

IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case number: **NCT/231628/2022/75(1)(b)**

In the matter between:

LIZIWE PEPETA

APPLICANT

And

MITCHELL MUNCK (PTY) LTD

RESPONDENT

Coram

Ms H Alwar - Presiding Tribunal Member

Date of consideration (in chambers) - 1 August 2022

Date of Judgment - 2 August 2022

LEAVE TO REFER JUDGMENT AND REASONS

THE PARTIES

1. The Applicant in this matter is Ms Liziwe Pepeta, a major female ("Ms Pepeta" or "the Applicant").
2. The Respondent is Mitchell Munck (Pty) Ltd, ("Mitchell Munck" or "the Respondent").

APPLICATION TYPE

3. This is an application in terms of Section 75(1)(b) of the Consumer Protection Act, Act 68 of 2008 (referred to as "the CPA").

4. Section 75(1) of the CPA 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 –

(a) ...

(b) the Tribunal, with the leave of the Tribunal."

JURISDICTION

5. Section 75(5) of the CPA states that:

"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:

(a)...

(b) an application for leave as contemplated in subsection (1)(b)"

6. Accordingly, the Tribunal has jurisdiction to consider this application for leave to refer a complaint to the Tribunal as contemplated under section 75(1)(b).
7. A single member of the Tribunal may consider the application as per section 75(5)(b) of the CPA.

BACKGROUND

8. Ms Pepeta lodged an application with the Tribunal in terms of section 75(1)(b) of the Consumer Protection Act 68 of 2008 ("the CPA"). Ms Pepeta submitted that on or about November 2018, she purchased a sheep head dehairing machine ("the machine") from the Respondent. She alleged that when the machine arrived, it (the machine) was not working. Ms Pepeta averred that she immediately informed the Respondent that the machine was not working. According to Ms Pepeta, the Respondent advised her that she (Ms Pepeta) needed to purchase a scalding tank as well for the machine to work. After purchasing the scalding tank, the machine still failed to work. Ms Pepeta was in constant discussions with the Respondent to have the machine replaced. The Respondent failed to assist Ms Pepeta in resolving the matter.

9. Ms Pepeta lodged complaints with the Consumer Goods and Services Ombudsman and the National Consumer Commission (NCC). She received a Notice of non-referral from the NCC dated 18 May 2022. She is requesting leave from the Tribunal to hear her dispute with Mitchell Munck.
10. On 15 June 2022, Ms Pepeta filed her application with the Tribunal and served the application on the Respondent on 11 June 2022 via registered mail.

APPLICATION FOR LEAVE

11. In terms of section 75(1)(b) of the NCA, the Applicant may only refer the matter directly to the Tribunal *with leave of the Tribunal*.
12. Previously, the Tribunal held a formal hearing on leave to refer with all the parties 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 useful 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 cost-effective 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."

Although the court judgment referred to section 141(1)(b) of the National Credit Act, 34 of 2005 ("NCA"), section 75(1)(b) of the CPA has the same wording.

13. 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 Applicant. As the matter is unopposed, the Respondent's version is not before the Tribunal.
14. The main issue in contention appears to be the defective machine that was purchased by Ms Pepeta from the Respondent. Sections 55 and 56 of the CPA are relevant to this matter as these sections refer to the consumer's right to fair value, good quality, and safe goods.
15. However, while Ms Pepeta's claim falls within the ambit of the CPA, she faces numerous serious challenges to her claim. Sec 116 of the CPA¹ states that a complaint may not be made to the Tribunal more than three years after the cause of the complaint arose. If the Tribunal accepts the Applicant's version that she informed the Respondent of the defects in the machine in November 2018, then this is when the cause of action would have arisen. Three years from November 2018 is October 2021. The application was filed with the Tribunal on 15 June 2022, more than eight months after the three-year period lapsed.
16. The High court recently issued an unreported judgment stating that the Tribunal had no power to interrupt prescription². Although the High court judgment referred to section 166 of the National Credit Act, 34 of 2005 ("NCA"), section 116 of the CPA and section 166 of the NCA have the same wording. The High court also stated that the requirements of Section 166 are peremptory and referred to a previous decision of the Tribunal and *stated "...in Mapeka v FirstRand Bank Ltd (Wesbank) case number NCT/14020/2014/141 par 21: Section 161(2) of the Act is very clear and does not allow any discretionary element. It places an absolute bar on if the matter is older than three years"*.

¹ **Limitations of bringing action**

116. (1) A complaint in terms of this Act may not be referred or made to the Tribunal or to a consumer court more than three years after—

(a) the act or omission that is the cause of the complaint; or

(b) in the case of a course of conduct or continuing practice, the date that the conduct or practice ceased.

(2) A complaint in terms of this Act may not be referred to the Tribunal or to a consumer court in terms of this Act, against any person that is, or has been, a respondent in proceedings under another section of this Act relating substantially to the same conduct.

² FirstRand Bank Ltd v A Ludick A277/2019 High Court of South Africa, Gauteng, Pretoria division, 18 June 2020 (unreported).

17. The Tribunal is bound by the High court judgment and must apply the provisions of section 116 of the CPA strictly.

CONCLUSION

18. The Tribunal finds that the matter is of substantial importance to the Applicant. The general circumstances under which the Applicant purchased the machine falls within the ambit of the CPA.

19. However, the Applicant's claim has prescribed. The application was filed with the Tribunal more than three years after the cause of action arose.

20. There is no reasonable prospect of the Tribunal being able to adjudicate on the Applicant's claim.

ORDER

21. Accordingly, the Tribunal makes the following order –

21.1. The Applicant's application for leave to refer is refused; and

21.2. There is no order as to costs.

THUS DONE IN PRETORIA ON THIS 2ND DAY OF AUGUST 2022

[signed]

Ms H Alwar
Presiding Tribunal Member

Authorised for issue by The National Consumer Tribunal

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