

**IN THE NATIONAL CONSUMER TRIBUNAL  
HELD IN CAPE TOWN**

Case Number: **NCT/86201/2017/75(1)(b)**

In the matter between

**THAMENDEREN DEVEN PERUMAL**

APPLICANT

and

**BIG BOY SCOOTERS (SA MOTORCYCLES (PTY) LTD)**

RESPONDENT

Coram:

Prof Tanya Woker – Presiding member

Date of hearing – 6 October 2017

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**APPLICATION FOR LEAVE TO REFER  
JUDGMENT AND REASONS**

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**THE PARTIES**

1. The Applicant is Thamenderen Perumal (hereinafter referred to as “the Applicant”), a consumer who lodged a complaint with the Motor Industry Ombudsman of South Africa (MIOSA) and the National Consumer Commission (the NCC), in terms of Section of the Consumer Protection Act, 2008 (the CPA). At the hearing the Applicant represented himself.
2. According to the application forms lodged by the Applicant, the Respondent is BIG BOY SCOOTERS (South African Motorcycles Pty Ltd) whose physical address is [...] S. R., Farm Rietvallei, 180IQ Krugersdorp, 1739 (hereinafter referred to as “the Respondent”). The application forms also indicate that the Respondent accepts correspondence at the following email addresses: [...@jonway.co.za];

[...@jonway.co.za]; and info@jonway.co.za. There was no appearance at the hearing by the Respondent or its representative.

## **APPLICATION**

3. The application brought before the Tribunal is in terms of section 75(1)(b) of the CPA. The Applicant lodged a complaint with the National Consumer Commission (NCC) and received a notice of non-referral in response. The Applicant is now applying for leave from the Tribunal for the complaint to be referred directly to the Tribunal.
4. In accordance with section 75(1)(b), only the application for leave is being considered at this stage by a single member of the Tribunal.
5. This judgment is based on the documents before the Tribunal as well as information provided by the Applicant at the hearing held in Cape Town on 6 October 2017.

## **BACKGROUND**

6. On 19 March 2016, the Applicant purchased two brand new Big Boy Pit Bikes, Model TTR125S from a Big Boy Scooters (South African Motorcycles Pty Ltd) dealership in the Western Cape. The name of the dealership is No Limited Quads.
7. The bikes were not available at the dealership on 19 March but the Applicant confirmed that the particular model he required was available from the Respondent and the dealership undertook to source the bikes for him. He paid R22 798 for the bikes by debit card. The dealership undertook to deliver the bikes to his home.
8. The Applicant purchased the two bikes after conducting a great deal of research for bikes that he regarded as being suitable for his purposes. He wanted off-road bikes for riding on sand dunes as he lived on the coast. He also sourced the dealership where he could obtain the bikes in the Western Cape by consulting the same website where there is a link headed "find a dealer".

9. He regarded this particular model of bike as being suitable for his purposes because the website clearly indicated that the TTR12S5 model comes with oversized 16 inch rear and 19 inch front wheels. The bigger wheels meant that the bikes would be much more stable when ridden on sand and would therefore be much safer. The website also stated that this particular model is aimed at slightly taller or older riders who can handle the extra ride height and stability of the bigger wheels.
10. The bikes were delivered to the Applicant on 20 March 2016. The Applicant was told to inspect the goods to ensure that he was happy with them. He immediately noticed that the wheels on the bikes did not match the size indicated on the website and drew this to the attention of the deliverer (he assumed that the deliverer of the bikes was the owner of No Limited Quads). The deliverer informed him that he had to refer any complaints directly to the Respondent as he did not deal with complaints.
11. The Applicant contacted the Respondent on or about 21 March 2016. He spoke to Sarah Mcbeth who deals with customer relations on behalf of the Respondent.
12. Mcbeth confirmed that the website had contained a mistake and undertook to ensure that the correct wheels and rims were delivered to the Applicant. This led to a series of communications with the Applicant the details of which are not necessary for this judgment but the final conclusion of this correspondence is as follows:
  - (1) The Respondent stated that it would replace the wheels but that would have to be at the expense of the Applicant;
  - (2) Only one set of wheels was immediately available and the other set would have to be manufactured in China, which would take up to 6 weeks to complete;
  - (3) The Applicant was initially happy for the wheels to be replaced by the Respondent provided this could be done without having an adverse effect on the bikes but when he was informed about the need to pay the dealer for changing the wheels and the 6 week waiting period he informed the Respondent that he wished to cancel his contract and asked for a refund; and
  - (4) The Respondent informed him that they do not provide refunds.
13. On 10 June 2016 the Applicant referred his complaint to the NCC who in turn referred him to the MIOSA.

14. He also referred the complaint to the Consumer Goods and Services Ombud on 10 June 2016 who also referred him to the MIOSA.
15. The Applicant referred the complaint to the MIOSA on 22 June 2016.
16. On 27 March 2017 the MIOSA ruled that the Respondent was to replace the rims and tyres of the bikes at no cost to the Applicant within 14 days of its ruling.
17. To date the Respondent has failed to comply with the MIOSA ruling.
18. On 21 April 2017, the Applicant referred the matter back to the MIOSA who then referred him to the NCC which led to some to-ing and fro-ing between the MIOSA and the NCC. Eventually on 21 June 2017 the NCC issued a notice of non-referral which enabled the Applicant to refer the matter to the Tribunal. This he did on 4 July 2017.

## THE HEARING

19. The Respondent did not appear at the hearing and was also not represented, therefore the matter was heard on a default basis in accordance with rule 24 of the Tribunal Rules.<sup>1</sup> This rule states that –

*“24 (1) If a party to a matter fails to attend or be represented at any hearing or any proceedings, and that party –*

*(a) is the applicant, the presiding member may dismiss the matter by issuing a written ruling; or*

*(b) is not the applicant, the presiding member may –*

*(i) continue with the proceedings in the absence of that party; or*

*(ii) adjourn the hearing to a later date*

*(2) The Presiding member must be satisfied that the party had been properly notified of the date, time and venue of the proceedings, before making any decision in terms of sub rule (1).”*

20. The Tribunal was satisfied that the Respondent was properly notified of the hearing.

## APPLICANT’S CASE

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<sup>1</sup> Rules for the Conduct of Matters Before the National Consumer Tribunal  
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21. At the hearing the Applicant set out the facts which led to this hearing. These facts have been set out in the background above and so it is not necessary to repeat them again.
22. The Applicant also informed the Tribunal that he had consulted the CPA and had attempted, although without any legal representation, to identify those sections of the Act that he believed were relevant to his complaint.
23. These included the following:
  - (1) Section 41 (1) (a) which deals with false, misleading and deceptive representations because the Respondent's website contained false information which was material in nature. The reason why he wanted to purchase these off-road bikes was because they were advertised to have these large wheels which made the bikes suitable for his intended purpose. The Applicant also argued that the advertisement indicated that these bikes came with the extra-large wheels only and that there was no indication in the advertisement that there were other smaller wheels for this model of bike;
  - (2) Section 41 (1) (c) which deals with a failure on the part of the Respondent to correct an apparent misapprehension on the part of the consumer. At no stage, before delivery of the bikes did the supplier indicate that a mistake had been made in the advertisement. It was only after the bikes had been delivered to the Applicant and the Applicant complained to the Respondent that the Respondent indicated that a mistake had been made in the advertisement;
  - (3) Section 54 (1) (a) which deals with the right of a consumer to demand quality service and section 54 (2) (b) which deals with the right to a refund when the supplier fails to provide quality service. The Applicant argued that the Respondent had initially agreed to replace the rims and the tyres but then it expected him to pay for this and it expected him to wait for 6 weeks for the parts. He did not regard this as quality service on the part of the Respondent. The Applicant is therefore of the view that, also in terms of this section, he is entitled to a refund for his purchase;
  - (4) Section 55 which deals with the consumer's right to safe, good quality goods which must be read with section 53 (1) (a) (the meaning of defect); section 53 (1) (b) (the meaning of failure) and 53 (1) (d) (the meaning of unsafe). The Applicant argued that as the bikes did not have the correct wheels as advertised on the Respondent's website, they were defective, unsafe for their intended purposes and would fail to perform in the intended manner as he would be unable to drive the bikes on sand; and

(5) Finally the Applicant referred to section 56 (2) which provides that within six months after the delivery of any goods to the consumer, the consumer may return the goods to the supplier, without penalty, and at the supplier's risk and expense, if the goods fail to satisfy the requirements and standards contemplated in section 55 and the supplier must, at the direction of the consumer, either–

(a) repair or replaced the failed, unsafe or defective goods; or

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

## THE LAW APPLICABLE TO THE APPLICATION

24. The question now before the Tribunal is whether or not leave should be granted for the matter to be heard by the Tribunal. The Tribunal can only assess the reasonable prospects of success by considering whether the CPA finds application in the dispute and may therefore be adjudicated on by the Tribunal. In this regard it must further be borne in mind that the Tribunal is merely considering the application for leave at this stage and is not engaging in a determination of the merits of the main dispute between the parties. At this stage the Tribunal is merely assessing whether the Applicant has made out a case which should be considered by the Tribunal.

25. In determining whether the Applicant should be granted leave to refer the matter to the Tribunal, the Tribunal must consider the requirements for the granting of “leave”. A similar application can be found in the High Court practice, where an Applicant applies for leave to appeal a judgment. It was held in the *Westinghouse Brake and Equipment (Pty) Ltd* – matter, as cited above, that -

*“in applications for leave to appeal properly brought before the appropriate court in terms of the old sec 20, read with sec 21 as it then was, the only relevant criteria were whether the applicant had reasonable prospects of success on appeal and whether or not the case was of substantial importance to the applicant or to both him and the respondent.”*

26. The Tribunal, when considering whether to grant the Applicant leave to refer or not, uses the same test as applied in the High Court for applications for “leave” .<sup>2</sup>

27. The Tribunal will therefore consider the following factors:

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<sup>2</sup> This issue has also been considered by the Tribunal in a number of other decisions , see for example, *MV Chauke v Standard Bank et al* NCT/4658/2012/141(1)(P), and *Coertze and Burger v Young* NCTT/7142/2012/73(3)&75(1)(b) CPA and *Esther Rhulani Tshwale (obo True Harvest College) v Faitzan Properties* NCT/12505/2014/75(1)(b) & (2) CPA.

- (1) whether the matter is of substantial importance to the Applicant; and
- (2) the Applicant's reasonable prospects of success with the referral.

- 28. Based on the lengths the Applicant has gone to lodge the complaint with the NCC, the MIOSA, the Consumer Goods and Service Ombud and ultimately the Tribunal and the value of the claim, it is clear that the matter is of substantial importance to the Applicant. The Applicant upon receiving the bikes immediately noticed that the wheels were not as advertised and informed the deliverer accordingly. On being informed that the deliverer could not assist him he contacted the Respondent who was the advertiser and supplier of the bikes. At each stage when he referred his complaint to an alternative dispute resolution agent, he followed up that complaint immediately or within a reasonable time when he received feedback. The Tribunal therefore finds that the requirement that the matter is of substantial importance to the Applicant has been met.
- 29. The second question, as to the reasonable prospects of success must be answered by considering whether the substance of the Applicant's complaint falls within the ambit of the CPA without deciding on the merits of the matter.
- 30. During the hearing the Applicant addressed the Tribunal on which sections of the CPA he believed were applicable to the matter and may have been contravened by the Respondent.
- 31. Although the Applicant has not formulated his case against the Respondent clearly on the papers within the ambit of the CPA, the Tribunal notes that he is unrepresented and has made a concerted effort to apply his mind to the issues.
- 32. In addition to the sections which the Applicant identified during the hearing, reference can also be had to section 18 of the CPA. This section provides that where a consumer has agreed to purchase goods solely on the basis of a description (which would apply to an advertisement) provided by the supplier, the goods delivered to the consumer must in all material respects and characteristics correspond to that which the consumer is entitled to expect based on the description.
- 33. Further, section 20 (read with section 19 (5)) provides that if the supplier delivers goods that the consumer did not have an opportunity to examine before delivery, and the consumer has rejected

delivery of those goods because they are not of the type which the consumer was expecting to receive, the goods may be returned to the supplier and the consumer may receive a full refund of his purchase price. Sub-section (4) provides that the goods must be returned to the supplier at the supplier's risk and expense.

34. Section 4(2) of the CPA also provides guidance as to the Tribunal's approach when considering cases in terms of the CPA –

*Realisation of consumer rights*

*(2) In any matter brought before the Tribunal or a court in terms of this Act—*

*(a) the court must develop the common law as necessary to improve the realisation and enjoyment of consumer rights generally, and in particular by persons contemplated in section 3(1)(b); and*

*(b) the Tribunal or court, as the case may be, must—*

*(i) promote the spirit and purposes of this Act; and*

*(ii) make appropriate orders to give practical effect to the consumer's right of access to redress, including, but not limited to—*

*(aa) any order provided for in this Act; and*

*(bb) any innovative order that better advances, protects, promotes and assures the realisation by consumers of their rights in terms of this Act.*

*(3) If any provision of this Act, read in its context, can reasonably be construed to have more than one meaning, the Tribunal or court must prefer the meaning that best promotes the spirit and purposes of this Act, and will best improve the realisation and enjoyment of consumer rights generally, and in particular by persons contemplated in section 3(1)(b).*

35. It is a common occurrence in the Tribunal that parties are not represented by legal counsel. It is indeed within the very nature of the Tribunal, as set out in Sections 4(2) of the CPA, that the Tribunal offer a forum where unrepresented parties are able to state their case without the need for carefully drafted legal argument and to receive redress where appropriate.<sup>3</sup>
36. The Applicant in this matter is unrepresented. Allegations have been made against the Respondent regarding the advertising of its products, the state of the final goods which were delivered and the manner in which it dealt with the Applicant's complaint. It is clear to the Tribunal that the Applicant has

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<sup>3</sup> See *Esther Rhulani Tshwale (obo True Harvest College) v Faitzan Properties* NCT/12505/2014/75(1)(b) & (2) CPA.



made a concerted effort to apply his mind to possible contraventions of the CPA and that a case can be argued in this regard.

37. In addition, the MIOSA has made a ruling in this matter in terms of which the MIOSA ruled that the Respondent should at its own expense replace the wheels on the two bikes within 15 days of the ruling.<sup>4</sup> The MIOSA is the accredited industry ombud appointed in terms of section 82 (6) of the CPA that is responsible for the resolution of consumer disputes in the motor vehicle industry. Its code of conduct applies to all those in the industry including the Respondent.<sup>5</sup> The Respondent has failed to respond to the ruling issued by the MIOSA, leaving the Applicant with no alternative but to refer the matter back to the NCC.
38. The Applicant, based on the allegations made and on the Respondent's failure to respond to the MIOSA's ruling, deserves an opportunity to argue the matter on the merits before a full Tribunal. The Respondent in turn will be granted a full opportunity to submit contrary argument.

## CONCLUSION

39. The Tribunal finds that the Applicant has satisfied the requirements for the granting of leave in terms of Section 75(1)(b) of the CPA.

## ORDER

40. Accordingly, the Tribunal makes the following order:

- (1) The application for leave from the Tribunal is granted.
- (2) No order is made as to costs

DATED 8 October 2017

**{signed}**

Prof T Woker

Presiding Member

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<sup>4</sup> The ruling was issued on 27 March 2017.

<sup>5</sup> See Government Gazette No 38107 17 October 2014. In accordance with this notice, MIOSA became the accredited industry ombud three months after publication which would have been on 15 January 2015,

