

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

Case number: **NCT/4734/2012/60(3)&101(1)**

In the matter between:

**HYUNDAI AUTOMOTIVE SA (PTY) LTD
T/A KIA MOTORS ROODEPOORT**

APPLICANT

and

THE NATIONAL CONSUMER COMMISSION

RESPONDENT

Coram:

Adv J Simpson – Presiding Member

Adv N Sephoti – Panel Member

Mr X May – Panel Member

Date of Hearing – 29 January 2014

JUDGMENT AND REASONS

[1] Review of a Compliance Notice – Compliance Notice issued in terms of Section 100(1) of the Consumer Protection Act ("the Act") – Review in terms of Section 101 of the Act.

[2] Review on the basis of failure to conduct an investigation – Where Respondent failed to provide Applicant with a complaint - Where notice does not exhibited any evidence of an investigation having been done by the Respondent – Respondent accepting complaint from Complainant as factually correct – In these circumstances the Compliance Notice does not comply with the provisions of Section 100 of the Act and stands to be set aside.

[3] Review on the basis of absence of prohibited conduct – Where notice does not set out the basis on which contravention of the Act is alleged – Notice creating doubt as to whether prohibited conduct took place – Cosmetic defect does not render vehicle unsuitable, of bad quality or unusable and therefore not compliant with the requirements of Section 55(2)(a)(c) – Would have been reasonable for the Applicant to simply replace the defective part – Tribunal cannot express a view on allegations of damage that is not supported by evidence.

[4] Compliance notice accordingly cancelled. No order as to costs.

APPLICANT

1. The Applicant in this matter is Hyundai Automotive SA (Pty) Ltd t/a Kia Motors Roodepoort, a company duly registered in accordance with the laws of South Africa (hereinafter referred to as "the Applicant").
2. At the hearing the Applicant was represented by Adv HJC Du Plessis.

RESPONDENT

3. The Respondent is the National Consumer Commission, a juristic person established in terms of section 85 of the Consumer Protection Act, Act 68 of 2008 ("the CPA"). (Hereinafter referred to as "the Respondent");
4. The Respondent did not file an answering affidavit and did not appear at the hearing.

APPLICATION TYPE

5. The Applicant brought an application to the National Consumer Tribunal ("the Tribunal") to have a compliance notice issued against it by the Respondent, reviewed and cancelled in terms of section 101(1) of the CPA.

BACKGROUND

6. According to the Applicant –

- 6.1 On 10 June 2011 Ms Phumudzo Patient Madzhie (hereinafter referred to as "the Complainant") purchased a Kia Sportage 2.0 motor vehicle from the Applicant.
- 6.2 On 20 June 2011 the Complainant's husband returned the vehicle to the Applicant and pointed out a paint bubble on an interior plastic panel of one of the doors. The Applicant immediately replaced the panel with another panel from a demonstration vehicle and at the same time ordered a new replacement panel.
- 6.3 On 22 June 2011 the new panel arrived and the Applicant contacted the Complainant to return the vehicle for the new panel. The Complainant refused to return the vehicle or collect the number plates and registration documents for the vehicle.

7. On 23 June 2011 the Complainant lodged a complaint with the Respondent stating that the vehicle they had bought had faults such as a defect in the door and the fuel gauge was not working. The Complainant alleged that the fuel gauge would still reflect a full tank although it was not full.
8. The dispute between Applicant and the Complainant was set down for conciliation on 19 January 2012. The Applicant attended the conciliation but it was unsuccessful.
9. The Respondent then issued a compliance notice to the Applicant dated 30 March 2012.
10. On 1 June 2012 the Applicant lodged an application with the Tribunal to have the compliance notice set aside.
11. On 6 June 2012 the Registrar of the Tribunal issued a notice of incomplete filing calling on the Applicant to lodge further documents.
12. On 8 March 2013 the Applicant applied for default judgment against the Respondent.
13. On 12 March 2013 the Registrar issued a notice of complete filing to both parties

APPLICATION FOR DEFAULT JUDGEMENT

14. In accordance with Rule 13 of the Rules of the Tribunal¹ the answering affidavit from the Respondent must be filed with the Registrar within 15 business days of the date of the application.
15. Although the Applicant lodged an application for default judgment on 8 March 2013 the Registrar only issued a notice of complete filing to the parties on 12 March 2013. The Respondent therefore had until 2 April 2013 to lodge an answering affidavit. At no stage was any answering affidavit filed by the Respondent and the time for doing so had in any event expired irrespective of the date of the application or the date on which the notice of complete filing was issued.
16. Rule 13(5) provides as follows:

¹ Regulations for matters relating to the functions of the Tribunal and rules for the conduct of matters before the national consumer tribunal 2007 published under GN 789 in GG 30225 OF 28 August 2007 ("the Rules of the Tribunal").

“Any fact or allegation in the application or referral not specifically denied or admitted in the answering affidavit, will be deemed to have been admitted”

17. As a result thereof the Applicant’s application and all of the allegations contained therein are deemed to be admitted.

APPLICABLE SECTIONS OF THE CPA

18. **“100 Compliance notices**

- (1) *Subject to subsection (2), the Commission may issue a compliance notice in the prescribed form to a person or association of persons whom the Commission on reasonable grounds believes has engaged in prohibited conduct.*
- (2) *Before issuing a notice in terms of subsection (1) to a regulated entity, the Commission must consult with the regulatory authority that issued a licence to that regulated entity.*
- (3) *A compliance notice contemplated in subsection (1) must set out—*
 - (a) *the person or association to whom the notice applies;*
 - (b) *the provision of this Act that has not been complied with;*
 - (c) *details of the nature and extent of the non-compliance;*
 - (d) *any steps that are required to be taken and the period within which those steps must be taken; and*
 - (e) *any penalty that may be imposed in terms of this Act if those steps are not taken.*
- (4) *A compliance notice issued in terms of this section remains in force until—*
 - (a) *it is set aside by the Tribunal, or a court upon a review of a Tribunal decision concerning the notice; or*
 - (b) *the Commission issues a compliance certificate contemplated in subsection*
- (5) *If the requirements of a compliance notice issued in terms of subsection (1) have been satisfied, the Commission must issue a compliance certificate.*
- (6) *If a person to whom a compliance notice has been issued fails to comply with the notice, the Commission may either—*
 - (a) *apply to the Tribunal for the imposition of an administrative fine; or*
 - (b) *refer the matter to the National Prosecuting Authority for prosecution as an offence in terms of section 110(2),*
but may not do both in respect of any particular compliance notice.

101 Objection to notices

- (1) *Any person issued with a notice in terms of section 100 may apply to the Tribunal in the prescribed manner and form to review that notice within—
 - (a) 15 business days after receiving that notice; or
 - (b) such longer period as may be allowed by the Tribunal on good cause shown.*
- (2) *After considering any representations by the applicant and any other relevant information, the Tribunal may confirm, modify or cancel all or part of a notice.*
- (3) *If the Tribunal confirms or modifies all or part of a notice, the applicant must comply with that notice as confirmed or modified, within the time period specified in it.”*

THE COMPLIANCE NOTICE

19. The notice provides a brief background of the complaint lodged with the NCC stating that the Complainant purchased a vehicle from the Applicant and that it had certain defects. The defects are described as a defect in the door panel and the fuel gauge registering a full tank even when it is not full.
20. The compliance notice alleges that the Applicant contravened sections 55(2)(a)(b)(c) and 56(2)(a)(b) of the CPA. The notice goes on to quote these sections but does not provide any detail on the manner in which these sections were contravened.
21. The notice states that the Applicant must refund the entire amount that the complainant paid to date and must settle the account with Imperial Motor Finance.
22. In the event that the Applicant does not comply within 15 working days the NCC will request the Tribunal to levy a fine of R500 000.00.

SUBMISSIONS BY THE APPLICANT

The Applicant's submissions, as contained in the application and made at the hearing, can be summarised as follows:

23. The Applicant denies ever attending a conciliation meeting as stated in the notice. It never received a complaint from the Respondent. The Applicant received directions relating to the conciliation but was

never advised what the meeting would be about and the location of the meeting. It therefore did not attend any meeting.

24. In accordance with the judgment in the *City of Johannesburg v NCC*² the NCC was required to do an investigation into the complaint received which was not done.
25. An investigation would have revealed that the defect in the door panel was a small bubble and was purely a cosmetic issue. It did not render the vehicle defective in any way.
26. The Applicant was never informed of a problem with the fuel gauge but in any event it was normal for any vehicle to still show a full tank even though a number of kilometres have been driven. This did not render the vehicle less acceptable, unsafe or unable to perform.
27. There is no evidence of prohibited conduct before the Tribunal or contained in the notice.

CONSIDERATION OF THE EVIDENCE

28. The factors to be considered when reviewing a compliance notice in terms of Section 101 of the CPA have been the subject of many cases before the Tribunal and they need not be repeated in detail again.
29. Suffices to say that in accordance with the judgment in *City of Johannesburg v NCC*³ the NCC is required to conduct an investigation before it issues a compliance notice. The purpose of the investigation would be to confirm the facts of the alleged prohibited conduct or non-compliance with the CPA and then to measure or evaluate those facts against the requirements in terms of the CPA. If this is not done then the Tribunal is unable to make a finding that the compliance notice was issued in accordance with the CPA.
30. The compliance notice issued by the NCC in this matter does not exhibit any evidence or indication of an investigation being done by the NCC. There is no evidence of the facts being confirmed or investigated. It appears that the NCC simply accepted the Complainant's version of events and put them forward in the notice as facts.

² NCT/2667/2011/101.

³ NCT/2667/2011/101.

31. In these circumstances the compliance notice cannot be said to comply with the requirements set down by Section 100 of the CPA and therefore stands to be cancelled.
32. Even if one considers the applicability of Section 55(2)(a) to (c) to the evidence available there is some doubt as to whether any prohibited conduct took place. The evidence before the Tribunal is that a small interior panel on one of the doors had a small bubble on it. While the Tribunal will acknowledge that a problem of this nature can be seen as a defect from a cosmetic perspective, it would be hard-pressed to find that it rendered the entire vehicle as unsuitable, of bad quality and unusable and therefore not compliant with the requirements set out in Section 55(2)(a) to (c). On the evidence available and in this specific matter, it would have been reasonable for the Applicant to simply replace the defective part with a new part, which is what it offered to do.
33. As far as the alleged problem with the fuel gauge is concerned, there is no information or evidence before the Tribunal to enable it to express any view whatsoever.

ORDER

34. Accordingly, the Tribunal makes the following order:

- 34.1 The compliance notice issued by the NCC against the Applicant is hereby cancelled.

- 34.2 No order is made as to costs.

DATED ON THIS 30TH DAY OF JANUARY 2014

[signed]

Adv. J Simpson

Presiding Member

Adv. N Sephoti and Mr X May concurring

