

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

Case Number: **NCT/217071/2022/101**

In the matter between:

THORIDIUM LIQUORS (PTY) LTD t/a GI MOTORS

APPLICANT

And

NATIONAL CONSUMER COMMISSION

RESPONDENT

Coram:

Ms. N Maseti - Presiding Tribunal Member

Prof. T Woker – Tribunal Member

Mr. T Bailey – Tribunal Member

Date of Hearing: 21 June 2022

JUDGMENT AND REASONS

PARTIES

1. The Applicant is Thoridium Liquors (Pty) Ltd, trading as GI Motors (“the Applicant”), a private company incorporated in terms of the Companies Act of 2008, involved in the distribution and sale of motor vehicles and related services. The Applicant operates its business at 397 Francis Baard Street, Pretoria.
2. At the hearing, the Applicant was represented by Adv J. Swanepoel, instructed by Johan Nysschens Attorneys.

3. The Respondent is the National Consumer Commission, (“the Commission” or “the Respondent”) a juristic person established in terms of the Consumer Protection Act 68 of 2008 to regulate consumer protection matters, protect consumers rights and ensure fairness in the consumer market. The Respondent’s principal business address is at 1 Dr Lategan Road, Groenkloof Pretoria.
4. The Respondent did not file an answering affidavit to oppose this review application. The Respondent’s legal adviser, Mr Jabulani Maphumlo observed the proceedings for the Commission.

NATURE OF THE APPLICATION

5. This is an application made in terms of section 101 of the Consumer Protection Act, 68 2008, (“the CPA” or “the Act”) wherein the Applicant seeks the National Consumer Tribunal’s order to review and set aside the compliance notice issued by the Commission on 26 November 2021.
6. The Applicant objects to the content of the compliance notice in its entirety. Section 101(2) of the Act empowers the National Consumer Tribunal (“the Tribunal”) to confirm, modify or cancel all or part of a notice issued by the Commission.
7. The Tribunal has jurisdiction to hear and adjudicate upon this application.
8. This application in terms of section 101 was set down for hearing on 21 June 2022. It is not opposed.

BACKGROUND

9. On or about 26 November 2021, the Commission issued a compliance notice against the Applicant following allegations that the Applicant sold a defective used vehicle, an Audi A5, to the consumer, Mr Chilliboy Thebeke Matsemele, in October 2018. The gearbox suffered a significant mechanical failure within a month of purchase of the vehicle. These allegations are contained in the aforesaid notice and entail:
 - 9.1 The vehicle was sold with a defective gearbox which needed replacement;
 - 9.2 A mechantronic fault causing clutches to burn; and
 - 9.3 Other components which required replacement, namely, filters, sump, gasket and flange seals.
10. The consumer allegedly informed the Applicant about the defective gearbox, who undertook to repair it at no cost to the consumer, and in line with section 56(2)(a) of the CPA. The Commission asserts in

the

compliance notice that the Applicant failed to repair the defective gearbox in accordance with the directive elected by the consumer in terms of section 56(2). According to the Commission, this constitutes a contravention of the CPA.

11. Further to the above allegation, the Commission asserts that the consumer had to repair the gearbox at his own expense with the total cost of R86, 218.95. The Commission requires the Applicant to refund the consumer this total amount of R86,218.95 for repair of the defective vehicle. In addition, the Applicant is required to pay interest over this amount in terms of the Prescribed Rate of Interest Act 55 of 1975. Such interest is applicable from 28 November 2018 to date of final payment.
12. The Commission also asserts that clause 7.5 of the Applicant's Purchase Agreement limits warranty on its vehicles to thirty (30) days, and this is inconsistent with the provisions of section 56(2) read with section 51(1)(a) and (b) of the Act.
13. The Commission directed the Applicant to refrain from engaging in conduct that violates section 56(2) and section 51(1). The Applicant was given 15 business days from date of receipt of the notice to object and have the notice reviewed.
14. The Applicant filed its review application together with a condonation application on 3 February 2022. On 30 March 2022, the Tribunal condoned the lateness of the application for cancellation of the compliance notice. On 20 April 2022, the Tribunal issued a Notice of Filing to the parties. On 25 May 2022, the Tribunal issued a notice of set down for hearing of this application on 21 June 2022.
15. The Tribunal is required to cancel all parts of the compliance notice, issued by the Commission, on the grounds set out in the founding affidavit deposed to by Mr Olasunkanmi Timothy Kolade.

AT THE HEARING

16. The hearing of the section 101 Compliance Notice cancellation application was held on 21 June 2022 via audio-visual platform, MS TEAMS. The Applicant was represented by Advocate Swanepoel at this hearing. The Respondent did not oppose this application and was not represented. The Respondent's legal adviser, Mr Jabulani Maphumlo, attended the hearing only to observe the proceedings.

17. The panel was satisfied that the Commission was properly served with the relevant papers concerning this application, and Tribunal proceeded to hear the matter on a default basis in accordance with Rule 24(1) (c) of the National Credit Act.¹

APPLICANT'S SUBMISSION

18. At the hearing, the Applicant requested the Tribunal to review and set aside all parts of the compliance notice on the grounds that:
- i. The compliance notice was addressed and directed to an incorrect party, GI Motors (Pty) Ltd with a registration number 2020/745291/07;
 - ii. The consumer is not entitled to the relief sought in the said notice, namely, the refund of R86,218.95 plus interest;
 - iii. The consumer elected to have the vehicle repaired by the Applicant in line with a ruling made by the Motor Industry Ombudsman of South Africa (MIOSA) in April 2019, which directed the Applicant to repair the defective vehicle in line with section 56(2) of the CPA; and
 - iv. The amount of R86,218.95 is exorbitant as the Applicant believes the total value of the repair is approximately R15,000.00.
19. Furthermore, the Applicant asserts that it made attempts to contact the consumer to arrange for collection and repair of the vehicle. It is alleged that the consumer refused to have the car taken away for repair by the Applicant. Instead the consumer elected to repair the vehicle at his own expense and demanded a refund of the money he allegedly paid for repair. The Applicant also asserts that the consumer could not provide any proof of the actual expenses incurred to repair the defects.

ISSUES TO BE DETERMINED

20. This ruling is based on the documents before the Tribunal and arguments made by the Applicant at the hearing held on 21 June 2022.

¹ See GN 789 of 28 August 2007: Regulations for matters relating to the functions of the Tribunal and Rules for the conduct of matters before the National Consumer Tribunal, 2007 (Government Gazette No. 30225), as amended.

Rule 24 (1) provides:

If a party to a matter fails to attend or be represented at any hearing or any proceedings, and that party-

(a)...

(b) is not the Applicant, the presiding member may-

(i) continue with the proceedings in the absence of that party.

21. The Tribunal is required to determine whether all or parts of the compliance notice should be cancelled, modified or amended.

LEGAL PRINCIPLES

22. Section 101 of the Act provides:

“(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.”

23. In the present case, the Applicant contends that the entire compliance notice be reviewed and cancelled as it is defective.

24. Section 56(2) provides:

“Within six months after the delivery of of any goos to a 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 ontemplated in section 55, and the supplier must at the direction of the consumer, either –

(a) Repair or replace the failed, unsafe or defective goods; or

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

ANALYSIS OF FACTS

25. It is not disputed that Thoridium Liquors (Pty) Ltd is the correct legal entity that owned the vehicle, Audi A5, which was sold to the consumer Mr Matsemele. Its registration number is 2005/009612/07, which is different from 2020/745291/07 provided in the compliance notice. These details are contained in the affidavit deposed to by Mr Kolade.

26. The Applicant accepted responsibility for the repair of the vehicle and made attempts to have it repaired to no success as the consumer chose to fix the failed gearbox and other problems at his cost.

27. GI Motors (Pty) Ltd to which the notice was issued is not a registered legal entity, and is unknown to the Applicant. The notice issued has no legal force as no such entity exists.
28. GI Motors is a trading name for Thoridium Liquors (Pty) Ltd. Therefore, the notice was issued to an incorrect party, which has no legal standing in the claims made by the Commission in the notice. GI Motors (Pty) Ltd lacks legal capacity to be sued by the Commission in these review proceedings.
29. The consumer exercised his choice contemplated in section 56(2), which he required the Applicant to repair the defects in the vehicle. However, he proceeded to repair the vehicle at his own cost, estimated at R86,218.95. The Commission ordered the Applicant to refund the consumer this amount and pay interest in addition to it. The Commission lacks powers to make this order. It is not empowered to make compensation orders. Section 56(2) gives the consumer three choices, namely, (i) to have the defective goods repaired, or (ii) replaced or (iii) demand a refund. The consumer elected to have the supplier repair the defective vehicle at its own cost. However, this could not happen because the consumer incurred the cost himself instead of allowing the supplier to carry out its responsibilities stipulated in section 56(2). The supplier also indicated that it was willing and committed to repair the vehicle in fulfilment of MIOSA's ruling of April 2019.
30. The order for a refund of costs incurred by the consumer for repairing the vehicle and the requirement to pay interest of the abovestated amount is unlawful and renders the notice invalid.
31. As stated above, Thoridium Liquors (Pty) Ltd is the correct party to whom the notice should have been issued, and directed to comply with section 56(2) of the Act by requiring it to repair the defective vehicle. Failure to comply with such direction, the matter should have been referred to the Tribunal to adjudicate on whether or not a prohibited practice occurred. This is the party that entered into the transaction with the consumer, and it has confirmed that it is the correct party against which any claim arising from the transaction entered with the consumer may be directed.
32. As acknowledged in the *Rapotsonyane v Sekhukhu Syndicate matter*², "Locus standi is a matter of law, and cannot be conferred by consent or by condonation of the Court...". It is important to allow due process to take its course in the correction of the wrongly cited party. However, in this case, there was no application to correct the incorrect citation and the Respondent did not oppose the application to set aside the entire notice based on deficiencies set out in the aforementioned paragraphs. The Tribunal has no

² *Rapotsonyane v Sekhukhu Syndicate* 2006 (2) BLR 607 CA, the court adopted the analysis of the law in

Morenane Syndicate and Others v Loeto {2005} 2 B.L.R. 37.

discretion, acting on its own accord, to condone the compliance notice defects pointed out by the Applicant in substantiation of its objection.

ORDER

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

331 The compliance notice issued by the Commission on 26 November 2021 is set aside.

332 No order is made as to costs.

DATED ON THIS 20th day of July 2022

Ms N Maseti
Presiding Member

Prof T Woker and Mr T Bailey concurring.

Authorised for issue by The National Consumer Tribunal

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