

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

Case No: NCT/3914/2012/101(1)P

In the matter between:

**KIA MOTORS SOUTH AFRICA (PTY) LTD
t/a KIA MOTORS THE GLEN**

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

Date of Judgment: 7 December 2012

JUDGMENT AND REASONS

1. The Parties

- 1.1. The Applicant in this matter is Kia Motors South Africa Proprietary Limited t/a Kia Motors the Glen, a private company with limited liability. It was incorporated in terms of the Companies Act 61 of 1973, read with Item 2 of Schedule 5 of the Companies Act 71 of 2008. It has its principal place of business at 1 Boundary Road, Oakdene, Gauteng ("the Applicant").
- 1.2. The Founding Affidavit of the Applicant is deposed to by Mr. Ralf Schaffernicht, 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 as "Annexure RS1").
- 1.3. While the Applicant did not appear, Adv. R.P. Van Niekerk, who was attending another matter at the Tribunal, stood in for Adv. Dean Whitton, who had been due to appear for the Applicant, but had fallen ill on the day of the hearing. The request relayed through Adv. Van Niekerk to the Tribunal, was to hear the matter in chambers due to the inability of the Applicant's

representative to appear and the failure of the Respondent to oppose the matter. The Tribunal acceded to this request.

- 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 ("the CPA") with physical address at Berkley Office Park, 08 Bauhinia Street, Highveld Techno Park, Centurion (hereinafter "the Respondent").
- 1.5. The Respondent neither attended the hearing 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. Section 101(1) empowers the Tribunal to confirm, modify or cancel all or part of a compliance notice.

3. Issues to be Decided

The issues to be decided in this matter included:

- 3.1. Whether the Respondent should have conducted an investigation into the complaint before issuing a Compliance Notice?
- 3.2. Whether the CPA is applicable to this matter given the date of the occurrence of the events complained about and the coming into effect of the CPA?
- 3.3. Whether the Respondent has the authority to order a replacement of the vehicle or refund of the deposit and all monthly instalments as well as repair costs as directed in the said Compliance Notice?
- 3.4. Whether the Applicant complied with the necessary sections and rules in lodging the present application?
- 3.5. Whether the CPA applies in the instance of damages caused as a result of a delict?
- 3.6. Whether this Tribunal should review and set aside a Compliance Notice dated 9 February 2012 and issued by the Respondent against the Applicant on 15 February 2012?

- 3.7. Whether this Tribunal should grant a default judgment against the Respondent in favour of the Applicant as applied on account of the failure of the Respondent to oppose the application?

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 in February 2012 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. The applicant lodged this application with the Tribunal on 6 March 2012 and the file became complete on 22 March 2012. In this application, the Applicant has approached the Tribunal to grant a default order against the Respondent following an application for the review of a compliance notice issued by the Respondent under section 100(1) of the CPA.
- 4.3. A compliance notice was issued by the Respondent, against the Applicant. The Applicant received such notice on 15 February 2012. The Applicant objected to this notice and is requesting the Tribunal to review it in terms of section 101(1) of the CPA. Since no opposing papers have been filed by the Respondent, the Applicant has applied for a default order to be issued against the Respondent.
- 4.4. There is no evidence of an answering affidavit contained on the file from the Respondent.
- 4.5. During May 2008, a customer by the name of Mrs MJ James, purchased a Tata Indica Hatch Back vehicle (registration number: XDL585GP) from the Tata Hatfield dealership, owned by Tata South Africa. This dealership has since closed down.
- 4.6. The customer had the vehicle serviced at the required intervals and raised no complaints regarding the vehicle. Towards the end of November 2010 the customer booked her motor vehicle in for its 45 000km service with the Applicant.

- 4.7. On 30 November 2010, and whilst the customer's motor vehicle was in the Applicant's workshop and therefore under its care, another motor vehicle, a Kia K2700, reversed into the customer's vehicle and collided with the front left fender of her vehicle.
- 4.8. Notwithstanding the fact that the damage to the fender was repairable, Alison Davies, the Workshop Manager, insisted and ensured that the damaged fender was completely replaced with a new fender at the cost of the Applicant.
- 4.9. The Applicant had checked and ensured that the motor vehicle was not damaged beyond the body damage to the fender. A confirmatory affidavit was attached to the founding affidavit marked "Annexure RS15" deposed to by Andy Simpson of Toscana Automotive Refurnishers CC, confirming the repairs to the customer's vehicle and that the repairs were done correctly with no other damage to the customer's vehicle.
- 4.10. On or about 21 January 2011, the customer informed the Applicant that she was not satisfied with the repairs done to her vehicle. The Applicant informed her that she could bring the vehicle to the dealership and that the dealership would have one of their technicians go through the vehicle and the repairs with her. The customer rejected this offer, and instead informed the Applicant that she would get a second opinion.
- 4.11. Thereafter, neither the Applicant nor TATA South Africa heard anything further from the customer.
- 4.12. On 21 June 2011, the Respondent's Complaints Handling Unit addressed a letter to TATA South Africa informing that a complaint had been lodged with the Respondent. A response was sent to the Respondent with the results of TATA SA's own investigation into the matter. After no response was received from the Respondent, TATA's response was resent.
- 4.13. On 3 November 2011, TATA South Africa received an email from the customer claiming that she received a call from the Respondent stating that a "compliance notice" (*sic*) had been issued by the Respondent against TATA SA due to its lack of co-operation with the Respondent.

- 4.14. On the same day, TATA SA sent a letter to the Respondent via all email addresses that could be located, due to the fact that no responses had been received from the Respondent following the previous emails sent. In the email the Applicant pointed out that it had fully co-operated with the Respondent's requests and that it had not received the alleged compliance notice. Again, no response was received to this email.
- 4.15. On 18 November 2011, a notice to attend a conciliation hearing on 30 November 2011 was sent to TATA SA by the Respondent. When TATA SA informed the Respondent that the customer had purchased the vehicle from TATA SA, but that the collision happened in the workshop of the Applicant and that TATA SA had nothing to do with that incident, the conciliation was postponed to 8 December 2011.
- 4.16. TATA SA reverted to the Respondent on 7 December 2011, confirming that the complaint should be redirected to the Applicant. The Respondent subsequently notified the Applicant of the complaint.
- 4.17. On 2 February 2012, the Applicant responded to the complaint, in which the Applicant indicated, *inter alia*, that:
- (a) The Applicant did not believe that the Respondent had jurisdiction to hear the matter;
 - (b) The Applicant was prepared to honour the original request to have independent technical experts from TATA SA inspect the vehicle with the Respondent and a representative of the panel repair centre, and if a problem was found TATA SA would gladly repair the vehicle in full;
 - (c) alternatively, should the customer not wish to accept the offer made above, the Applicant suggested that the matter be referred to the Motor Industry Ombudsman of South Africa for a decision which the Applicant would abide by and apply immediately; and
 - (d) Notwithstanding the above, the Applicant was served with a compliance notice by the Respondent, on 15 February 2012.

5. Default Application

- 5.1. With regard to the Default application, the Applicant is of the view that 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.
- 5.2. The Tribunal noted that the Respondent did not attend the hearing and no representation was made on its behalf.
- 5.3. There is no evidence of an answering affidavit contained on the file. And 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. 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 was issued by the Tribunal to the Applicant.
- 5.4. Due to the Respondent's failure to advise the Applicant of its notice of intention to oppose the application, the Applicant has lodged an application for a default order against the Respondent.
- 5.5. However, the Tribunal has been of the view that even though the matter has not been opposed, the Tribunal, as a creature of statute, would wish to ensure that the order it makes is one that is justifiable in law given the substantive grounds of the application. Therefore, before concluding the matter, the Tribunal went on to consider the merits of the matter. 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.
- 5.6. 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:
 - (a) after it has considered or heard any necessary evidence; and
 - (b) If it is satisfied that the application documents were adequately served.

- 5.7. 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. Grounds for Challenging the Compliance Notice

The Applicant's listed **grounds** for objection are that:

- 6.1. The conduct complained of took place prior to the commencement of the CPA and therefore falls outside of the Respondent's jurisdiction.
- 6.2. The Respondent failed to conclude an investigation in respect of the complaint as required by Section 72 of the CPA and therefore should not have issued a Compliance Notice in terms of Section 100 of the CPA.
- 6.3. The Applicant has not contravened any provisions of the CPA and in particular not the sections referred to in the Compliance Notice; namely:
- (a) Section 54(1)(b) and (d);
 - (b) Section 55(2)(b);
 - (c) Section 56(2)(a);
 - (d) Section 57(1); and
 - (e) Section 65(1) (b) and (c).
- 6.4. The steps to be taken by the Applicant as stipulated in the Compliance Notice are not steps directed at ensuring compliance with the provisions of the CPA that the Applicant is alleged to have transgressed.
- 6.5. The Applicant therefore submits that the notice constitutes directions to the Applicant that falls outside of the Respondent's powers.

6.6. The complaint in respect of which the compliance notice has been issued, has not been provided to the Applicant in any legible form, thus the Applicant has gained knowledge of what the complaint is from the compliance notice as well as what has been divulged to a third party at an attempted conciliation meeting on 30 November 2011.

6.7. The CPA commenced on 1 April 2011 and it does not have retrospective effect. Schedule 2 of the 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.”*

6.8. 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”

6.9. Only the 60 000km service of the customer’s motor vehicle is subject to the provisions of the CPA and everything else falls outside the jurisdiction of the Respondent.

6.10. The customer did not have any complaint pertaining to the 60 000km service of the vehicle.

6.11. The events which are complained about happened prior to the effective date of the CPA and the Respondent had no power to issue a compliance notice in respect thereof.

6.12. The Compliance Notice does not contain the results of an investigation by an inspector on behalf of the Respondent. This is apparent from the fact that paragraphs 1.2.1 to 1.2.12 of the Compliance Notice merely set out the allegations made by the Complainant, without substantiation.

- 6.13. There is no evidence of these complaints having been investigated by the Respondent. The Respondent did not investigate, as it had not engaged with the Applicant beyond what has been set out in the chronology of events as set out in the Founding Papers.
- 6.14. As the Respondent did not conduct and complete an investigation as required of it in terms of section 72 of the CPA, the Respondent should not have issued the Compliance Notice, as the completion of the investigation is a jurisdictional prerequisite for the issuing of such notice.

7. The Law on the Matter

- 7.1. 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.

7.2. 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 3¹;*
- (c) *Monitor-*
 - a) *The consumer market to ensure that prohibited conduct and offences are prevented, or detected and prosecuted; and*
 - b) *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.”*

8. Analyses of the Evidence and Arguments

8.1. In arriving at its finding on the merits of the Compliance Notice, the Tribunal has considered the submissions of the Applicant. And in so doing, the Tribunal notes that:

- (a) While the Respondent is supposed to first carry out an investigation of each complaint received², there was no evidence that the Respondent had done so.

¹ Part B of Section 3 relates to Commission Investigations (ss72-75)

² Section 99(d) of the CPA

- (b) 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.
- (c) 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 CPA³.
- (d) 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.
- (e) Sections 55 and 56 only apply with respect to goods or services supplied to the consumer in terms of the agreement, on or after the general effective date. The vehicle was purchased, and the damages to the vehicle occurred prior to the effective date of the Act.
- (f) On 30 November 2010, the Complainant suffered damages as a result of a delict in that a person collided with her motor vehicle in the workshop of the Applicant. Any liability that the Applicant would thus incur in favour of the Complainant would be delictual liability for damages suffered.
- (g) Section 5 of the CPA clearly provides that the CPA will apply in respect of certain transactions as well as the provisioning and marketing of goods and services. This Tribunal is of the view that damages suffered as a result of a delict would not fall within the provisions of this section. In the result, the CPA does not apply in the present matter.
- (h) Section 150 of the NCA provides the Tribunal with authority to “*require repayment to the consumer of any excess amount charged, together with interest at the rate set out in the agreement*”. No similar provision exists that gives the NCC the right to order

³ Specifically the provisions of Section 99 of the CPA.

repayment. Since the NCC has not been cloaked with the power to do so, it therefore, should (not may) not order repayment.

9. Order

For the reasons interwoven in the above sections of this order, we accordingly order that the compliance notice issued by the Respondent is hereby reviewed and cancelled.

Thus done and handed down on this 7th day of December 2012.

[signed]

Prof. Joseph M. Maseko
Presiding Member

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