

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

Case No: NCT/3710/2012/101(1) (P) CPA

In the matter between:

CMH FIAT ALFA WESTRAND

Applicant

and

THE NATIONAL CONSUMER COMMISSION

Respondent

CORAM:

MASEKO J.M. (PROF.) (PRESIDING)

BONKE DUMISA (PROF.) (DEPUTY CHAIRPERSON)

FUNGAI SIBANDA (MR) (MEMBER)

Date of Hearing: 5 December 2012

JUDGMENT AND REASONS

1. The Parties

- 1.1. The Applicant is CMH Fiat Alfa Westrand, a company with limited liability incorporated in terms of the Companies Act 61 of 1973, read with Item 2 of Schedule 5 of the Companies Act 71 of 2008, with principal place of business at Cnr. Hendrik Potgieter & Cascades Road, Little Falls, Roodepoort (hereinafter “the Applicant”).
- 1.2. The Applicant’s Founding Affidavit was deposed to by Mr. Nico Fourie, Dealer Principal of the Applicant who is duly authorised to act on behalf of the Applicant by virtue of a resolution annexed to the Founding Affidavit marked “Annexure NF1”.
- 1.3. At the hearing of this matter, the Applicant was represented by Adv R.P. Van Niekerk instructed by Mr. R. Bottin of Whalley & Van Der Lith Incorporated Attorneys.

- 1.4. The Respondent is the National Consumer Commission, an organ of state within the public administration established in terms of Section 85 of the Consumer Protection Act No. 68 of 2008 ("the CPA") with physical address at Berkley Office Park, 08 Bauhinia Street, Highveld Techno Park, Centurion ("the Respondent").
- 1.5. The Respondent neither attended the hearing and nor was represented thereat.

2. Jurisdiction

- 2.1. This National Consumer Tribunal (Tribunal) has jurisdiction to hear this matter in terms of section 101 of the CPA.
- 2.2. This section (101) empowers the Tribunal, to confirm, modify or cancel all or part of a compliance notice.

3. Issue to be Decided

The issues to be decided in this matter included:

- 3.1. Whether the Applicant should be granted condonation for the late and incomplete filing of an application to the Tribunal in terms of Rule 34 of the Tribunal¹;
- 3.2. Whether this Tribunal should grant a default judgment against the Respondent in favour of the Applicant as applied for;
- 3.3. Whether this Tribunal should review and set aside a Compliance Notice dated 22 November 2011 issued by the Respondent and served on the Applicant on 8 December 2011.

¹ Published as Regulations for Matters Relating to the Functions of the Tribunal and Rules for the Conduct of Matters before the National Consumer tribunal in GN 789 in GG 30225 of 28 August 2007 as amended by GenN in GG 34405 of 29 June 2011

4. Background

- 4.1. The hearing is consequent to the Applicant objecting, in terms of section 101(1) of the CPA, to the compliance notice issued by the Respondent against it on the 23rd November 2011 in terms of section 100 (1) of the CPA. The matter was set down for a full hearing on all the above issues to be decided as well as the grounds of objection that were raised against the compliance notice on 5 December 2012.
- 4.2. This matter was referred by the Applicant on the 31st January 2012 and the file became complete on 12 April 2012.
- 4.3. The Applicant is seeking the Tribunal to grant a default order against the Respondent following an application for the review of a compliance notice issued by the Respondent in terms of section 100 (1) of the CPA.
- 4.4. There is no evidence of an answering affidavit contained on the file.
- 4.5. A compliance notice was issued by the Respondent against the Applicant. The Applicant received such notice on 8 December 2011. The Applicant objected to this notice and has applied to this Tribunal to review it in terms of the section 101(1) of the CPA.
- 4.6. Since no opposing papers had been filed by the Respondent, the Applicant had further applied for a default order to be issued against the Respondent.

5. The Condonation Application

- 5.1. As already indicated above, part of the issues to be decided was an application for condonation for late referral of the matter to the Tribunal by the Applicant. The Tribunal dealt with this matter first at the hearing, and disposed of it before dealing with the substantive and procedural issues of the case. The said application was not opposed either in papers or at the hearing as the Respondent was absent.

- 5.2. The Tribunal decided, ***ex tempore***, to grant the condonation for late referral in the absence of any opposition, and the matter proceeded into a hearing on the merits and the other issues raised in the application.

6. Application for a Default Order

- 6.1. Due to the Respondent's failure to advise the applicant of its notice of intention to oppose the application, the Applicant has launched an application for a default order against the Respondent.
- 6.2. Default order applications are regulated under Rule 25(2) of the NCA. Rule 25(3) of the NCA provides that the Tribunal may grant a default order:
- 6.2.1. after it has considered or heard any necessary evidence; and
- 6.2.2. If it is satisfied that the application documents were adequately served.
- 6.3. In assessing the Applicant's application for a default order the requirements for the submission of a default application have been complied with by the Applicant, hence a notice of complete filing had been issued by the Tribunal to the Applicant.
- 6.4. Again, the Tribunal has deliberated on the question of whether the default judgment should be granted or not as applied for. And in doing so, the Tribunal has combined the answer to this question with that of the merits of the case of the Applicant. This was in recognition of the fact that mere failure to oppose by a party does not necessarily make a case of an applicant automatically valid in law and in fact. The merits of the matter still had to be considered in the view of this Tribunal.

7. The Case of the Applicant

The evidence of the Applicant, states, in summary, and among other things that:

- 7.1. The compliance notice states that the Applicant failed to co-operate with the Respondent and/or failed to reply to the complaint which was sent to the Respondent on 4 July 2011.
- 7.2. On 22 August 2011 the Applicant replied to the complaint dated 4 July 2011, both by facsimile and email. The Respondent failed to reply to the letter dated 22 August 2011 and on 2 September 2011 a further letter was sent to the Respondent requesting a reply, which the Applicant never received.
- 7.3. On 16 November 2011 the Respondent once again addressed a letter to the Applicant informing the Applicant to reply to the complaint by close of business on 25 November 2011.
- 7.4. The Applicant's attorneys of record addressed a letter to the Respondent on 18 November 2011 once again indicating that the Respondent did not answer the Applicant's query dated 22 August 2011. This letter of 18 November 2011 also questions an irregularity in which more than one case number seemed to have been allocated by the Respondent to this matter.
- 7.5. On 5 December 2011, Applicant addressed a further letter to the Respondent requesting the latter to acknowledge receipt of all previous correspondence sent to them. On 8 December 2011 the Respondent sent a compliance notice to the Applicant. In that compliance notice, the Respondent states that a conciliation hearing was set down for 5 September 2011. The Applicant avers that it never received such notification and that the hearing in any event preceded the date the Applicant's reply was due - 25 November 2011.
- 7.6. The Applicant further avers that it has, up to the point of lodging the application, despite numerous communications; addressed to the Respondent; neither received any acknowledgment of receipt of correspondence nor a reply.

8. Grounds for Challenging the Compliance Notice

- 8.1. The **grounds of objection** by Applicant against the Compliance Notice in question are that:

- 8.1.1. The conduct complained of took place prior to the commencement of the CPA and therefore falls outside of the Respondent's jurisdiction;
- 8.1.2. The Applicant had a disclaimer which had been accepted by the Complainant;
- 8.1.3. The disclaimer governs the aspects relating to damages, prior to the early effective date of the CPA;
- 8.1.4. The Applicant is indemnified from liability to the Complainant; and
- 8.1.5. Further submissions were made at the hearing of this matter. And among these were:

- 8.1.5.1 Evidence of a letter from the Respondent dated 27 November 2012, in which the Respondent stated, inter alia, that:

"Kindly be advised that we are withdrawing the compliance notice in ... matter..."

- 8.1.5.2 The second paragraph of the same letter also stated in part, that:

"We are aware that the rules do not make provision for the withdrawal of (a) compliance notice. But the purpose of this letter is to allow the Tribunal to decide if it is necessary to allocate a full panel for a decision to set aside a(n) unopposed section 101 application."(my brackets)

- 8.1.6. In its reply to the foregoing letter, the Applicant wrote to the Respondent electing to invoke Rule 25(2) which covers the "default process" and stating that:

"...as the compliance notice is withdrawn but not replaced by a dismissal of the complaint, the part heard

matter may be recalled to your commission for adjudication pursuant to the withdrawal of the compliance notice. We have no alternative to request that the matter proceed in front of the Tribunal ...”

8.1.7. Even if the Compliance Notice was effective, the Applicant decries certain deficiencies in it as it stands. The Compliance Notice stipulates that the Applicant has contravened certain sections of the CPA:

8.1.7.1. With regard to section 54(1) (b) the Applicant disputes the conclusion that it did not adhere to any of the provisions of the CPA mentioned in the Compliance Notice. The Applicant contends that, as it had never been provided with any detail as to what the particular complaints are, it is impossible to deal with any of such complaints to any further degree.

8.1.7.2. Under the circumstances sketched in the Founding Affidavit, the Respondent could never have come to the reasonable conclusion that the Applicant had contravened any of the sections listed in the Compliance Notice.

8.1.7.3. The steps ordered by the Respondent through the Compliance Notice are not steps that would ensure compliance with any of the sections of the CPA allegedly contravened by the Applicant; and in fact, these steps have no bearing on any of the relevant sections of the CPA, save for Sections 55 and 56.

9. The Law on the Matter

- 9.1. The Applicant contends that the CPA commenced on 1 April 2011 and that it does not have retrospective effect. The Applicant further refers to Schedule 2 of the CPA which provides that:

“(1) except to the extent expressly set out in this item, the Act does not apply –

- (a) To the marketing of any goods or services before the general effective date;*
- (b) To any transaction concluded, or agreement entered into, before the general effective date; or*
- (c) To any goods supplied or services provided to a consumer before the general effective date.”*

- 9.2. The Applicant further contends that Item 3(2) provides for those instances where the Act may have retrospective effect to some extent. It specifically stipulates that, in respect of Section 53 to 58 of the CPA, it shall:

“Apply only with respect to any goods or services supplied to the consumer in terms of the agreement, on or after the general effective date”

- 9.3. With regard to the application of the CPA to pre-existing transactions and agreements, Item 3 of Schedule 2 of the Act provides that:

(1) Except to the extent expressly set out in this item, this Act does not apply to-

- (a) the marketing of any goods or services before the general effective date;*

(b) *any transaction concluded, or agreement entered into, before the general effective date; or*

(c) *any goods supplied, or services provided, to a consumer before the general effective date.*

(2) *The sections of this Act listed in the first column of the following table apply, to the extent indicated in the second column, to a pre-existing agreement between a supplier and a consumer, if the pre-existing agreement –*

(a) *would have been subject to this Act if this Act had been in effect at the time the agreement was made; and*

(b) *contemplates that the parties to it will be bound for a fixed term until a date that is on or after the second anniversary of the general effective date:*

- *Sections 53 to 58 would apply only with respect to any goods or services supplied to the consumer in terms of the agreement, on or after the general effective date.*
- *Applies only with respect to an amount paid or payable to the consumer, or to property that comes into the possession of the supplier, on or after the general effective date.*

9.4. The Applicant further contends that the **disclaimer** between the Applicant and the Complainant governs the aspects relating to damages, prior to the early effective date of the CPA, and that the Applicant is indemnified from liability to the Complainant.

9.5. The Applicant also contends that the events which are complained about occurred prior to the effective date of the CPA and the Respondent had no power to issue a **compliance notice** in respect thereof.

9.6. The question whether the Respondent is entitled to order a replacement or refund of all costs incurred by the Complainant, is also worth exploring. The Respondent is mandated by Section 99 of the CPA to do the following:

- (a) *Promote informal “resolution of any dispute arising in terms of this Act between a consumer and a supplier, but is not responsible to intervene in or directly adjudicate any such dispute resolution of any dispute arising in terms of this Act between a consumer and a supplier, but is not responsible to intervene in or directly adjudicate any such dispute;*
- (b) *Receive complaints concerning alleged prohibited conduct or offences, and deal with those complaints in accordance with Part B of Chapter 3²;*
- (c) *Monitor-*
 - (i) *The consumer market to ensure that prohibited conduct and offences are prevented, or detected and prosecuted; and*
 - (ii) *The effectiveness of accredited consumer groups, industry codes and alternative dispute resolution schemes, service delivery to consumers by organs of state, and any regulatory authority exercising jurisdiction over consumer matters within a particular industry or sector;*
- (d) *.....*
- (e) *Referring matters to the Tribunal, and appearing before the Tribunal, as permitted or required by this Act; and*
- (f) *Referring alleged offences in terms of this Act to the National Prosecuting Authority.”*

² Part B of Section 3 relates to Commission Investigations (ss72-75)

10. Analyses of the Evidence and Arguments

10.1. In arriving at its finding on the merits of the Compliance Notice, the Tribunal has since the hearing considered the submissions of the Applicant. And in so doing, the Tribunal:

10.1.1. Noted the above-mentioned self contradictions contained in the Compliance Notice, and that these invalidate the same Compliance Notice which thence stands it to be reviewed and set aside.

10.1.2. Further concurs with the argument of the Applicant that it was impossible for it to comply with the Compliance Notice, even if it had wanted to, as the deadline for such order was on the same day on which the Compliance notice was delivered to the Applicant.

10.1.3. Notes that the “**no refund**” clause is subject to statutory law (CPA), it cannot be seen as an unassailable contractual issue not subject to Consumer law. However, even with this in mind, the issue to be decided is whether the Compliance Notice is to be reviewed and set aside based on all the grounds advanced by the Applicant above.

10.1.4. While the Respondent is supposed to first carry out an investigation of each complaint received³, there was no evidence that the Respondent had done so.

10.1.5. As already stated above, in the absence of the Respondent, only the version of the Applicant was presented. The Tribunal was satisfied that the Respondent had been notified of the Notice of Set Down in this case.

10.1.6. Much as the Respondent has no authority to withdraw a Compliance Notice once it has issued it, the Tribunal notes that it nevertheless attempted to do so. This, when seen with the failure of the Respondent to oppose this matter, seems to indicate the willingness on its part to concede that its compliance notice should indeed be reviewed and set aside.

³ Section 99(d) of the CPA

10.1.7. The other question considered is whether the Respondent was entitled to order a replacement of the vehicle or refund of the deposit and all monthly instalments plus repair costs as the Compliance Notice directs? Respondent effectively ordered this at **Paragraph 2.1** of the Compliance Notice in question. And the obvious answer to this question is in the negative when considering the provisions of the statute in question.

11. Application for Cost Order

- 11.1. The applicant further applied for costs at the hearing. The grounds for this application were many and varied, but included the assertions that the Respondent should have known and indeed knew from the start that it had no right to issue the compliance Notice. Applicant further indicated the numerous written protestations to the Respondent which the latter appears to have ignored.
- 11.2. Section 147(1) provides, subject to subsection (2) thereof, that each party participating in a hearing must bear its own costs.
- 11.3. Rule 25(7) of the NCA empowers this Tribunal to award punitive costs. But such an order can be made only against ***“any party who is found to have made a frivolous or vexatious application to the Tribunal.”*** And from the plain reading of this rule, it is the understanding of this Tribunal that while there is express provision to award penal costs against an Applicant, no such provision is made towards a Respondent in a matter. And to this end, the maxim ***Inclusio unius est exclusio alterius***⁴ finds application.
- 11.4. However section 147(2) of the NCA allows for the awarding of costs against a Respondent... who referred a matter in terms of section 141(1) NCA and section 75(1) of the Consumer protection Act No. 68 of 2008.

⁴ In which is understood and meant that “a specific inclusion of one implies the exclusion of the other”

12. Order

For the reasons interwoven in the above sections of this order, we accordingly make the following order:

12.1 That the compliance notice issued by the Respondent is hereby cancelled.

12.2 there is no order as to costs.

Thus done and handed down on this 6th day of December 2012.

[signed]

Prof. Joseph M. Maseko

Presiding Member

Prof. Bonke Dumisa, Member and **Mr. Fungai Sibanda**, Member, concurring.