



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)**

CASE NO: **2212/2017**
DATE HEARD: **16 APRIL 2018**
DATE DELIVERED: **25 APRIL 2018**

In the matter between:

DIPICO, TEBOGO LESLEY

Applicant

and

IMPERIAL GROUP LIMITED t/a CARGO MOTORS KLERKSDORP

1st Respondent

THE CHAIRMAN: NORTHERN CAPE CONSUMER COURT

2nd Respondent

Coram: Olivier J et Mamosebo J

JUDGMENT

Olivier J:

[1.] In proceedings in the Northern Cape Consumer Court as envisaged in sections 1 and 18 of the **Northern Cape Consumer Protection Act**¹ (*"the NCCPA"*) the applicant, Mr Tebogo Lesley Dipico, claimed orders that the first respondent, Imperial Group Limited t/a Cargo Motors Klerksdorp, be ordered to pay the applicant R482 592.50, interest thereon and costs of suit.

¹ 1 of 2012

- [2.] The claim concerned a white Jeep Grand Cherokee vehicle that the first respondent had delivered to the applicant after the conclusion of an instalment sale agreement between the applicant and Wesbank².
- [3.] The claim was based on allegations that the applicant had rescinded the instalment sale agreement in terms of section 16 of the **Consumer Protection Act**³ ("*the CPA*"), alternatively that the white Jeep had been defective, had not complied with implied warranties in 55 and 56 of the CPA, entitling the applicant to return the white Jeep and to claim a refund of the amounts that he had paid.
- [4.] It was common cause that the applicant had indeed returned the white Jeep to the first respondent and that the amount claimed represents the total of the payments that the applicant had made.
- [5.] The Northern Cape Consumer Court effectively dismissed the applicant's claim and ordered the parties to bear their own costs.
- [6.] In the present matter the applicant claims the review of the findings and orders of the Northern Cape Consumer Court, as well as orders declaring "*the contract (offer to purchase) concluded between the Applicant the first Respondent to be lawfully cancelled*" and that the first respondent pay the amount claimed to the applicant, together with interest thereon.
- [7.] Adv. MJ Grobler has been joined as second respondent, in his capacity as "*Deputy Chairperson and/or Presiding Officer*" of the Northern Cape Consumer Court, but has not responded to service of the application on him.
- [8.] The founding affidavit contains not even as much as an allegation that this court would have the jurisdiction to review the judgment of the Northern Cape Consumer Court in the present circumstances⁴. More specifically no allegation

² A division of FirstRand Bank Limited

³ 68 of 2008

⁴ Compare **Natalse Landboukoöperasie Bpk v Fick** [1982] 2 All SA 326 (N), 1982 (4) SA 287 (N); **Communication Workers Union v Telkom SA Ltd** [1999] 2 All SA 113 (T), 1999 (2) SA 586 (T)

has been made that this court would have the power of review in the present circumstances. Allegations to this effect can also in my view not even be inferred from what has been alleged in the founding affidavit.

[9.] It is trite that an applicant must generally make out its case in the founding affidavit⁵, and this the applicant has in my view not done as regards this particular issue.

[10.] In its answering affidavit the deponent for the first respondent raised the issue of jurisdiction as an *in limine* objection. It was contended –

10.1. that the provisions of sections 21 and 22 of the **Supreme Court Act**⁶ (“*the SCA*”) do not empower this court to entertain this review, because the Northern Cape Consumer Court is not a Magistrates’ Court; and

10.2 that a review by this court is in fact in the present circumstances precluded by the provisions of section 24(1) of the NCCPA, read with those of section 148 of the **National Credit Act**⁷ (“*the NCA*”).

[11.] In terms of section 24(1) of the NCCPA the provisions of Parts C and D of Chapter 7 of the NCA are applicable to hearings of the Northern Cape Consumer Court. Those provisions include section 148, the relevant part of which reads as follows:

“Appeals and Reviews –

(1) A participant in a hearing before a single member of the Tribunal may appeal a decision by that member to a full panel of the Tribunal.

⁵ Compare **Titty’s Bar & Bottle Store v ABC Garage and Others** 1974 (4) SA 362 (T) at 369A - B

⁶ 10 of 2013

⁷ 34 of 2005

(2) *Subject to the rules of the High Court, a participant in a hearing before a full panel of the Tribunal may –*

(a) *apply to the High Court to review the decision of the Tribunal in that matter; or*

(b) *appeal to the High Court against the decision of the Tribunal in that matter, ...”.*

[12.] The Northern Cape Consumer Court is a “court”⁸, but because it is not a Magistrates’ Court it cannot be a court as intended in the provisions of sections 21 and 22 of the SCA, and those provisions would therefore not provide a power to this court to review the proceedings of the Northern Cape Consumer Court.

[13.] Mr Khokho, counsel for the applicant, contended that this court has an inherent jurisdiction to review the decision of lower courts. Mr Khokho did not point out the source of such jurisdiction. Section 24(1) of the erstwhile **Supreme Court Act**⁹ provided this court with the power to review proceedings of “*inferior courts*”, the definition of which would arguably have included the Northern Cape Consumer Court. That Act has, however, been repealed and replaced by the SCA, sections 21 and 22 of which provides for the review of proceedings of, specifically, Magistrates’ Courts, and contains no reference to “*lower*” or “*inferior*” courts. No attempt has been made to argue that a provincial Consumer Court would in fact be a Magistrates’ Court as envisaged in these sections.

[14.] The provisions of section 148(2) of the NCA, however, do provide for the review by the High Court of a decision of a “*full panel*” of a “*Tribunal*”, and therefore also of a “*full panel*” of a Consumer Court¹⁰.

⁸ See *inter alia* section 18(1)(c) of the NCCPA.

⁹ 59 of 1959

¹⁰ In the context of the provisions of the NCCPA (See section 24(1) of that Act).

- [15.] The distinction between a Consumer Court chaired by only one member and a Consumer Court consisting of three members also appear in sections 19 and 23 of the NCCPA, and indeed also in the NCA¹¹.
- [16.] In the present matter the Northern Cape Consumer Court was chaired by a single member, and section 148(2) of the NCA would therefore not be applicable at this stage; in other words where the decision has not yet been subjected to the internal appeal intended by section 129(1)¹².
- [17.] The provisions of section 148(1) of the NCA provide an internal remedy that is available in the case where a consumer is dissatisfied with a decision, order or ruling of a Consumer Court comprised of a single member. When regard is had to the provisions of subsection (2) of section 148 the internal remedy could then, should the internal appeal not succeed, be a step towards approaching the High Court, whether on review or appeal.
- [18.] The first respondent's case is that it is indeed an indispensable step towards that goal, that the applicant was obliged to first exhaust that remedy and that this court's power of review would only then have come into existence in terms of section 148(2)(a).
- [19.] The applicant's response to this contention in his replying affidavit is that "*The provisions of Section 148(1) of the NCA governs **appeals and not review applications***" (applicant's emphasis) and that the use of the word "*may*" is indicative of an intention on the part of the Legislature that a consumer like the applicant, who is dissatisfied with a ruling of a single member of a Tribunal¹³, would have the option of either taking that ruling on appeal to a full Tribunal or Consumer Court, or taking it on review to the High Court.
- [20.] In my view any of the grounds upon which the second respondent's judgment is in this application challenged by the applicant, could also have been grounds of

¹¹ See sections 26, 27 and 31

¹² Compare **Bornman v National Credit Regulator** [2014] 2 All SA 14 (SCA)

¹³ Or in the present case of a Provincial Consumer Court.

appeal, especially when regard is had to the wide range of powers that a full Consumer Court would have in considering such an appeal¹⁴. This was conceded by Mr Khokho. It is therefore not really clear what point the applicant was trying to make with the emphasised reference to “*appeals and not review applications*” alluded to above.

- [21.] In the answering affidavit it was submitted that the applicant had not shown that any grounds of review as envisaged in section 6 of the **Promotion of Administrative Justice Act**¹⁵ (“*the PAJA*”) exist in this matter. To this the applicant replied that “*no reasonable decision maker could (have) arrived at*” the decision of the second respondent, which would on the face of it suggest that the applicant was relying on the ground of review provided for in section 6(2)(h) of the PAJA. During argument, however, Mr Khokho denied that the applicant’s case was premised upon the PAJA.
- [22.] Insofar as the applicant’s case may indeed have been based on the provisions of the PAJA, section 7(2)(a) of that Act would have required that the applicant first exhaust any internal remedy that may be available to him before applying for review in terms of section 6(1) of that Act. The provisions of section 7(2)(a) of the PAJA would therefore not have provided the applicant with the option that he claims to have.
- [23.] Even if section 7(2)(a) of the PAJA was not applicable in this particular case, the provision of an internal remedy in section 148 of the NCA, read in the context of that Act and of the NCCPA, in my view make it very clear that the Legislature intended that remedy to be exhausted before recourse is taken to the High Court. This view is fortified by the fact that, in the absence of any other source of power

¹⁴ See Rule 27 of the Rules for the conduct of matters before the National Consumer Tribunal, promulgated in Government Gazette no. 30225 on 28 August 2007, in Government Notice 789 *inter alia* provides as follows:

“(2) *The appeal panel is not restricted to the record of the proceedings before a single member and may:*
 (a) *call for additional documentation and representations from the parties on any matter relevant to the complaint; or*

(b) *procure expert evidence and further research.*

(3) *The appeal panel, in collaboration with the Chairperson, may take any steps as are reasonably necessary for the just and effective determination of the appeal.”.*

¹⁵ 3 of 2000

for the review of the decision of a single member Tribunal or Consumer Court, the exercise of the internal remedy would apparently be the only mechanism through which the High Court could eventually be approached to review such a decision. The mechanism provides access from a single member “*panel*” to a full panel of the Tribunal or Consumer Court, the decision of which the High Court would indeed in terms of the provisions of section 148(2)(a) be competent to review.

[24.] In **Imperial Group (Pty) Ltd t/a Auto Niche Bloemfontein v MEC: Economic Development, Environment Affairs and Tourism, Free State Government and others**¹⁶ it was held that:

“The Legislature has created a statutory framework in adopting the CPA to deal with the rights and obligations of suppliers and consumers to ensure speedy, inexpensive and fair procedures. A specialised framework has been created for consumers and suppliers to resolve disputes. Parties must pursue their claims primarily through these mechanisms. See: Chirwa v Transnet Ltd and others 2008 (4) SA 367 (CC) The Constitutional Court has repeatedly held that where legislation has been enacted to give effect to a constitutional right(s), a litigant should rely on that legislation to give effect to the right(s), or else to challenge that legislation as being inconsistent with the Constitution ... The NCA, CPA and the Free State Act¹⁷ were specifically enacted to entrench and govern the realisation of the fundamental consumer rights under the Constitution ...” (Para [18]).

and that :

¹⁶ [2016] 3 All SA 794 (FB)

¹⁷ The Free State counterpart of the NCCPA

“The High Court’s right of review is limited in casu. The remedies provided in the CPA, read with section 148 of the NCA have to be pursued” (Para [21])

- [25.] I respectfully agree with this. In my view the “*clear ... intention of the Legislature*”¹⁸ is that the provisions of section 148(1), in providing an internal remedy of appeal and when read in context, would indeed oust any conceivable power of review by the High Court of a decision of a single member provincial Consumer Court that has not yet been subjected to an appeal by a full provincial Consumer Court¹⁹. Put another way, in my view the High Court’s only source of power to review the proceedings of a single member Tribunal or Consumer Court would be the provisions of section 148(2)(a), and that power can only come into existence through an unsuccessful internal appeal to the full Tribunal or Consumer Court.
- [26.] In my view the second respondent’s judgment is therefore not susceptible to review by this court at this stage. The applicant’s failure to follow the route of an internal appeal not only rendered this application premature, it also failed to activate this court’s power of review in terms of section 148(2)(b).
- [27.] It is therefore at this stage unnecessary to express an opinion on whether the second respondent’s judgment would have constituted “*administrative action*” for the purposes of a review in terms of the PAJA²⁰.
- [28.] For the same reason the merits of the application cannot be considered at this stage. I feel constrained, however, to remark that although the applicant, in his

¹⁸ **De Wet v Deetleffs** 1928 (AD) 286 at 290

¹⁹ Compare **Nichol & Another v Registrar of Pension Funds & others** [2005] JOL 15607 (SCA) para [15]; Compare also **Du Toit v Benay Sager (NCRD 2482) t/a Debt Busters and Others** [2017] ZAWCHC 141 and **Phaladi v Lamara and another and a related matter** [2018] JOL 39473 (WCC)

²⁰ See the definition of “*administrative action*” in section 1, which in sub-section (ee) excludes from review in terms of that Act, inter alia, “*judicial functions of a judicial officer of a court referred to in section 166 of the Constitution*”, read with sub-section (e) of section 166 of the Constitution and the reference therein to, inter alia, courts “*recognised in terms of an Act of Parliament*”.

founding affidavit, labelled some of the findings of the second respondent as misdirections and others as absurd, embarrassing and erratic, he never as much as attempted to allege that any of those findings would indeed constitute one of the grounds of reviews set out in section 6(2) of the PAJA, or would constitute any other ground of review.

[29.] It has to be kept in mind that, for purposes of a review, it would not suffice to show that the challenged finding was factually wrong²¹.

[30.] As I have already said, it was only in the replying affidavit that the applicant, for the first time and after having been challenged in this regard, made an allegation that could be said to refer to a recognised ground of review. There was, and is, no explanation for this. It was incumbent upon the applicant to set out the ground/s of review clearly in his founding affidavit²².

[31.] The material findings of the second respondent were:

34.1 that the cooling-off period in section 16 of the CPA, which had been applicable when the applicant had initially bought a gold coloured Jeep, no longer applied when that vehicle was at a later stage substituted with the white Jeep; and

34.2 that the applicant had not on a balance of probabilities proven that the white Jeep had a defect as envisaged in the CPA and which could entitle him to the refund that he claimed.

[32.] It is in particular in respect of these findings that the applicant, for purposes of review, would have had to allege and show, in his founding affidavit, that they had resulted from, and/or had constituted irregularities or illegalities and/or had constituted grounds of review in terms of section 6(2) of the PAJA, and not

²¹ Compare **Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims and others** 2015 (3) BCLR 268 (CC); **Justice Alliance of South Africa v Mncube NO and others and 2 related matters** 2015 (4) BCLR 402 (WCC)

²² Compare **Smuts v Adair and another** [1999] 4 BLLR 392 (LC); **Communication Workers' Union and others v SA Post Office Limited and others** [2014] JOL 31295 (LC)

merely that the second respondent had on the evidence been wrong in making those findings.

- [33.] Getting back to the applicant's failure to exhaust the internal remedy provided in section 148(1) of the NCA, the applicant has not applied for exemption in terms of section 7(2)(c) of the PAJA.
- [34.] He was not entitled to institute this application in circumstances where he had not first exhausted the internal remedy provided for in section 148(1) of the NCA²³ and, in the absence of that remedy having been exhausted, this court in any event would not have the power of review. It follows that the application should be dismissed.
- [35.] The question arises whether an order in terms of section 7(2)(b) of the PAJA should then be made. It provides that "*Subject to paragraph (c), a court or Tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or Tribunal for judicial review in terms of this Act*".
- [36.] Subsection (c) makes provision for an application for exemption from the duty to exhaust an internal remedy before instituting review proceedings.
- [37.] In **Directory Solutions CC v TDS Directory Operations (Pty) Ltd and others**²⁴ it was held that sub-section (2)(b) did not apply where review proceedings were instituted and there was no application for exemption.
- [38.] In the **Evaluations Enhanced** case referred to above²⁵, and in circumstances where there had been no application for exemption at any stage, the order of the court *a quo* was substituted with orders, *inter alia*, that the review application

²³ Compare **Koyabe and Others v Minister for Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae)** 2010 (4) SA 327 (CC), para [82]; **Evaluations Enhanced Property Appraisals (Pty) Ltd v Buffalo City Metropolitan Municipality and others** [2014] 3 All SA 560 (ECG), para [57] and [58]

²⁴ [2008] JOL 21689 (SE)

²⁵ See footnote 24 above

concerned be dismissed and that *“The Applicant is directed under section 7(2)(b) of PAJA to first exhaust its internal remedy before instituting review proceedings”*.

- [39.] It could in my view be argued that the order made on appeal in the **Evaluations Enhanced** case left no room for an application for exemption. Theoretically, and depending on the particular applicable provisions, an applicant may even at such a late stage be entitled to apply for exemption. Even if it could be argued that this was not the literal meaning of that order, the fact would be that any order in a subsequent successful application for exemption would inevitably be irreconcilable with the unqualified directive made on appeal.
- [40.] It is trite that the Legislature is to be presumed not to have intended to do away with rights²⁶ and in my view this would all the more be so where the particular right concerns access to courts.
- [41.] The peremptory wording of sub-section (2)(b) is qualified by the introductory provision of the right to apply for exemption. In my view effect can easily be given to both the duty to direct and to the qualification, viz by making the direction subject to the right to apply for exemption.
- [42.] There is no reason at all why costs should not follow the result in this application.
- [43.] The first respondent in fact sought a punitive costs order. It appears that the first respondent’s attorney had, after the institution of this application and in a letter to the applicant’s attorney, taken the stand that the application should have exhausted his internal remedy and had invited the applicant to withdraw the application for review. It was also contended, in seeking punitive costs, that some of the allegations in the founding affidavit are incorrect, in the sense that they are contradicted by the record of the proceedings in the Northern Cape Consumer Court.

²⁶ Compare **Blaauwberg Municipality v Bekker and others** [1998] 1 All SA 88 (LCC) para [33]

[44.] As far as the letter is concerned, it was responded to by the applicant's attorney, who declined the invitation that the application for review be withdrawn. In my view it cannot be said that either the applicant or his attorney had in this regard been *mala fide*, or even reckless, in holding the view that the applicant had not been obliged to pursue the remedy provided for in section 148(1) of the NCA.

[45.] It can also not be found, on the available information, that there was any malice or ill intent in any incorrect exposition in the founding affidavit of the evidence presented at the hearing. The record of those proceedings would inevitably have been part of the information before this court on review, and therefore nothing could have been achieved by intentionally misrepresenting any part of that evidence.

[46.] I will however make one further remark in this regard, and that is that insofar as any of the applicant's legal representatives had assisted him in the preparation of his founding affidavit, much more caution should obviously have been exercised in dealing with the evidence presented at the hearing.

[47.] In the premises the following orders are made:

1. THE APPLICATION IS DISMISSED.

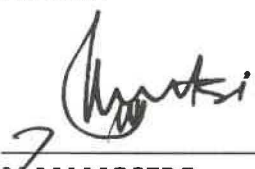
2. IT IS DIRECTED THAT, UNLESS THE APPLICANT IS IN TERMS OF SECTION 7(2)(C) OF THE PROMOTION OF ADMINISTRATIVE JUSTICE ACT, 3 OF 2000, GRANTED EXEMPTION FROM EXHAUSTING THE INTERNAL REMEDY PROVIDED IN SECTION 148(1) OF THE NATIONAL CREDIT ACT, 34 OF 2005, THE APPLICANT SHALL FIRST EXHAUST SUCH REMEDY BEFORE INSTITUTING PROCEEDINGS IN THIS COURT FOR JUDICIAL REVIEW IN TERMS OF THE PROMOTION OF ADMINISTRATIVE JUSTICE ACT.

**3. THE APPLICANT IS ORDERED TO PAY THE COSTS OF THE APPLICATION ON
THE PARTY AND PARTY SCALE.**



CJ OLIVIER
JUDGE
NORTHERN CAPE DIVISION

I concur.



M MAMOSEBO
JUDGE
NORTHERN CAPE DIVISION

For the Applicant:

ADV N D KHOKHO
(Instructed by **Luma Lobi Attorneys**)

For the 1st and 2nd Respondent:

ADV M C LOUW
(Instructed by **Symington & De Kok c/o Mervyn Joel Smith**)

