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

Case number: **NCT/272304/2023/75(1)(b)**

In the matter between:

**A[...] M[...] D[...]**

APPLICANT

AND

**CONCORD FOOD AND DRUG DISTRIBUTORS (PTY) LTD**

RESPONDENT

Coram:

Mr S Hockey

-

Presiding Tribunal member

Date of consideration (In chambers) 30 October 2024

Date of judgment 30 October 2024

**LEAVE TO REFER RULING**

**THE PARTIES AND APPLICATION TYPE**

1. The applicant in this application for leave to refer is Andre Marlon Dumas (the applicant), a consumer as defined in section 1 of the Consumer Protection Act, 2008 (the CPA).

2. The respondent is Concord Food and Drug Distributors (Pty) Ltd (the respondent), incorporated in terms of the company laws of South Africa and a supplier as defined in section 1 of the CPA.

3. This matter was filed with the National Consumer Tribunal (the Tribunal) in terms of section 75(1)(b) of the CPA. In terms of this section, if the National Consumer Commission (the NCC) issued a notice of non-referral in response to a complaint, the complainant concerned may refer the matter directly to the Tribunal with the leave of the Tribunal. In this judgment, the Tribunal must consider whether leave to refer the applicant's matter to the Tribunal should be granted.

## **BACKGROUND**

4. The origins of this matter stem back to 16 March 2013, when the applicant, a thirteen-year-old minor at the time, visited a friend's house where they were swimming. When he returned home, he experienced discomfort from water in his ear.

5. Two days later, water was still in the applicant's ear. His mother bought a product distributed by the respondent, known as "Swimmers Ear Cleanser" (the eardrops), over the counter. His mother administered the drops in his ear. The applicant instantly experienced pain in his ear and fainted. Thereafter, he cried due to the pain, and his parents rushed him to an emergency medical facility.

6. According to the applicant, the doctor who attended to him advised his parents that he had a perforation in his eardrum. He states that as a result of the eardrops, he is suffering from chronic labyrinthitis.

7. The applicant's father lodged a complaint with the NCC, which issued a notice of non-referral only on 16 November 2022.

8. The applicant argues that the respondent did not have a license in terms of sections 22C(1)(b) of the Medicines and Related Substances Act 101 of 1965 (the Medicines Act) to distribute the eardrops, that it failed to disclose efficient product information and that the product was recalled by the South African Health Products Regulatory Authority (SAHPRA).

9. As for the relief sought by the applicant, he states that he studied marine biology with the prospect of becoming a marine biologist. In the final year of his

studies, he was advised that he could not scuba dive and would, therefore, be unable to perform the normal duties of a marine biologist. He states that he still experiences vertigo, loss of balance, nosebleeds and other symptoms, as a result of which he has suffered considerable financial loss and future income and cannot fulfil his dreams. He also claims future medical expenses and a claim for pain and suffering.

10. The respondent denies that the eardrops or its administration were the cause of the applicant's problems and that insufficient medical evidence was presented to support the applicant's allegations. It is not necessary to delve into detail about the medical aspect or the cause of the applicant's medical issues for present purposes as this part of the applicant's case is not in front of the Tribunal, as will be discussed below. The matter under consideration is the allegation relating to the respondent's manufacturing and distribution of an alleged dangerous product until 2021 in contravention of the Medicines Act.

11. The respondent argues that in 2013 when the incident with the applicant happened, the eardrops were not classified as a medical device under the Medicines Act and did not require registration. They were classified as a Class A medical device only in August 2016 when SAHPRA issued guidelines. After that, the eardrops had to be manufactured in a factory with a medical device manufacturing licence. The guidelines did not prohibit the selling of the product.

12. The respondent further avers that, in November 2019, SAHPRA issued an administrative update exempting persons who manufactured, imported, distributed or exported only Class A medical devices from requiring a medical device establishment licence until further notice.

13. According to the respondent, unbeknown to it, SAHPRA reversed the decision requiring class A medical devices to be manufactured in a facility without a medical device manufacturing licence. In September or October 2022, a representative of SAHPRA visited the respondent, enquiring why they were manufacturing and distributing a product classified as a medical device without the requisite licence. Only then did the respondent become aware that the licence was required. As a result of the above, the respondent recalled the eardrops to comply with the existing legislation.

## THE ISSUE UNDER CONSIDERATION

14. To clarify the issue in front of the Tribunal, it is necessary to consider previous rulings of the Tribunal relating to this matter.

15. The Tribunal previously considered an application for the condonation of the late filing of the application for leave to refer the applicant's complaint to it for adjudication. On 15 April 2024, a single member of the Tribunal dismissed this application on the basis that the act that was the cause of the applicant's complaint occurred more than 10 years before and in terms of sections 116(1)(a), a complaint may not be referred or made to the Tribunal or the consumer court more than three years after the act or omission that is the cause of the complaint.

16. The applicant appealed the above decision of a single Tribunal member to a full Tribunal panel (the appeal panel), and an appeal ruling was handed down on 26 September 2024.

17. The appeal panel held that, in essence, the applicant brought two complaints to the Tribunal, namely;

17.1. the respondent supplied the product during or around 2013, which was dangerous and caused the applicant to suffer severe medical conditions (the first complaint); and

17.2. the respondent produced and retailed an unsafe product until 2021 when it was discontinued (the second complaint).

18. The appeal panel held that the first complaint was time-barred in terms of sections 116(1)(a) but that the second complaint was not as it constituted a course of conduct or continuing practice in terms of sections 116(1)(b)<sup>1</sup>. The appeal panel held that the single member of the Tribunal did not consider the second complaint and held that the condonation application in respect of this complaint should be condoned.

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<sup>1</sup> In terms of this subsection, the three-year period for time barring in the case of a course of conduct or continuing practice commences only when the date of the conduct or practice ceased.

Therefore, the Tribunal must consider whether leave to refer the second complaint for adjudication by the Tribunal should be granted.

## THE RELEVANT LEGAL CONSIDERATIONS

19. As already stated, an applicant requires the Tribunal's leave to refer a dispute to it if the NCC has issued a notice of non-referral.

20. Previously, the Tribunal held formal hearings on leave to refer, and all the parties would be present. In *Lewis Stores (Pty) Ltd v Summit Financial Partners (Pty) Ltd and Others*<sup>2</sup> (*Lewis Stores*), the court provided helpful guidance to the Tribunal in making 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 –

*“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.”*

21. *Lewis Stores* dealt with section 141(1) of the National Credit Act, 2005 (Act 34 of 2005), which is identical to section 75(1) of the CPA. Therefore, the same legal principles and conclusions apply to these sections.

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<sup>2</sup> 2022 (1) SA 377 (SCA) at para 15.

## DISCUSSION

22. The Tribunal is mindful that the complaint under consideration for leave to refer concerns the respondent's manufacturing and distribution of the eardrops, not the allegation that this caused injury or damage to the applicant. The appeal panel did not condone the late filing of the latter complaint, which raises the question of whether the applicant has standing in the matter.

23. Section 4 lists the persons who may approach a court, the Tribunal or the NCC alleging that the consumer's rights in terms of the CPA have been infringed, impaired or threatened or that the prohibited conduct has occurred or is occurring. The list is alphabetised in section 4(1) as follows:

- a) A person acting on his or her own behalf;
- b) an authorised 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 interest 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.

24. The applicant has not presented any facts or arguments indicating that he is acting in any capacity other than on his own behalf. This is also evident in the relief that he seeks. The problem is, however, that the relief he seeks relates to the harm that he allegedly suffered as a result of the administration of the eardrops by his mother. The appeal panel held that his complaint in this regard is time-barred in terms of sections 116(1)(a).

25. The Tribunal is aware of its power to declare any omission or conduct in

contravention of the CPA as prohibited conduct. However, any order in this regard would be academic in the circumstances of this matter.

26. The Tribunal considered the strict liability provision in section 61. However, this section deals with the liability of a producer, importer, distributor or retailer of goods for any harm caused by the supply of any unsafe goods, a product failure, defect or hazard in any goods or inadequate instructions or warnings provided to a consumer pertaining to any hazards arising from or associated with the use of the goods. Again, the applicant's claim for the alleged harm that he may have suffered as a result of the administration of the eardrops is not in front of the Tribunal. His complaint in this regard, as held by the appeal panel, is time-barred in terms of section 116(1)(a).

27. In the circumstances outlined above, the Tribunal is of the view that it would serve no purpose if leave to refer this matter for adjudication by the Tribunal is granted.

## **THE ORDER**

28. In the result, the following order is made:

28.1. The application for leave to refer is refused.

28.2. There is no order as to costs.

S Hockey (Presiding Tribunal member)

**Authorised for issue by The National Consumer Tribunal**

**National Consumer Tribunal**

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