

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

Case Number: NCT/214406/2022/75(1)(b)

In the matter between:

**KESIGAN SUBRAYEN**

**APPLICANT**

and

**FCA SOUTH AFRICA (PTY) LTD & 1 OTHER**

**FIRST RESPONDENT**

**NMI DURBAN SOUTH MOTORS (PTY) LTD**

**SECOND RESPONDENT**

**Coram:**

Adv. C Sassman: Presiding Tribunal member

Dr. MC Peenze: Tribunal member

Mr. CJ Ntsoane: Tribunal member

Date of hearing: 09 December 2022

Date of judgment: 12 December 2022

**JUDGMENT AND REASONS**

## **INTRODUCTION**

1. The Applicant is Kesigan Subrayen (the Applicant), an adult male and a consumer as defined in the Consumer Protection Act 68 of 2008 (the CPA), who resides in Kwa-Zulu Natal.
2. The First Respondent is FCA South Africa (Pty) Ltd (FCA). FCA is a private company registered in terms of the company laws of the Republic of South Africa. Its registered address is Building 14, Oxford Office Park, Centurion, Gauteng. FCA is a supplier of motor vehicle spare parts to motor vehicle dealers.
3. The Second Respondent is NMI Durban South Motors (Pty) Ltd (NMI). NMI is a private company registered in terms of the company laws of the Republic of South Africa. NMI's registered address is 2 Canegate Road, Umhlanga, Kwa-Zulu Natal. NMI is a motor vehicle dealer.
4. At the hearing of this matter, Mr. Louie Subrayen, the Applicant's uncle, represented the Applicant. Adv. Michael Dafel represented FCA, and Mr. Boden Callum represented NMI.
5. Collectively, FCA and NMI are referred to as "the Respondents" in this judgment.
6. The Tribunal conducted the hearing via a Teams technology link.

## **JURISDICTION**

7. Section 27(1)(a)(iii) of the National Credit Act, 2005 (the NCA) empowers the Tribunal or a Tribunal member acting alone to adjudicate allegations of prohibited conduct by determining whether prohibited conduct has occurred and, if so, by imposing a remedy provided for in the NCA. Section 150 of the NCA empowers the Tribunal to make an appropriate order concerning prohibited or required conduct under the NCA or the CPA. The Tribunal, therefore, has jurisdiction to hear this application.

## **TERMINOLOGY**

8. A reference to a section in this judgment refers to a section in the CPA. A reference to a regulation refers to the CPA Regulations, 2011 (the Regulations).<sup>1</sup> Moreover, a reference to a rule refers to the Tribunal Rules.<sup>2</sup>

## **APPLICATION TYPE AND RELIEF SOUGHT**

9. The Applicant makes this application in terms of section 75(1)(b). That section provides that if the National Consumer Commission (the NCC) issues a notice of non-referral in response to a complaint, the complainant may refer the matter directly to the Tribunal, with leave of the Tribunal. On 25 April 2022, the Tribunal granted the Applicant leave to refer his complaint directly to the Tribunal.

10. The Applicant alleges the Respondent contravened sections 54(1) and 57(1). Further, the Applicant submits that the Respondent must provide redress as set out in section 54(2).

11. As outlined in Form TL73(3) & 75(1)(b) & 2 CPA, the Applicant sought an order for the following relief:

*"Respondent to cover all costs of repairs and logistics. Vehicle must be repaired to Manufactures Specifications Using OEM Pads. Repair must carry a Guarantee/warranty based on Milage or Time, Respondent to cover costs of Towing vehicle from current position (Bluff, Durban) to Dealership. Respondent to reimburse Applicant for logistics of vehicle from Port Edward to Pinetown and Pinetown to Umhlanga " (sic in toto).*

## **BRIEF BACKGROUND**

12. The Applicant complains about the quality of services executed by NMI on the late Mr. Visvanathan Subrayan's vehicle, a 2010 Dodge Journey (the vehicle).

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<sup>1</sup> Published under Government Notice R293 in Government Gazette 34180 of 1 April 2011.

<sup>2</sup> GN 789 of 28 August 2007: Regulations for matters relating to the functions of the Tribunal and Rules for the conduct of matters before the National Consumer Tribunal, 2007 (Government Gazette No. 30225).

13. The Applicant brought this complaint on behalf of Mrs. Parvathy Subrayan, his mother (Mrs. Subrayan). Mrs. Subrayan is the wife and executrix of the estate of the late Mr. Visvanathan Subrayan (Mr. Subrayan). The vehicle presently forms part of his estate.

14. On 27 June 2018, Mr. Subrayan took the vehicle for repairs. The vehicle was generally in bad condition. They found that the vehicle required a cylinder head overhaul. NMI attempted to get hold of Mr. Subrayan to get his authorization to carry out the work. It subsequently came to their attention that Mr. Subrayan had passed away.

15. In January 2019, Mrs. Subrayan, the executrix of Mr. Subrayan's estate, approached NMI and requested that the quotation be revised. NMI agreed but recommended that the vehicle be sold due to its poor state. Mrs. Subrayan decided to continue with the services and authorised the repairs. The repairs were concluded on 25 April 2019, and the vehicle was released.

16. On 29 April 2019, Mrs. Subrayan returned the vehicle to NMI's workshop due to an oil leak. The oil leak was a new issue Mr. Subrayan had not raised before. The diagnostics executed by the Respondent revealed that the flex hoses were damaged and required replacing. Once NMI received Mrs. Subrayan's authorization to replace the flex hoses, they were replaced, and the vehicle was released on 10 May 2019. NMI provided a 3-month warranty on its services.

17. NMI submitted that it provided good quality services in line with the CPA. It further outlined that the three-month contractual and statutory warranty period on the services provided had lapsed in August 2019.

18. The evidence before the Tribunal confirms that, up to February 2019, NMI had a dealer agreement in place with FCA. Regarding this dealer agreement, FCA provided an additional 12-month warranty on spare parts used by contracted dealers during their services. At the time of the repairs to the vehicle in 2019, the dealer agreement between the Respondents had been terminated. Accordingly, NMI did not provide the consumer with a 12-month warranty on spare parts used in 2019.

19. On an unspecified day in October 2019, the Applicant contacted FCA for assistance with a knocking sound. At that point, NMI was no longer dealing with or repairing Fiat

Chrysler Automobiles. Also, NMI's 3-month warranty for the service provided had expired by that time.

20. FCA advised the Applicant that they offer a 12-month warranty on spare parts and services conducted to replace parts. However, because this ten-year-old vehicle's motor warranty had long since lapsed, FCA's extended 12-month warranty was dependent on the outcome of an engine assessment following the engine's dismantling at the consumer's cost.

21. The Applicant refused to pay for the dismantling of the engine and the warranty subsequently lapsed.

22. The Applicant insists that FCA was required to pay for the dismantling of the engine and the assessment thereof. FCA disputes such responsibility, as the extended guarantee was conditional to the consumer authorizing the disassembling of the vehicle. FCA emphasized this contractual obligation and industry practice in light of the lapsing of the vehicle's purchase warranty.

23. On 13 February 2020, the Applicant referred the complaint to the Motor Industry Ombudsman of South Africa (MIOSA). Subsequently, on 4 December 2020, the Applicant referred the complaint to the NCC, who non-referred the matter on 15 January 2021.

24. On 31 March 2021, after payment by the Applicant, Kia disassembled the engine and concluded that there was no oil in the vehicle. The report is not conclusive of whether the services by NMI caused the final malfunctioning of the vehicle but confirms the bad state of the vehicle in general.

25. As the 12-month extended warranty lapsed, FCA denies accountability for the alleged faults in the vehicle. According to FCA, the Applicant waived his right to claim the warranty, and the matter has become moot. FCA outlined that the Applicant did not allow FCA to inspect the vehicle before the warranty on the repair parts expired in April 2020, and presently it is impossible to determine the cause of the alleged knocking sound. The Respondents aver that there is no evidence of defective repair parts or workmanship.

26. The Applicant avers that, as he brought the vehicle to the FCA within the 12-month extended warranty period, FCA is still accountable for repairing the vehicle to a state of

roadworthiness. The Applicant could not tell the Tribunal what is defective about the repair parts or work. Irrespective, he submitted that the Respondents should determine the exact problem and repair it.

27. The matter is important for the Applicant because the vehicle is not in running condition.

## **ISSUES TO BE DECIDED**

28. The Tribunal is required to decide whether:

28.1. The Applicant has proved a contravention under the CPA; and

28.2. The Applicant is entitled in law to the relief sought.

## **THE HEARING**

29. At the hearing, the Applicant requested a postponement to obtain the diagnostic report for services provided by NMI prior to 2019. The Respondents opposed the request. The Tribunal heard the argument on the request for postponement and subsequently denied the request. The following factors were considered:

29.1. The Applicant had adequate time to obtain the particular documentation before the day of the hearing;

29.2. There was no formal request for a postponement before the Tribunal. The Applicant brought the request for a postponement on the day of the hearing;

29.3. The matter had been considered over a long period by different forums, such as the MIOSA and the NCC, and an unjustified further delay would impact negatively on and prejudice the parties;

29.4. The matter was set down twice before and postponed for good reason. At the previous set-down, the Applicant indicated that he was ready and anxious to proceed;

29.5. No sound or substantial reasons were provided for the postponement. The matter before the Tribunal relates to services provided in 2019, and evidence relating to services rendered before 2019 will not turn the merits of the matter; and

29.6. The matter had been duly set down and should be heard in the interest of justice.

30. The Respondents raised the Applicant's *locus standi* as a matter *in limine*. As the merits of the matter can only be considered after the Applicant's *locus standi* is determined, the Tribunal considered argument by parties on the *in limine* point of *locus standi*.

## **POINT IN LIMINE: LOCUS STANDI**

### **Submissions**

31. The Respondents argued that the Applicant lacks legal standing to seek relief under the CPA for the alleged defective workmanship and products.<sup>3</sup> They argued that the Applicant failed to substantiate why the estate executrix could not bring the application and the Applicant had no interest in the matter.

32. The Applicant argued that his mother, the estate executrix, cannot bring the application herself. The Applicant did not explain the executrix's alleged incapacity but explained that he was concerned about his family's financial losses resulting from numerous repairs to the vehicle. He also confirmed that Mrs. Subrayen gave him written authority to act on her behalf in this matter.

### **Analysis**

33. It is trite that the onus rests on the person instituting proceedings to allege and provide *locus standi*.<sup>4</sup> *Locus standi* is divorced from the substance of a party's case and is a question to be decided at the outset before the merits are considered.<sup>5</sup> It is an essential element of every case.

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<sup>3</sup> See FCA para 6-9, pages 242-243.

<sup>4</sup> *Mars Incorporated v Candy World (Pty) Ltd* 1991 (1) SA 567 (A) at 575H-I.

<sup>5</sup> *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others* 2013 (3) SA BCLR 251 (CC) at para 32.

34. The Applicant carried the onus in the main action to prove its locus standi. Its locus standi had to appear *ex facie* his papers.<sup>6</sup>

35. The Applicant explained in the papers that he was acting under the written authorization of his mother. The Tribunal considered the leave to refer judgment where *locus standi* was mentioned in passing. Although the leave to refer was granted, it is upon the Tribunal in the main hearing to decide whether the Respondents have a bona fide defence on the merits. As the Respondents brought the Applicant's alleged failure to prove his *locus standi* as a point *in limine*, the Tribunal must decide the point.<sup>7</sup>

36. As the Tribunal is a creature of statute, the principles regulating an Applicant's *locus standi* are found in the CPA. Section 4 provides that:

*"Any of the following persons may, in the matter provided for in this Act, approach a court, the Tribunal, or the Commission alleging that a consumer's right in terms of this Act has been infringed, impaired or threatened, or that prohibited conduct has occurred or is occurring:*

- (a) A person acting on his or her own behalf;*
- (b) An authorized person acting on behalf of another person who cannot act in his or her own name;*
- (c) A person acting as a member of, or in the interests of, a group or class of affected persons;*
- (d) A person acting in the public interest, with leave of the Tribunal or court, as the case may be; and*
- (e) An association acting in the interest of its members."*

37. The Applicant did not act as a member of, or in the interests of, a group or class of affected persons. Nor did he act in the public interest or as an association in the interest of its members. The Tribunal therefore considered *locus standi* in compliance with either section 4(a) or (b).

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<sup>6</sup> *Kommissaris van Binnlandse Inkomste v van den Heever* 1999 (3) SA 1051 (A) at para 10. <sup>7</sup> *De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1043 G-H.



38. The Tribunal firstly contemplated whether the Applicant acted on his own behalf. According to the evidence, NMI rendered services to the deceased and not to the Applicant. He was not the customer<sup>7</sup> in the consumer transactions. The vehicle on which NMI rendered these services fell in the estate under the executorship of Mrs. Subrayen. The Applicant is not the executor or co-executor of the estate, and the Applicant did not provide evidence that the Master approved any executor rights for the Applicant.

39. In addition, the Applicant failed to prove his interest in the litigation. Being a family member of the deceased or the subsequent executrix does not qualify as an interest in law. More particularly, the Applicant did not prove that he is bound by the conditions in the service agreement or the 3-month warranty it contained. Regarding the relief requested, the Applicant did not persuade the Tribunal that he has a direct interest in the relief sought. The intention to ensure justice for his family is too remote, abstract, and academic. The Applicant did not prove a current personal interest and was not the regular driver of the vehicle. The circumstances outlined by the Applicant were hypothetical, outlining that his father paid considerable amounts to service the vehicle, which he believes were not justified.

40. The rule that only a person who has a direct interest in the relief sought can claim a remedy is no more clearly expressed than in the judgment of Innes CJ in *Dalrymple*:<sup>9</sup>

*“The general rule of our law is that no man can sue in respect of a wrongful act, unless it constitutes a breach of a duty owed to him by the wrongdoer, or unless it causes him some damage in law.”*

41. If the Applicant wanted to establish *locus standi* in his own name, the Tribunal would have expected that he would outline how he in person was affected when his father's vehicle was allegedly poorly serviced. In this matter, the Applicant did not establish any personal interest apart from producing the written authorisation to act on behalf of his mother in this matter. The Applicant did not have any *vinculum iuris* with the Respondents.

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<sup>7</sup> The name on the invoice is Mr. Visanathan Subrayan (his father). <sup>9</sup> *Dalrymple & others v Colonial Treasurer* 1910 TS 372 at 379.

42. The Tribunal subsequently considered if the Applicant was the *authorised person acting on behalf of another person who cannot act in his or her own name*. The Applicant provided documentary evidence that his mother authorised him to act on her behalf.

43. The Applicant argued *locus standi* based on this mandate provided by his mother to litigate on her behalf. It is not disputed that the Applicant's mother is the estate executrix and, therefore, that she has an interest in the matter. If Mrs. Subrayen had litigated this matter, she would have had *locus standi*. The question is, therefore, whether Mrs. Subrayen had the legal right to appoint the Applicant to bring this application on behalf of the executrix in the estate.

44. The executor or executrix of an estate litigates on behalf of an estate. It follows that any executor duties, such as litigating on behalf of the estate, resort under the authority of the appointed executor or executrix. The Applicant failed to provide evidence that he was appointed or co-appointed as executor in his late father's estate. The evidence does not include a letter of authority by the Master of the High Court relating to any rights of the Applicant, and Mrs. Subrayen has not appointed the Applicant as an agent in the administration of the estate. Even if Mrs Subrayen would have appointed the Applicant as an agent in the administration of the estate, she would remain legally responsible and liable for the administration of the estate. Without a power of attorney to act as an agent on behalf of Mr. Subrayen in her capacity as executrix, the only reasonable deduction is that Mrs. Subrayen gave authority in her personal capacity. As such, the authorization of the Applicant to litigate on behalf of the estate is not allowed in law, and the Applicant does not have *locus standi* to bring the matter to the Tribunal on behalf of the executrix.

45. Mrs. Subrayen gave instructions for the repairs in April 2019. Consequently, the Tribunal considered whether she could authorise the Applicant to bring this application on her behalf in her personal capacity. In terms of the Affidavit filed by the Applicant on 21 September 2021, Mrs. Subrayen confirmed the authorisation of Mr. Kesigan Subrayen to act on her behalf in all aspects for the “*repair/replacement or rehabilitation of my motor vehicle, a 2010 Dodge Journey with VIN [...], to road worthy conditions approved by an accredited, vehicle testing body.*”<sup>8</sup>

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<sup>8</sup> See page 99 of the Tribunal Bundle.

46. After scrutiny of the evidence before the Tribunal, it is clear that Mrs. Subrayen is not incapacitated. The Applicant portrayed Mrs. Subrayen as capable of being the executrix in the estate of the late owner of the vehicle, but that *she "is in no position to handle these sort issue, therefore, I have taken this upon my time to pursue." (sic).*<sup>9</sup> The Tribunal does not perceive the statement that Mrs. Subrayen is "*in no position to handle these sort issue*" as sufficient reason to determine that she cannot act in her name.

47. In the absence of any evidence that Mrs. Subrayen cannot act in her name, the Tribunal finds that the Applicant does not have *locus standi* to bring the application on behalf of Mrs. Subrayen.

48. Failure to prove *locus standi* is dispositive of the entire application.

## **ORDER**

49. Accordingly, the Tribunal makes the following order:

49.1. The application is dismissed; and

49.2. There is no cost order.

Dated at Centurion on 12 December 2022.

**DR. MC PEENZE PRESIDING MEMBER**

Adv. C Sassman and Mr. CJ Ntsoane concur.

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<sup>9</sup> See page 65 of the Tribunal Bundle.