021

JUDGMENT ON APPLICATION FOR LEAVE TO REFER

APPLICANT

1. The Applicant in this matter is Mr Etienne De Villiers, a major male (“Mr De Villiers” or “the Applicant”).

RESPONDENT

2. The Respondent is Donford proprietary limited, trading as BMW Stellenbosch (“BMW” or “the Respondent”).

APPLICATION TYPE

3. This is an application in terms of Section 75(1)(b) of the Consumer Protection Act, Act 68 of 2008 (“the CPA”).
4. Section 75(1) of the CPA states the following –

“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 –
 - (a) ...
 - (b) *the Tribunal, with the leave of the Tribunal.”*

JURISDICTION

5. Section 75(5) of the CPA states that:

“The Chairperson of the Tribunal may assign any of the following matters arising in terms of this Act to be heard by a single member of the Tribunal, in accordance with section 31(1)(a) of the National Credit Act:
 - (a)...
 - (b) *an application for leave as contemplated in subsection (1)(b).”*
6. Accordingly, the Tribunal has jurisdiction to hear this application for leave to refer a complaint to the Tribunal as contemplated under section 75(1)(b).
7. A single member of the Tribunal may hear the application in accordance with section 75(5)(b) of the CPA.

BACKGROUND

8. Mr De Villiers lodged an application with the Tribunal in terms of section 75(1) (b) of the CPA regarding purchasing a pre-owned BMW 320i from BMW on 24 July 2019. It was sold with a one year or 25 000km motor plan warranty. While still within the warranty period, he took the vehicle to BMW due to a noise when starting the vehicle. BMW did not find anything wrong with the vehicle. A month later, after the warranty had expired,

he took the vehicle back to BMW for the same noise. He was then quoted approximately R15 000.00 to repair the vehicle. Mr De Villiers submits that the repair should have been diagnosed and repaired the previous month while under warranty. He wants BMW to refund him the repair costs. It is not clear whether he has already repaired the vehicle at his own cost or wants BMW to pay the repair cost.

9. Mr De Villiers lodged a complaint with the Motor Industry Ombudsman of South Africa (“MIOSA”) on 25 August 2020. The application does not contain any response from MIOSA; it appears to have been omitted from the documents attached. Mr De Villiers lodged a complaint with the National Consumer Commission (“the NCC”) on 9 November 2020. He received a Notice of Non-referral from the NCC dated 17 March 2021. The Notice states that there is no evidence that Mr De Villiers requested a diagnosis from BMW while still under warranty.
10. Mr De Villiers lodged the application for leave with the Tribunal on 19 May 2021; he also filed an application to condone the late filing of the application. The condonation for the late filing was granted in a written judgment dated 27 July 2021.
11. The judgment stated that BMW had to file its answering affidavit within 15 business days of the ruling being issued. BMW did not file an answering affidavit. The matter was then set down for a default decision on leave to refer.

APPLICATION FOR LEAVE

12. In terms of section 75(1) of the CPA, the Applicant may only refer the matter directly to the Tribunal *with leave of the Tribunal*.
13. Previously, the Tribunal held formal hearings on leave to refer, and all the parties would be present. In the matter of *Lewis Stores (Pty) Ltd v Summit Financial Partners (Pty) Ltd and Others* (Case no 314/2020) [2021] ZASCA 91 (25 June 2021) *SAFLII*, the court provided useful guidance to the Tribunal in decisions regarding leave to refer. It held that a formal hearing on leave to refer was unnecessary, there was no test to be applied and the decision to consider leave could not be appealed. The court held –

“[15] As I have explained, the NCA provides for an expeditious, informal and cost-effective complaints procedure. Section 141(1)(b) confers on the Tribunal a wide, largely unfettered discretion to permit a direct referral. The NCA does not require a formal application to be made and it is not necessary for purposes of the present appeal, nor is it desirable, to circumscribe the factors to which the Tribunal should have regard. There is no test to be applied in deciding whether or not to grant a direct referral to it in respect of a complaint. The purpose of the provision is simply for the Tribunal to consider the complaint afresh, with the benefit of any findings by the Regulator, and to decide whether it deserves its attention. Circumstances which may influence its decision may include the prospects of success, the importance of the issue, the public interest to have a decision on the matter, the allocation of resources, the complainant’s interest in the relief sought and the fact that the Regulator did not consider that it merited a hearing before the Tribunal. The list is not intended to be exhaustive.”

14. As there is no test to be applied, the Tribunal will consider the matter in the general context of the circumstances as submitted by the parties.
15. The condonation ruling dated 27 July 2021 noted various challenges with Mr De Villiers’ application and that the issues would be considered in the leave to refer stage of the process. Mr De Villiers did not file an application to condone the filing of further supplementary affidavits and evidence. BMW did not file any answering affidavit in the matter. Therefore, the Tribunal must decide on granting leave based on the rather scant evidence before it.
16. The application does not state which specific section of the CPA the Respondent has contravened. The alleged facts have not been explained clearly, and the relevant dates and invoices are unclear. Mr De Villiers appears to be alleging that he reported an engine noise to BMW on 22 June 2020, while it was still under warranty. BMW could not find any fault with the engine. Based on the invoices attached, on 15 October 2020, after the warranty period had expired, he took the vehicle back to BMW. BMW appears to have found some problem with the engine and quoted R13 882.59 to repair it. He wants the money he paid for the repairs to be refunded to him. He appears to be alleging that BMW should have diagnosed the problem in June 2020 and repaired it while the vehicle was still under warranty. Therefore, it appears Mr De Villiers is alleging that BMW did not provide him with good quality services as required by section 54 of the CPA. Section 54 states:

“Consumer’s rights to demand quality service

54. (1) *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 timely notice of any unavoidable delay in the performance of the services;

(b) the performance of the services in a manner and quality that persons are generally entitled to expect;

(c) the use, delivery or installation of goods that are free of defects and of a quality that persons are generally entitled to expect, if any such goods are required for performance of the services; and

(d) the return of any property or control over any property of the consumer in at least as good a condition as it was when the consumer made it available to the supplier for the purpose of performing such services, having regard to the circumstances of the supply, and any specific criteria or conditions agreed between the supplier and the consumer before or during the performance of the services.

(2) If a supplier fails to perform a service to the standards contemplated in subsection (1), the consumer may require the supplier to either—

(a) remedy any defect in the quality of the services performed or goods supplied;

or

(b) refund to the consumer a reasonable portion of the price paid for the services performed and goods supplied, having regard to the extent of the failure.”

17. Section 54 of the CPA only provides a remedy of the defective service or a refund of a portion of the price paid for the services. It appears Mr De Villiers did not pay for the services rendered in June 2020. Therefore, the Tribunal cannot order a refund. There is no defect in the service as such that the Tribunal can remedy.

18. It is possible that the Tribunal could make a finding of prohibited conduct without making any order as to a refund, which would allow the applicant to apply for a certificate under Section 115(2) of the CPA and possibly pursue a claim for damages in the High Court. However, for a finding of prohibited conduct to be made, the Tribunal would have to make a factual finding that the engine problem that arose in October 2020 (or whatever date the Applicant alleges) resulted from the same problem which he reported to BMW in June 2020. Mr De Villiers has not provided any evidence to support such a conclusion. At the very least, there would have to be a reasonable prospect of expert evidence by a technical expert confirming that the problem in October 2020 was the same and should have been diagnosed and repaired in June 2020. It appears unlikely that the Applicant took the car for an expert opinion in June 2020 and that the fault in October 2020 can be linked to this fault.
19. The Tribunal accepts and understands that Mr De Villiers may not be legally trained and may have difficulty clearly submitting and providing evidence for his claim. However, he is expected to provide a reasonably clear basis for his claim and reasonable prospects of proving it. The evidence submitted does not provide any reasonable prospects of proving his claim.
20. It would not serve any practical or legitimate purpose to allow an application to proceed unless there is a reasonable prospect of the Tribunal making a finding on the matter.

CONCLUSION

21. Mr De Villiers has not provided a clear basis or sufficient evidence to support a claim in terms of the CPA. There is no reasonable prospect of the Tribunal making a finding in his favour.

ORDER

22. Accordingly, the Tribunal makes the following order –
 - 22.1 The Applicant's application for leave to refer is refused; and
 - 22.2 There is no order as to costs.

THUS DONE IN CENTURION ON THIS 2ND DAY OF DECEMBER 2021

[signed]

Adv. J. Simpson

Presiding Tribunal Member

Authorised for issue by The National Consumer Tribunal

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