IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case number: **NCT/9136/2013/75(1)(b)**

In the matter between:

MAKGOMO DEGRACIA SEBOTHOMA	APPLICANT
and	
NATIONAL CONSUMER COMMISSION	FIRST RESPONDENT
THREE LIONS	SECOND RESPONDENT

Coram:

Adv F Manamela	–	Presiding member
Mr X May	–	Member
Adv J Simpson	–	Member

Date of Hearing – 22 May 2014

JUDGMENT AND REASONS

APPLICANT

1. The Applicant in this matter is Makgomo Degracia Sebothoma, a major female residing in Johannesburg, Gauteng (hereinafter referred to as "the Applicant").

2. The Applicant deposed to her own founding affidavit.

FIRST RESPONDENT

3. The First Respondent is the National Consumer Commission ("the NCC"), a juristic person established in terms of Section 85 of the Consumer Protection Act, 68 of 2008 ("the CPA").

4. There was no appearance by the First Respondent or a representative on its behalf.

SECOND RESPONDENT

5. The Second Respondent is cited as Three Lions. No further details as to the possible registration of the entity as company or close corporation are available. It conducts business as a repairer of Land Rover motor vehicles from Midrand, Gauteng (hereinafter referred to as "the Respondent").

6. The Respondent was represented at the hearing by its owner, Mr Ian Brydon.

APPLICATION TYPE

7. This is an application in terms of Section 75(1)(b) of the CPA.

8. In relation to the First Respondent, the Applicant's application sets out the purpose of the application which is to *"review and set aside the final decision"* made by the NCC. While the Tribunal takes note of the Applicant's various submissions in this regard, an application to refer a complaint directly to the Tribunal (with the leave of the Tribunal) in terms of Section 75(1)(b) of the Act is in respect of a complaint where the NCC elected to issue a notice of non-referral. The Tribunal therefore firstly conducts a hearing to consider whether it should grant leave to the applicant to refer the complaint directly to the Tribunal. If the Tribunal grants leave, it then conducts a hearing on the main dispute or complaint. The purpose of the application is therefore not to review and set aside a decision made by the NCC but to deterrmine whether it will grant leave for the Applicant to refer directly and then to adjudicate on the complaint. The

Tribunal will therefore not *"review and set aside the final decision"* made by the First Respondent.

BACKGROUND OF THE MATTER BASED ON APPLICANT'S AFFIDAVIT

9. In March 2012 the Applicant's car ("the vehicle") broke down. It appeared to the Applicant that the vehicle's transmission system would need to be repaired to restore mobility as it completely stopped moving.

10. The vehicle was towed to the Second Respondent's business premises and the Second Respondent informed the Applicant that it would have to determine what the cause of the problem is. The Second Respondent telephoned the Applicant a few days later and informed her that the vehicle's IRD Unit would have to be replaced.

11. The Applicant requested a quotation for the replacement of the IRD Unit and was furnished with the quotation. The Applicant gave the Second Respondent approval to proceed with the repairs.

12. On 19 April 2012, the Second Respondent contacted the Applicant and informed her that she can collect the vehicle. Upon her arrival at the Second Respondent's premises, the Applicant was informed that the vehicle's prop-shaft had been removed to save on petrol consumption. This was done without the Applicant's knowledge or approval. It should be noted that the Applicant alleges that the removal of a prop-shaft modifies the transmission system of the vehicle.

13. The Second Respondent failed to give the used IRD Unit back to the Applicant to keep or dispose of.

14. The Applicant test drove the vehicle and informed the Second Respondent's Manager ("Nick") that the brakes of the car are making a noise when braking and changing gears. This problem did not exist prior to the repairs being conducted.

15. Nick test drove the vehicle and informed the Applicant that the driving will "adjust" after a while.

16. The Second Respondent issued an invoice to the Applicant but the Applicant was not provided with a diagnostic report or warranty document.

17. When driving home that afternoon, the Applicant noticed that the noise was increasing, especially when the vehicle stopped and pulled away, and that the vehicle was vibrating. The Applicant once again contacted the Respondent and it was agreed that she would bring the vehicle back to the Second Respondent's premises on 23 April 2012. This was done and the Second Respondent did further work on the vehicle.

18. The vehicle was returned to the Applicant and she was once again told that "the driving will adjust" and that she can bring the vehicle back if she has any further problems. The Applicant was not furnished with a diagnostic report and as there were no additional charges, no further invoice was issued to the Applicant.

19. On 14 June 2012 the vehicle broke down again. The vehicle was towed back to the Second Respondent's premises and the Applicant was telephoned the next day and told that the external splines of the gearbox are badly worn out causing the transmission system breakdown. The Second Respondent informed the Applicant that the repair cost would be similar to the previous costs but the Applicant explained that the vehicle was still under warranty and that she should not be held liable for these costs. It would appear that the "warranty" that the Applicant refers to is a warranty on the previous repairs.

20. The Second Respondent then refused to repair the transmission system breakdown on the basis that the previous repairs to the IRD Unit were not related to the gearbox issues.

21. The Applicant requested the diagnostics report for the previous repairs and was furnished with reports for the "new" work done in June. The Applicant was however not furnished with a diagnostic report for the April-repairs.

22. The vehicle has been standing at the Second Respondent's premises since June 2012.

23. The Applicant submitted a complaint to the NCC on 19 July 2012.

24. A copy of the complaint submission was also sent to the Second Respondent.

25. On 23 August 2012, the Second Respondent submitted a response via e-mail to the NCC.

26. On 30 November 2012, the Applicant received a conciliation notice from the NCC. A conciliation meeting was scheduled to take place at the NCC offices in Centurion on 05 December 2012.

27. The Second Respondent did not attend the conciliation meeting and claimed that it did not receive the notice. The Second Respondent however agreed to take part in a telephonic conciliation but no resolution was reached.

28. The Applicant thereafter sent several letters to the NCC to enquire as to the outcome of the matter.

29. On 28 February 2013 the Applicant lodged a complaint, relating to the manner in which the NCC dealt with the matter, with the Presidential Hotline under reference 4813143.

30. On 26 April 2013 the Applicant received a non-referral notice from the NCC. The notice simply stated that the complaint *"Does not allege any facts which, if true, would constitute grounds for a remedy under the Consumer Protection Act, 2008."*. The Applicant further attached a letter she received from the NCC containing the following conclusion regarding her complaint:

"We confirm that the Commission has not received a technical report from yourself as it was requested (sic). We wish to further inform you that without supporting evidence the Commission will not pursue the case and will close the file."

31. The Applicant subsequently lodged the application with the Tribunal in terms of Section 75(1) of the CPA during May 2013.

THE HEARING

32. The matter was initially set down by the Registrar for the hearing to be held on 21 February 2014. On that date both the Applicant and the Second Respondent were present. In the early afternoon, the Tribunal inquired from the parties whether they wanted to try and reach a settlement between them before the hearing commenced. Both parties agreed and the matter stood down. Late in the afternoon the parties advised the Tribunal that they were possibly close to an agreement. The Tribunal decided to postpone the matter to enable a possible settlement to be reached. The Tribunal advised both parties that expert evidence relating to the repairs to the vehicle would possibly be required should the hearing continue on the next date. The matter was then postponed *sine die* for the Registrar to issue a new notice of set down.

33. The Registrar set the matter down for the hearing to be held on 22 May 2014. On the date of the hearing both the Applicant and the Second Respondent were again present. The parties advised the Tribunal that they were unable to reach a settlement on the matter. Prior to the hearing date, the Second Respondent had sent the Applicant a letter proposing a possible resolution to the dispute but the Applicant stated at the hearing that she did not accept the proposal. The Applicant stated that the Respondent's settlement proposal did not include any reference to the prop shaft. She further stated that she never gave instructions for the prop shaft to be worked on.

34. Both parties testified under oath and did not call any witnesses. The right to cross-examine witnesses after testifying was explained to both parties.

PROCEDURAL ISSUES

Applicant's application for condonation

35. In accordance with the Rules of the Tribunal[1], the Applicant had to file the section 75(1)(b) application within 20 business days of the date of the Notice of non-referral or within a longer time as permitted by the Tribunal. The date of the NCC Notice is 22 April 2013 and the Applicant

[1] Rules for the Conduct of Matters before the National Consumer Tribunal (Government Notice No 30225, 28 August 2007 as amended) ("the Rules of the Tribunal")

therefore had until 21 May 2013 to file the application with the Tribunal. The application is dated 26 May 2013 and the date of receipt by the Tribunal is reflected as 30 May 2013. The application was therefore filed at least 4 days out of time.

36. In her application the Applicant stated that she first had to investigate the process of lodging an application with the Tribunal and had to draft the application herself. She only received the Notice of Non-referral from the NCC on 26 April 2013.

37. The Applicant completed an application to condone the late filing on 21 January 2014, but there is no indication that it was served on the Second Respondent.

38. At the hearing on 22 May 2014 the Applicant handed a copy of the Application for condonation to the Second Respondent. The Second Respondent was asked by the Tribunal whether he had any objection to the Application and he replied in the negative.

Second Respondent's application for condonation

39. In accordance with Rule13 of the Rules of the Tribunal, the Second Respondent had to file an answering affidavit within 15 business days of the date of the Application by the Applicant. The date of the application is reflected as 23 May 2013; therefore the Second Respondent had to file the answering affidavit by 14 June 2013. The Tribunal Registrar further sent a notice of complete filing to the parties on 4 June 2013. The notice stated that the Second Respondent may oppose the application by serving an answering affidavit within 15 business days of the notice. The Registrar therefore accepted that the application was complete and the Second Respondent's answering affidavit was therefore due at the latest on 25 June 2014.

The Second Respondent however only filed his answer to the Application on 2 December 2013. It should be noted that the Second Respondent's answer to the application was not in the form of an affidavit as required. The Second Respondent merely attached copies of letters and e-mails relating to the dispute as his response.

40. The Second Respondent completed an application for condonation for the late filing of his answering affidavit on 2 December 2013 and attached a registered postal slip as proof of service.

The Second Respondent stated that he was not aware that he had to file an answering affidavit as he only received the notice of set down towards the end of 2013.

41. During the hearing on 22 May 2014 the Applicant denied ever receiving the condonation application or the Second Respondent's answer to the application. The Second Respondent confirmed during the hearing that the condonation application and answer had not been sent to the correct address of the Applicant and she would not have received it.

42. A copy of the Second Respondent's condonation application was then handed to the Applicant and she confirmed that she has no objection to the condonation application.

Consideration of the applications for condonation

43. In the interests of brevity both applications for condonation will be considered together.

44. In *Head of Department, Department of Education, Limpopo Province v Settlers Agriculture High School and Others*[2] it was held that the standard of considering an application of this nature is the interests of justice.

45. Whether it is in the interest of justice to grant condonation depends on the facts and circumstances of each case. It requires the exercise of a discretion on an objective evaluation of all the facts. Factors that are relevant include but are not limited to:

- the nature of the relief sought;
- the extent and cause of the delay;
- the effect of the delay on the administration of justice and other litigants;
- the reasonableness of the explanation for the delay;
- the importance of the issue to be raised in the intended appeal; and
- the prospects of success[3]

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2 2003 (11) BCLR 1212 (CC) at para[11].

3 *Van Wyk v Unitas Hospital and Others* 2008(4) BCLR 442 (CC) at para 20 as applied in *Camagu v Lupondwana* Case No 328/2008 HC Bisho.

46. In *Melane v Santam Insurance Company Limited*[4] it was held that:

> *"The approach is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degrees of lateness, the explanation therefore, the prospects of success and the importance of the case. These facts are inter-related: they are not individually decisive. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay. There is a further principle which is applied and that is that without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused...cf Chetty v Law Society of the Transvaal 1985(2) SA 756 (A) at 765 A-C; National Union of Mineworkers and Others v Western Holdings Gold Mine 1994 15 ILJ 610 (LAC) at 613E. The courts have traditionally demonstrated their reluctance to penalize a litigant on account of the conduct of his representative but it emphasized that there is a limit beyond which a litigant cannot escape the results of the representative's lack of diligence or the insufficiency of the information tendered. (Salojee & Another NNO v Minister of Community Development 1965 (2) A 135 (A) 140H-141B; Buthelezi & Others v Eclipse Foundries Ltd 18 ILJ 633 (A) at 6381-639A)."*

47. From the dictum in *Melane* it was held that these factors are interrelated and should not be considered separately.

48. It needs to be noted that both parties brought their respective applications before the Tribunal in an extremely haphazard manner. There are numerous problems with the procedures followed by both parties.

49. The fact however remains that both parties had no objections to the condonation applications lodged and both parties were ready and eager to present their respective versions to the Tribunal at the hearing.

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4 1962 (4) SA 531 (A) at 532C-F.

50. In accordance with Rule 34 of the Rules of the Tribunal, the Tribunal may grant applications for condonation on good cause shown. The Tribunal takes note that both parties are lay persons in respect of the law and Tribunal proceedings. As stated, they did not have any objections to the applications for condonation and further did not raise any objections regarding any procedural irregularities.

51. In the specific circumstances of this matter the Tribunal therefore finds that good cause has been shown and condonation in respect of both applications is granted.

APPLICATION FOR LEAVE

52. Section 75(1) of the Act requires that the NCC issues a notice of non-referral in response to a complaint as a pre-requisite for a referral in terms of that section to the Tribunal.

53. The Applicant attached the Notice of non-referral from the NCC to her application.

54. Sections 72(1)(a) and 73(1)(a) of the Act state that the Notice of non-referral shall be in the prescribed form. The prescribed forms are contained in the CPA regulations as Annexure F – Regulation 36 and Annexure G – Regulation 37 respectively.

55. The Notice which the Applicant received from the NCC is in accordance with the form required by Regulation 36 and states that the complaint does not allege any facts which, if true, would constitute grounds for a remedy under the CPA.

56. The Tribunal is therefore satisfied that the NCC issued a Notice of non-referral as required by Section 75(1).

57. In the matter of *Coertze and Burger v Young*[5] the Tribunal considered the factors which must be evaluated regarding leave. The Tribunal held that the following two factors should be considered:

[5] NCT/7142/2012/75(1)(b)&(2).

57.1 The Applicant's reasonable prospects of success with the referral; and

57.2 Whether the matter is of substantial importance to the Applicant or the Respondent.

58. It is firstly very clear that the matter is of substantial importance to the Applicant. She has gone to a great deal of effort to lodge the complaint with the NCC and to pursue it further with the Tribunal. The Second Respondent has further indicated his willingness to engage with the Applicant regarding a settlement and has appeared at every hearing date. The Second Respondent therefore also appears to regard the matter as of substantial importance.

59. The repair of the vehicle in question took place during June 2012 which is after the CPA came into operation. The Applicant is a consumer as defined in the Act and the Second Respondent is a service provider. The CPA is therefore applicable to the dispute and the Tribunal has jurisdiction to hear this matter. In considering the reasonable prospects of success the Tribunal is satisfied that the Applicant has laid a solid foundation for a complaint in terms of the CPA which the Respondent must answer to.

60. The Tribunal therefore grants leave for the matter to be heard.

SUMMARY OF THE WITNESSES' TESTIMONY

61. The testimony of both witnesses covered a wide range relating to the history of the matter. The Tribunal will limit the summary to those aspects which are relevant to the application before the Tribunal.

Witness – Ms Makgomo Degracia Sebothoma (Applicant)

62. The Applicant's testimony was essentially a restatement of the version she provided in her affidavit attached to her application. She stated that the total cost of the quotation for the repair work which she paid was R13 611.60, R2 211.60 of which was for labour. The Applicant mentioned numerous times that she never received any form of diagnostic report from the Second Respondent or the replaced parts. The Tribunal requested the Applicant to clearly state

what award she wanted from the Tribunal and granted her an adjournment to consider her request. The Applicant stated that she wanted the Respondent to fix the vehicle so that mobility is restored. The Tribunal pointed out to the Applicant that this was not a specific right she had in terms of the CPA. The Applicant insisted that the Tribunal had a discretion in this regard and could make such an order. She referred to various sections in the CPA which she argued granted the Tribunal such powers.

63. During cross examination by the Second Respondent it was put to Applicant that the Applicant never requested any replaced parts from the Second Respondent at any stage. The Applicant did not provide a specific response to the question and stated that she did not know what parts had been replaced. The Respondent put it to the Applicant that she was aware that the IRD unit was a secondhand unit as he had told her. The Applicant did not provide a specific response to the question and stated that the invoice provided to her did not state whether the part was second-hand or new. The Respondent put it to the Applicant that he test-drove the vehicle with her on the first occasion. They both heard a noise emanating from the rear of the vehicle. The Applicant asked the Respondent what the noise was and her told her it could be the rear differential. Instead of replacing the rear differential, which would be very expensive, he could remove the prop shaft which would reduce the noise. The Applicant agreed and he therefore removed the prop shaft which he placed in her vehicle when she returned to collect it. The Applicant did not provide a clear response but stated that the prop shaft was removed without her authorisation. The Respondent put it to the Applicant that the vehicle had been standing at his premises since June 2012 and therefore the battery would be flat and seals could have started leaking. He further could not say whether the gearbox itself was damaged internally and would need to be repaired.

Witness – Mr Ian Brydon (Second Respondent)

64. Mr Brydon testified that the vehicle was brought to them on a flatbed truck. They informed the Applicant that they would need to inspect the vehicle to determine the cause of the problem. They removed the prop shaft to inspect the IRD unit. The IRD unit is a transfer box which couples the gearbox to the prop shaft. IRD stands for intermediate reduction drive. When they removed the IRD they found the gear connecting the IRD to the gearbox was damaged. The gear was not sold separately and the entire IRD unit would need to be replaced. He phoned the

Applicant and told her the cost of a new IRD unit but he would try to source a second-hand unit. She agreed. He managed to find a second-hand unit and sent the quotation to the Applicant who agreed to the replacement. Once the IRD unit was replaced he test drove the vehicle and found it could drive but was noisy. He contacted the Applicant and told her she could collect the vehicle. When the Applicant returned and test drove the vehicle she complained about the brakes being noisy. They used compressed air to remove any particles from the brakes and she drove away with the vehicle. Some weeks later the vehicle was returned to them again due to it being unable to drive. They then found that the splines inside the gearbox which connect to the IRD unit were damaged and would have to be replaced. They contacted the Applicant who refused to pay anything further for the repair of the vehicle. The vehicle has been with them ever since.

65. During cross examination by the Applicant she put various questions to the Second Respondent regarding the prop shaft. The Second Respondent stated that he had initially removed the prop shaft so that he could remove the IRD unit. He put the prop shaft back after fitting the second-hand unit. He then only removed the prop shaft again when the Applicant test drove the vehicle and complained about the noise. That is when he suggested that they can replace the rear differential or remove the prop shaft which would reduce the noise. The Applicant put it to the Respondent that he would have realised that the splines on the gearbox were worn when he fitted the IRD unit as they both fit into each other. The Respondent replied that he did not have to inspect the gearbox when replacing the IRD unit. The fact that the car was able to be driven after fitting the IRD unit shows that the splines were in a good enough condition at the time to connect with the IRD unit. He conceded that one could simply feel the splines with a finger to determine their general condition but there was no reason for him to do this as the vehicle was able to move after the fitting of the IRD unit. He would only have inspected the splines if the car was unable to move after the fitment of the IRD unit.

66. The Tribunal put certain questions to the Respondent regarding his testimony. The Respondent conceded that removing the prop shaft from the vehicle on a permanent basis was not ideal as it placed more stress on the engine mountings. He however stated that he had removed the prop shaft in many similar vehicles over the years and none of them had experienced any problems. The replacement of a rear differential was very expensive and many clients opted to rather remove the rear prop shaft. He further stated that the removal of the prop shaft would not have caused the splines on the gear box to be worn. He could not recall warning the Applicant of the

possible negative implications of removing the prop shaft. The Applicant's vehicle was a 1.8 litre, 2001 model Land Rover Freelander, with 154 334 kilometres on the odometer.

ANALYSIS OF THE EVIDENCE

67. Based on the information placed before the Tribunal the following evidence does not appear to be in dispute:

- The Respondent removed the faulty IRD unit and replaced it with a second-hand part.
- The Respondent removed the rear prop shaft from the vehicle on a permanent basis so as to reduce the noise possibly emanating from the rear differential.
- The Respondent did not work on any other parts of the vehicle relating to the IRD unit such as the gearbox.

68. The following aspects appear to be in dispute:

- Whether the Applicant consented to the removal of the prop shaft.
- Whether the removal of the prop shaft caused the damage to the gearbox splines.
- Whether the Applicant was aware that the IRD unit fitted was second-hand.

69. In general the Tribunal found the Applicant to be somewhat hesitant to provide direct responses to the questions and submissions put to her by the Second Respondent. There are numerous examples in the record where the Applicant could have provided a simple answer to the question put to her by the Second Respondent but instead provided evasive responses which did not provide much clarity. The Tribunal would then intervene to try and obtain a clear response from her. The Tribunal did not get the impression that she was trying to mislead the Tribunal, rather that she was doing her utmost not to make any form of concession which she might perceive as being detrimental to her claim.

70. The Second Respondent generally made a good impression on the Tribunal and provided clear responses to questions when asked. The Tribunal did not perceive any intention by the Respondent to evade direct questions or mislead the Tribunal. The Tribunal must however note that he is a single witness and further did not call any of his employees to corroborate his version.

71. Based on the evidence presented, the Tribunal finds it highly improbable that the Respondent would have removed the prop shaft of his own accord without informing the Applicant. The Second Respondent's version that the Applicant was indeed with the Second Respondent on the test drive and the parties agreed that the prop shaft could be removed to try and reduce the noise, appears far more probable.

72. From the outset the Tribunal warned the parties that expert evidence might be required to make a determination on the matter. Ultimately neither the Applicant nor the Second Respondent called any expert witnesses to testify on their behalf. As it stands the Tribunal only has the testimony of the Second Respondent regarding the damage to the gearbox splines. While the Applicant included various documents containing technical data regarding the removal of a prop shaft in her application, this evidence appears to have been procured from the internet. The Tribunal is unable to rely on this documentary evidence to find that the removal of the prop shaft caused the damage to the splines. Under the circumstances the Applicant has failed to prove that the removal of the prop shaft in fact caused the damage to the gearbox splines.

73. While the Tribunal takes note that the quotation supplied to the Applicant does not state whether the IRD unit was new or second-hand we find it highly improbable that the Second Respondent mislead the Applicant in this regard. There is no evidence to show that the Second Respondent made any representation of any kind that he would fit a new IRD unit. The Applicant further did not make any allegation that the Second Respondent had made such a representation. It appears the Applicant was alleging that the mere fact that the quotation does not state whether the unit is new or second-hand in itself constitutes a misrepresentation. The Tribunal is unable to agree.

74. On a balance of probabilities the Tribunal therefore finds that the Second Respondent only replaced the IRD unit and removed the prop shaft. He did not work on any other component of

the vehicle which may have caused the damage to the gearbox. The Applicant was further aware of the reason for the prop shaft being removed and consented to it. The IRD unit which had been replaced was still functional and was not the cause of the problem with the vehicle. There was no misrepresentation regarding the IRD unit. The vehicle was repaired and the Applicant collected the vehicle on 20 April 2012. The vehicle was returned on 23 April 2012 for further repairs. The vehicle was again collected by the Applicant the same day. On 14 June 2012 the vehicle broke down again and was returned to the Second Respondent. The vehicle has been with the Second Respondent ever since. The Second Respondent did not return the faulty IRD unit to the Applicant.

ANALYSIS OF THE LAW APPLICABLE TO THE EVIDENCE

75. At this stage it bears mentioning that the Applicant's application and affidavit is comprised of some 200 pages of submissions and internet based research. While the Tribunal appreciates the Applicant's extensive efforts and takes note of the extensive submissions made, it will not be dealing with each and every aspect raised by the Applicant. The Tribunal will only consider the sections of the CPA which may find application in the present circumstances.

76. The Applicant alleged that the following specific sections of the CPA had been contravened:

76.1 Section 20(1)

Section 20 deals with the consumer's right to return goods under certain circumstances such as direct marketing or where the consumer was unable to inspect the goods. As the issue in question in the present matter relates to provision of services and not goods, this section is not applicable to the present matter.

76.2 Section 40(2)

Section 40(2) provides that it is unconscionable for a supplier to knowingly take advantage of the fact that a consumer was substantially unable to protect the consumer's own interest because of a physical or mental disability, illiteracy, ignorance, inability to understand the language of an agreement, or any other similar factor.

The language of an agreement is not the central to the dispute in the present matter and this section is therefore not applicable.

76.3 Section 41(1)

Section 41(1) relates to false, misleading or deceptive representations.

There is no evidence before the Tribunal of any false, misleading or deceptive representation being made. This section is therefore not applicable.

76.4 Section 48(2)(c) and (d)(ii)

Section 48 relates to unfair, unreasonable or unjust contract terms.

There is no evidence before the Tribunal of any unfair, unreasonable or unjust contract terms. Therefore this section is not applicable.

76.5 Section 54(1) and (2)

Section 54 sets out the consumer's right to demand quality service.

It provides *inter alia* that the services must be performed in a manner and quality that persons are generally entitled to expect. The Applicant's general submissions in this regard are that anyone would expect the vehicle to be in a working condition after repairs were affected.

Based on the evidence before the Tribunal and the findings made on the facts, there is no basis for a finding that the Second Respondent did not provide a quality service. The Second Respondent replaced the IRD unit and the Applicant was able to use the vehicle. While it is conceivable that the removal of the prop shaft may have caused the damage to the gearbox splines, the Applicant has been unable to prove this to the Tribunal on a balance of probabilities. The Tribunal further found on the facts that the Applicant consented to the removal of the prop shaft and was made aware of the reason for the removal.

76.6 Section 55 (2), (3) and (5)

Section 55 relates to the consumer's rights to safe, good quality goods. As the present matter relates to services within the context of section 54 above, section 55 is not applicable to the present matter.

76.7 Section 56(1) – (4)

Section 56 provides for an implied warranty of quality and provides in subsection (3) that *"if a supplier repairs any particular goods or any component of any such goods, and within three months after that repair, the failure, defect or unsafe feature has not been remedied, or a further failure, defect or unsafe feature is discovered, the supplier must-*

(a) Replace the goods ;

(b) Refund to the consumer the price paid by the consumer for the goods.

On face value this section appears to apply to the facts before the Tribunal. The Applicant's vehicle broke down and could not be driven. The Second Respondent replaced the IRD unit with a second-hand unit so as to restore the ability of the vehicle to be driven. Within a period of less than 2 months thereafter the vehicle again could not be driven and had to be returned to the Second Respondent.

The question the Tribunal must however ask is - what are the "goods" as referred to in the section. The legislature could not have intended that the "goods" in the context of this specific matter would be the vehicle itself. If this was the case then any component of the vehicle (whether related to the repaired part or not) which broke within a period of three months after the repair services were provided would render the supplier liable to replace the originally repaired component whether or not it was related to the reason for the second failure. This would further place an unreasonable burden on a repairer to check every single component of the vehicle before returning it to the consumer.

A more logical reasoning is to say that the "goods" in this context is the actual IRD unit which was replaced. If the IRD unit failed within a period of three months then the Second Respondent

would have been responsible for replacing the IRD unit or refunding the Applicant the price paid. This would apply irrespective of whether or not another part of the IRD unit broke down which the Second Respondent had not specifically worked on or repaired. The evidence before the Tribunal is that the IRD unit is a part on its own. Although it does integrate with other parts of the vehicle (the gearbox and prop shaft) it performs a specific separate function. As stated previously, the Applicant has been unable to prove to the Tribunal that the Second Respondent damaged the gearbox splines or caused the gearbox splines to be damaged. The Applicant was further unable to prove to the Tribunal that the IRD unit was faulty or installed in any improper manner.

This interpretation of the section is further supported by section 57 of the CPA which relates to a service provider that warrants every new or reconditioned part for a period of three months after installation. Section 57 relates specifically to new or reconditioned parts, it does not relate to second-hand parts. The only context within which a second-hand part would find application is in section 56(3).

The Tribunal therefore finds that the Applicant has not proven that the Second Respondent is liable under section 56(3).

76.8 Section 67(1) states the following:

Return of parts and materials

(1) When a supplier is authorised to perform any service to any goods or property belonging to or ordinarily under the control of the consumer, the supplier must-

(a) Retain any parts or components removed from any goods or property in the course of any repair or maintenance work ;

(b) Keep those parts or components separate from parts removed from other goods or property; and

(c) Return those parts or components to the consumer in a reasonably clean container,

unless the consumer declined the return of any such parts or materials.

(2) This section does not apply to any substance, parts or components that are required-

(a) *In terms of any warranty under which the work was carried out, to be returned to, or disposed of at the direction of, the producer or distributor ;*
(b) *In terms of any insurance claim under which the work was carried out, to be returned to, or disposed of at the direction of, the insurer; or*
(c) *In terms of any public regulation, to be recovered or disposed of in a safe manner in the interests of environmental safety or public health and safety.*

Based on the evidence before the Tribunal the Second Respondent did not return the original faulty IRD unit to the Applicant as required by this section. There is no evidence that the Applicant declined the return of the unit. The section clearly places the responsibility on the Second Respondent to return the unit unless the Applicant specifically said she does not want it. The fact that the Applicant may not have specifically asked for the return of the unit does not excuse the Second Respondent.

The section does not however provide for any right to a refund or replacement. The section further contains no reference to a contravention of the section being an offence. It would therefore appear that the NCC is at liberty to lodge an investigation into the Second Respondent's conduct in this regard and ultimately bring the matter before the Tribunal as prohibited conduct and apply for the imposition of an administrative fine.

The Tribunal did consider whether the notice of non-referral issued by the First Respondent would enable the Tribunal to make a finding of prohibited conduct in this regard without the NCC having to decide whether or not to investigate.

Firstly, Section 99(d) of the CPA specifically tasks the NCC, as regulatory authority, with investigating and evaluating prohibited conduct and taking the required action, which may ultimately include referring the matter to the Tribunal in terms of section 99(h). It would therefore be highly exceptional for a consumer to step into the shoes of the NCC so to speak and independently take this process further through the Tribunal. This independent process can be compared to a private prosecution in terms of section 7 of the Criminal Procedure Act 51 of 1977, which is very rare and exceptional. The Tribunal would therefore only grant the required leave to hear such an application in highly exceptional circumstances. The leave granted to the Applicant in this matter was not in

respect of an application for a finding of prohibited conduct or the imposition of an administrative fine.

Secondly, it would in any event offend against the principle of *audi alteram partem* to assess and adjudicate on a finding of prohibited conduct if the Second Respondent has not specifically been informed of this possibility and been granted an opportunity to prepare his defence accordingly. The NCC would ordinarily receive a complaint regarding prohibited conduct and then make a decision on whether to investigate the matter or not in accordance with Section 72 of the CPA. The notice of non-referral does not contain any reference to Section 67(1) of the CPA or any indication of the NCC having considered possible prohibited conduct in terms of this section.

CONSIDERATION OF THE SECOND RESPONDENT'S CONDUCT DURING THE HEARING

77. During the hearing on 22 May 2014 the Second Respondent's (Mr Brydon) cell phone rang. The Tribunal requested him to switch the phone off and ensure that it does not ring again. Mr Brydon confirmed he would do so. Soon thereafter his phone rang again and he told the Tribunal that he had now switched it off. Immediately thereafter his phone rang again and Mr Brydon proceeded to leave the hearing room. The Tribunal informed him that he could not leave. Mr Brydon informed the Tribunal, as he exited the door, that the call was important and he had to answer it. The Tribunal adjourned to allow Mr Brydon to return.

78. When the hearing resumed the Tribunal informed Mr Brydon that his conduct was unacceptable and a contravention of section 109(f) of the CPA which states that a person commits an offence if they wilfully interrupt the proceedings of a hearing or misbehave in the place where a hearing is being conducted. Mr Brydon apologised and confirmed that his cell phone was no longer in the hearing room. The Tribunal warned him that his conduct during the rest of the hearing would be evaluated to determine whether a recommendation would be made by the Tribunal that the NCC institute criminal proceedings against him under section 109(f). Mr Brydon apologised to the Tribunal and confirmed that he understood what the Tribunal had told him.

79. No further problems were experienced and at the conclusion of the hearing Mr Brydon once again apologised for his conduct.

80. The Tribunal is satisfied that Mr Brydon realised the seriousness of his actions and his apologies are accepted. The Tribunal therefore does not make any recommendation that his behaviour be prosecuted in terms of section 109(f).

CONCLUSION

81. While the Tribunal acknowledges that the Applicant had a most unfortunate experience with her motor vehicle, she has not proven on a balance of probabilities that the Second Respondent should be held liable to refund the amount charged to repair the motor vehicle.

82. Although the Applicant has been unable to prove her case the Tribunal wishes to make the following observations:

82.1 During the hearing the Second Respondent stated that he would replace the prop shaft to the vehicle for the Applicant as it could be done very easily and quickly. By implication he would not charge the Applicant for this service.

82.2 The Second Respondent further made a settlement offer to the Applicant that he could source a Second hand replacement part for the gearbox and he would only charge the Applicant a total of R2500.00 excluding VAT for the part and the installation thereof.

83. The Tribunal can therefore simply remark that it would appear that the Second Respondent is willing to engage with Applicant and it is within the Applicant's sole discretion to approach the Second Respondent in this regard.

ORDER

84. Accordingly, the Tribunal makes the following order:

84.1 The Applicant's application for relief in terms of the CPA is denied; and

84.2 There is no order as to costs.

DATED ON THIS 23rd DAY OF JUNE 2014

[signed]

Adv J Simpson

Member

Adv F Manamela (Presiding member) and Mr X May (member) concurring.

Authorised for issue by the National Consumer Tribunal

Case number NCT/9136/2013/75(1)(b)

Date: 2014/07/24
Ccyy / mm / dd

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