

SOUTH AFRICA / JUDGMENT

Mthembu v Boundlesstrade 11 (Pty) Ltd t/a Jaguar Land Rover Waterford (NCT/245311/2022/75(1)(b) CPA) [2023] ZANCT 3 (18 January 2023) [2023] ZANCT 3

COURT

National Consumer Tribunal

BEFORE

C Sassman

CASE / FILE NUMBER

NCT/245311/2022/75(1)(b) CPA

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case Number: NCT/245311/2022/75(1)(b) CPA

In the matter between:

BETRICE THOKOZILE MTHEMBU

APPLICANT

and

BOUNDLESSTRADE 11 (PTY) LTD t/a JAGUAR LAND ROVER

WATERFORD

RESPONDENT

Coram:

Adv C Sassman – Presiding Tribunal Member

Date of consideration (in chambers) - 17 January 2023

Date of judgment - 18 January 2023

LEAVE TO REFER - JUDGMENT AND REASONS

APPLICANT

1. The Applicant in this matter is Ms Betrice Thokozile Mthembu, a major female (“the Applicant”). The Applicant is a consumer, as defined in section 1 of the Consumer Protection Act 68 of 2008 (“the CPA”).

RESPONDENT

2. The Respondent is Boundlesstrade 11 (Pty) Ltd, trading as Jaguar Land Rover Waterford (“the Respondent”). The Respondent is a supplier, as defined in section 1 of the CPA.

TERMINOLOGY

3. A reference to a section in this judgment refers to a section of the CPA.

APPLICATION TYPE

4. This is an application in terms of section 75(1)(b).
5. Section 75(1)(b) states the following:

“If the Commission issues a notice of non-referral in response to a complaint, other than on the grounds contemplated in section 116, the complainant concerned may refer the matter directly to the Tribunal, with the leave of the Tribunal.”

JURISDICTION

6. Section 75(5)(b) states the following:

“The Chairperson of the Tribunal may assign any of the following matters arising in terms of this Act to be heard by a single member of the Tribunal, in accordance with section 31(1)(a) of the National Credit Act - an application for leave as contemplated in subsection (1)(b).”

7. Accordingly, the Tribunal has jurisdiction to hear this application for leave to refer a complaint to the Tribunal as contemplated under section 75(1)(b).
8. A single member of the Tribunal may hear the application in accordance with section 75(5)(b).

BACKGROUND

9. In April 2017, the Applicant purchased a new Land Rover Evoque from the Respondent and began to experience mechanical difficulties within the first four months of taking delivery of the vehicle. On 24 August 2017, she took the vehicle to the Respondent, complaining of noise when reversing. The Respondent provided a technical explanation for the noise and replaced the front brake pads.[1] It appears that the problem persisted as the Applicant returned the vehicle to the Respondent several times for the same issue during

2018. In each instance, the Respondent repaired either the vehicle's brakes, wheel discs, or wheel alignment but could not resolve the issue.
10. On 19 June 2019, the Applicant lodged a complaint with the Motor Industry Ombudsman of South Africa ("MIOSA"). MIOSA found that the noise the Applicant reported seems to recur after brake components are replaced. It advised the Respondent to make arrangements for their technical team to attend to the vehicle in line with the vehicle warranty or seek assistance from the Jaguar Land Rover Head Office. Between June 2019 and June 2022, the noise, while reversing, continued and was reported to the Respondent several times. The Respondent continued with attempts to resolve the issue each time but to no avail.
11. On 10 June 2022, the Applicant lodged a complaint with the National Consumer Commission ("the NCC"). The NCC assessed the complaint and determined that the redress sought by the Applicant cannot be provided in terms of the CPA. It noted that the action which led to the dispute had occurred more than three years before the complaint was lodged. Accordingly, the NCC issued a Notice of Non-Referral on 22 September 2022.
12. On 19 October 2022, the Applicant applied for leave to refer the matter to the Tribunal. The Applicant seeks an order for her vehicle to be replaced with a similar vehicle in good condition with an extended warranty. Alternatively, she seeks an order instructing the Respondent to purchase her vehicle from her and refund her the amounts she paid for certain repairs and diagnostic tests carried out on the vehicle.
13. The Applicant has complied with all filing requirements in bringing this application before the Tribunal, but the Respondent has not filed any pleadings in this matter.

APPLICATION FOR LEAVE

14. In terms of section 75(1), the Applicant may only refer the matter directly to the Tribunal with leave of the Tribunal.
15. Previously, the Tribunal held formal hearings on leave to refer, and all the parties would be present. In the matter of *Lewis Stores (Pty) Ltd v Summit Financial Partners (Pty) Ltd and Others* (Case no 314/2020) [2021] ZASCA 91 (25 June 2021) SAFLII, the court provided helpful guidance to the Tribunal in decisions regarding leave to refer. It held that a formal hearing on leave to refer was unnecessary, there was no test to be applied, and the decision to consider leave could not be appealed. The court held –

"[15] As I have explained, the NCA provides for an expeditious, informal and costeffective complaints procedure. Section 141(1)(b) confers on the Tribunal a wide, largely unfettered discretion to permit a direct referral. The NCA does not require a formal application to be made and it is not necessary for purposes of the present appeal, nor is it desirable, to circumscribe the factors to which the Tribunal should have regard. There is no test to be applied in deciding whether or not to grant a direct referral to it in respect of a complaint. The purpose of the provision is simply for the Tribunal to consider the complaint afresh, with the benefit of any findings by the Regulator, and to decide whether it deserves its attention. Circumstances which may influence its decision may include the prospects of success, the

importance of the issue, the public interest to have a decision on the matter, the allocation of resources, the complainant's interest in the relief sought and the fact that the Regulator did not consider that it merited a hearing before the Tribunal. The list is not intended to be exhaustive."

16. As there is no test to be applied, the Tribunal will consider the matter in the general context of the circumstances as submitted by the parties.

CONSIDERATION

17. The evidence submitted by the Applicant falls within the basic parameters of a claim in terms of sections 54, 55, and 56. Within six months of delivery of any goods, if a supplier fails to perform a service to the standards contemplated in section 54(1), then the consumer is entitled to require the supplier to remedy any defects or refund a reasonable portion of the price paid for the services rendered. If the product itself is not reasonably suitable for the

purposes for which it was intended or proven to be defective, then in terms of section 55(2)(b), the consumer is entitled to a repair, replacement, or refund of the price paid for the goods in terms of section 56(2)(a)(b).

18. However, in this case, the cause of the act which led to the complaint occurred in August 2017. This was the first time the noise heard while reversing the vehicle was reported to the Respondent. Even if the Applicant could prove that the vehicle was defective or that the quality of work and components supplied by the Respondent was below standard, the Tribunal would still not have the required jurisdiction to hear the matter.
19. Section 116(1)(a) states that a complaint may not be referred or made to the Tribunal more than three years after the act or omission that is the cause of the complaint occurred. The CPA does not make provision for this period to be delayed or interrupted in any way by the continuous work carried out on the vehicle by the Respondent over

the years that followed.

CONCLUSION

20. The Tribunal finds that the act which led to the complaint occurred in April 2017 and that the application to the Tribunal was filed on 19 October 2022, some five and a half years later. Therefore, the complaint is time-barred from being considered by the Tribunal.

ORDER

21. Accordingly, for the reasons set out above, the Tribunal makes the following order:

21.1 The application for leave to refer is refused; and

21.2 No costs order is made.

DATED ON THIS 18TH DAY OF JANUARY 2023.

(signed)

Adv C Sassman

Presiding Tribunal Member

[1] See Respondent's invoice on page 29 of the bundle.

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Prepared on 12 October 2026 · Esheria