

IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case number: **NCT/227713/2022/75(1)(b)**

In the matter between:

HENRY BESTER

APPLICANT

And

NAUSHAAD'S CAR SALES AUTO CC T/A AUTO BELGRAVIA

RESPONDENT

Coram

Ms H Alwar - Presiding Tribunal Member

Date of consideration (in chambers) - 13 July 2022

Date of Judgment - 18 July 2022

LEAVE TO REFER JUDGMENT AND REASONS

THE PARTIES

1. The Applicant in this matter is Mr Henry Bester, a major male ("Mr Bester" or "the Applicant").

2. The Respondent is Naushaad's Car Sales Auto CC trading as Auto Belgravia, ("Auto Belgravia" or "the Respondent").
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APPLICATION TYPE

3. This is an application in terms of Section 75(1)(b) of the Consumer Protection Act, Act 68 of 2008 (referred to as "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 consider 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 consider the application as per section 75(5)(b) of the CPA.

BACKGROUND

8. Mr Bester lodged an application with the Tribunal in terms of section 75(1)(b) of the Consumer Protection Act 68 of 2008 ("the CPA"). Mr Bester submitted that on or about 23 March 2017, he purchased a VW Polo 1.6 TDi ("the vehicle") from the Respondent. He alleged that shortly after taking possession of the vehicle the airbag warning light came on. In July 2017, Mr Bester noticed that he was unable to start the vehicle with the spare key and that the airbag warning light came on again. According to Mr Bester, he took the vehicle to Volkswagen for an assessment. The result of the assessment was that the vehicle had previously been involved in an accident. On or about 2 August 2017, Mr Bester informed the Respondent that it (Auto Belgravia) had not disclosed that the vehicle was in an accident. Mr Bester requested that the Respondent repair the vehicle or provide him with a refund. The Respondent failed to provide Mr Bester with a response.
9. Mr Bester lodged complaints with the Motor Industry Ombudsman of South Africa (MIOSA) and the National Consumer Commission (NCC). He received a Notice of nonreferral from the NCC dated 31 March 2022. He requests leave from the Tribunal to hear his dispute with Auto Belgravia.
10. On 6 May 2022, Mr Bester filed his application with the Tribunal and served the application on the Respondent on 29 April 2022 via registered mail.

APPLICATION FOR LEAVE

11. In terms of section 75(1)(b) of the NCA, the Applicant may only refer the matter directly to the Tribunal *with leave of the Tribunal*.
12. Previously, the Tribunal held a formal hearing on leave to refer with all the parties 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 costeffective 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.”

13. Although the court judgment referred to section 141(1)(b) of the National Credit Act, 34 of 2005 (“NCA”), section 75(1)(b) of the CPA has the same wording.
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 Applicant. As the matter is unopposed, the Respondent’s version is not before the Tribunal.
15. The main issue in contention appears to be whether the Respondent informed Mr Bester of the defects in the vehicle and that the vehicle was in an accident. Section 41 of the CPA provides for false, misleading, or deceptive representations.
16. However, while Mr Bester’s claim falls within the ambit of the CPA, he faces numerous serious challenges to his claim. Sec 116 of the CPA¹ states that a complaint may not be made to the Tribunal more than three years after the cause of the complaint arose. If the Tribunal accepts the Applicant’s version that he informed the Respondent of the defects in the vehicle and that the vehicle was involved in an accident, in August 2017, then this is when the cause of action would have arisen. Three years from August 2017

is July 2020. The application was filed with the Tribunal on 6 May 2022, more than two years after the three-year period lapsed.

17. The High court recently issued an unreported judgment stating that the Tribunal had no power to interrupt prescription². Although the High court judgment referred to section 166 of the National Credit Act, 34 of 2005 ("NCA"), section 116 of the CPA and section 166 of the NCA have the same wording. The High court also stated that the requirements of Section 166 are peremptory and referred to a previous decision of the

¹ **Limitations of bringing action**

116. (1) A complaint in terms of this Act may not be referred or made to the Tribunal or to a consumer court more than three years after—

- (a) the act or omission that is the cause of the complaint; or
 - (b) in the case of a course of conduct or continuing practice, the date that the conduct or practice ceased.
- (2) A complaint in terms of this Act may not be referred to the Tribunal or to a consumer court in terms of this Act, against any person that is, or has been, a respondent in proceedings under another section of this Act relating substantially to the same conduct.

² *FirstRand Bank Ltd v A Ludick A277/2019 High Court of South Africa, Gauteng, Pretoria division, 18 June 2020 (unreported)*

Tribunal and stated "...in Mapeka v FirstRand Bank Ltd (Wesbank) case number NCT/14020/2014/141 par 21: Section 161(2) of the Act is very clear and does not allow any discretionary element. It places an absolute bar on if the matter is older than three years".

18. The Tribunal is bound by the High court judgment and must apply the provisions of section 116 of the CPA strictly.

CONCLUSION

19. The Tribunal finds that the matter is of substantial importance to the Applicant. The general circumstances under which the Applicant purchased the vehicle falls within the ambit of the CPA.
20. However, the Applicant's claim has prescribed. The application was filed with the Tribunal more than three years after the cause of action arose.
21. There is no reasonable prospect of the Tribunal being able to adjudicate on the Applicant's claim.

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 PRETORIA ON THIS 18TH DAY OF JULY 2022

[signed]

Ms H Alwar Presiding Tribunal Member

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