



Reportable:	<u>YES</u> / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
Circulate to Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA (Northern Cape Division, Kimberley)

Saakno / Case number: **1260/2015**
Datum aangehoor / Date heard: **02/02/2016**
Datum beskikbaar / Date available: **01/04/2016**

In the matter between:

IMPERIAL GROUP (PTY) LTD t/a

CARGO MOTORS KLERKSDORP

Applicant

And

TEBOGO LESLIE DIPICO

First Respondent

ADV EJP KAMMIES N.O.

Second Respondent

Coram: Phatshoane J and Mamosebo J

JUDGMENT

Phatshoane J

INTRODUCTION

- [1] This is an application in terms of s 148(2)(a) of the National Credit Act, 34 of 2005 (NCA), by Imperial Group (Pty) Ltd t/a as Cargo Motors Klerksdorp (Cargo Motors), to review and set aside the decision of Adv EJP Kammies, the Chairperson of the Northern Cape Consumer Court (NCCC), the second respondent, in refusing to grant condonation for the late filing of an appeal under Case number: 02/03/2014 at the NCCC and to substitute the Chairperson's decision with an order in terms of which condonation is granted for the late filing of the appeal.

SOME BACKGROUND FACTS

- [2] Around 14 April 2012 Cargo Motors, the applicant, and Mr Tebogo Leslie Dipico, the first respondent, entered into an agreement in terms of which Cargo Motors sold a Jeep Grand Cherokee vehicle to Mr Dipico who took delivery thereof. Pursuant thereto, Mr Dipico informed Cargo Motors, telephonically and by means of an e-mail, that the vehicle overheated and returned it to the merchant who, around 25 April 2012, undertook to replace it with a prototype Jeep Grand Cherokee. A new offer to purchase was concluded. Thereafter Mr Dipico and Wesbank, a Division of FirstRand Bank Limited, entered into a large instalment sale agreement in terms of which Wesbank financed the vehicle.
- [3] On 26 April 2012 Mr Dipico took delivery of the prototype which, according to him, also malfunctioned around 27 April 2012. He delivered it to the merchant for inspection and repair. Although gainsaid by the merchant, Mr Dipico allege that the vehicle was not suitable for its general intended purpose; not of good quality; not in good working order; not free of any defect; and not usable and durable for a reasonable period of time. On 29 April 2012 Mr Dipico forwarded an email to the sales manager of Cargo Motors informing him that he was cancelling the transaction and returning the vehicle but the latter was not amenable to the cancellation. Mr Dipico nevertheless effected restitution on 30 April 2012.

THE DISPUTE RESOLUTION MECHANISMS FOLLOWED BY MR DIPICO

- [4] Relying on various provisions of the Consumer Protection Act, 68 of 2008 (CPA), Mr Dipico referred his complaint to the following dispute resolution forums:¹

¹ This appears in para 22 of the particulars of claim attached as annexure "A" to the founding affidavit in respect of the application for condonation for the late filing of an appeal that served before the Chairperson of the Northern Cape Consumer Court (NCCC).

- 4.1 The Office of the Consumer Protector at the Department of Economic Development and Tourism, Kimberley, during May and June 2012. The Consumer Protector was unable to assist him but advised him to refer his dispute to the National Consumer Commissioner (NCC).
- 4.2 The North West Province Consumer Affairs Office, where the dealership of Cargo Motors is situated. This office informed him that they did not have the technical knowledge to determine whether the vehicle suffered from a latent defect.
- 4.3 The Motor Industry Ombudsman of South Africa (MIO) during November 2012. The MIO informed Mr Dipico that Cargo Motors could not find any fault with the vehicle; there was nothing to repair; and therefore the MIO was closing his file.
- 4.4 The National Consumer Commission (NCC) and National Consumer Tribunal (NCT) between March 2013 to July 2013. The NCC informed Dipico that it would refer the matter to the MIO a second time.
- 4.5 Mr Dipico intimated that from August 2013 to 10 March 2014, the dispute remained unresolved at the MIO who failed to make a ruling.
- 4.6 During November 2013 to February 2014 Mr Dipico, once more, approached the NCC. This time, the NCC issued a Notice of non-referral of the dispute which enabled him to approach the NCCC².

² Section 75 of the Consumer Protection Act, 2008 (CPA) provides:

“ (1) 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) the consumer court, if any, in the province within which the complainant resides, or in which the respondent has its principle place of business in the Republic, subject to the provincial legislation governing the operation of that consumer court; or
- (b) the Tribunal, with leave of the Tribunal”

Although this notice does not form part of the record before us, it is recorded in the ruling of the NCCC (the hearing at first instance) that the notice read:

“The Commission has reviewed the complaint, the ruling by the MIO as well as factors surrounding the recourse of your complaint.”

The reason for the issuance of the Notice of non-referral is recorded as follows:

“This is because your matter needs adjudication and as you may be aware that section 99(1) of the CPA states that the Commission is not responsible to directly adjudicate any such dispute, therefore the commission will then issue a Notice of non-referral on your complaint.”

- [5] Pursuant to the issuing of the Notice of non-referral by the NCC Mr Dipico issued a summons in the NCCC against Cargo Motors, Chrysler South Africa, and Wesbank, claiming, amongst others, the refund of the purchase price of the vehicle and ancillary relief. He later withdrew his claim against Chrysler and Wesbank but proceeded against the merchant.

- [6] When Mr Dipico issued the aforementioned summons he omitted to seek leave from the NCCC to refer his dispute directly to that Court. In terms of s 11 of the Northern Cape Consumer Protection Act, 1 of 2012 (NCCPA), if the Authority issues a Notice of non-referral in response to a complaint, other than on grounds contemplated in s 116³ of the CPA, the complainant may refer the matter directly to the Consumer Court, *with leave* of the Consumer Court.

- [7] In July 2014 Mr Dipico served and filed an application in the NCCC in terms of which he sought leave to refer his dispute directly to the

³ Section 116 of the CPA places limitations in bringing action. For instance, a complaint in terms of the 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. Furthermore a complaint in terms of the Act may not be referred to the Tribunal or to a consumer court in terms of the Act, against any person that is, or has been, a respondent in proceedings under another section of the Act relating substantially to the same conduct.

NCCC and condonation for various other issues of non-compliance with the applicable legislation. Cargo Motors opposed the application for direct referral. Notwithstanding this, it granted Mr Dipico an indulgence to cure the defects in his application for direct referral but persisted with its opposition on the basis that s 69(b) and (c) of the CPA precluded a referral of a dispute to a Consumer Court where there was an Ombud with jurisdiction to entertain the dispute, *in casu*, the MIO. Section 69 (b) of the CPA is dealt with later on in this judgment.

- [8] Sometime during August 2014 the application for direct referral was enrolled before a single member of the NCCC, Adv NJ Grobler. The NCCC granted Mr Dipico leave for direct referral of his dispute to that Court.

- [9] Cargo Motors noted an appeal against the judgment and order granting leave for direct referral by the NCCC. The Notice of leave to appeal was filed outside the 20 (twenty) day's period allowed in Rule 26 of the Rules for the conduct of matters before the National Consumer Tribunal published in terms of Government Gazette No: 30225 of 28 August 2007.⁴ These Rules also applied to the NCCC. In view of the late filing of the Notice of Appeal Cargo Motors brought an application for condonation.

- [10] In the judgment handed down by the Chairperson of the NCCC the Full Panel of that Court refused to condone Cargo Motors' late filing of the Notice of Appeal. This is the impugned decision sought to be reviewed and set aside.

⁴ The appeal before the Chairperson was brought in terms of section 148(1) of the NCA which provides:
“(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.”

THE IMPUGNED DECISION

- [11] The impugn decision (judgment on appeal by the NCCC) is not well-structured. To comprehend it, sifting the wheat from the chaff became necessary. Apparent from the decision is that the Chairperson had regard to the factual background highlighted in this judgment and noted that the *“dispute between the appellant (Cargo Motors) and the respondent (Dipico) had its origin outside the borders of the Northern Cape Province”*. He correctly identified that the appeal was against the direct referral of the dispute to the NCCC in terms of s 11 of the NCCPA. He was of the view that, for purposes of determining whether to grant the application for condonation for the late filing of the Notice of Appeal, it was pertinent to have regard to two issues: Firstly, the reason given for non-compliance with the Rules by Cargo Motors and secondly, its prospects of success on appeal.
- [12] The Chairperson noted that the dispute was referred to the MIO who in due course closed its file. He was of the view that at the time that the dispute was filed with the NCCC there was a Notice of non-referral which had been issued by the NCC conferring jurisdiction upon NCCC to entertain the application for direct referral in terms of the CPA read with the NCCPA and the Rules for the conduct of matters before the NCT. He reasoned that Cargo Motors had ample time to challenge the validity of the Notice of non-referral issued by the NCC prior to the filing of the dispute with the NCCC because the dispute between the parties remained unresolved for a considerable period of time.
- [13] In conclusion the Chairperson acknowledged that there were no Rules for the conduct of proceedings in the NCCC regulating the filing of appeals and reviews. However, he was of the view that, *ex facie* Cargo Motor’s founding papers, it was aware of the 20 days’ period within which the Notice of Appeal ought to have been filed. He concluded that

Cargo Motors did not demonstrate that good cause existed for the application to succeed and expressed serious doubt whether Cargo Motors had reasonable prospects of success on appeal.

THE GROUNDS OF REVIEW

[14] The grounds of review may be summarised as follows:

- 14.1 The court *a quo* (the Chairperson) failed to take into account the material facts before him and the legal principles;
- 14.2 The court *a quo* failed to give consideration to all the factors applicable in the evaluation of an application for condonation, *inter alia*, the importance of the case. The issues raised on appeal related to new legislation which required the Court's interpretation to lend legal certainty thereto.
- 14.3 There is no rational connection between the facts and the finding arrived at by the court *a quo*.
- 14.4 Lastly, that the court *a quo* did not have jurisdiction to entertain the dispute: Firstly, because Cargo Motor's business is situated outside the jurisdiction of the NCCC and secondly, the sale agreement, to which the dispute relates, was concluded outside the court's territorial boundaries.

THE ANALYSIS

[15] The approach to the granting of an application for condonation was authoritatively settled in *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532C-F and reaffirmed as follows in *United Plant Hire (Pty) Ltd v Hills and Others* 1976 (1) SA 717 (A) at 720E-G:

"It is well settled that, in considering applications for condonation, the Court has a discretion, to be exercised judicially upon a consideration of all of the facts; and that in essence it is a question of fairness to both sides. In this enquiry, relevant considerations may include the degree of non-compliance with the Rules, the explanation therefore, the prospects of success on appeal, the importance of the case, the respondent's interest in the finality of

his judgment, the convenience of the Court, and the avoidance of unnecessary delay in the administration of justice. The list is not exhaustive.

These factors are not individually decisive but are interrelated and must be weighed one against the other; thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong.”

- [16] Cargo Motors, understandably, criticised some of the remarks made by the Chairperson of the NCCC in his ruling because they were illogical and contributed nothing of substance to the issues he was called upon to determine. It is unnecessary to highlight those issues as nothing of consequence turns on them.

- [17] Evidently, the Chairperson did not address the wantonness of the delay for filing of the Notice of Appeal or made any reference to the explanation proffered for the delay by Cargo Motors in his ruling. Neither did he deal with the importance of the matter.

- [18] The ruling of Adv Grobler, sitting as the NCCC Court of first instance, which granted Mr Dipico leave to refer his dispute to the NCCC, was brought to the attention of Cargo Motors on 23 September 2014. The Notice of Appeal was filed on 10 February 2015, almost 4 months from date of the ruling, approximately 75 court days late. In explaining the delay on behalf of Cargo Motors Mr Oba van Tonder, a professional assistant in the employ of Symington & De Kok Attorneys, Bloemfontein, explained that on 21 October 2014 he was instructed to obtain counsel’s opinion on whether to challenge Adv Grobler’s ruling. On 03 November 2014 counsel advised that the ruling was assailable.

- [19] Counsel’s attention was drawn to s 24 of the NCCPA which makes the provisions of the CPA and the NCA applicable to the hearings before the NCCC⁵. He in turn advised that a Notice of Appeal be filed.

⁵ It is to be recalled that s 148 (1) of the National Credit Act (NCA), upon which this review is founded, stipulates that a participant in a hearing before a single member of the Tribunal (in this case the NCCC) may appeal a decision by that member to a full panel of the Tribunal (NCCC).

Mr Van Tonder received the Notice of Appeal from counsel on 29 January 2015 which was served and filed 8 days later.

[20] Cargo Motors does not say at what stage between November 2014 and January 2015 its counsel became aware of provisions of s 24 of the NCCPA nor why the notice was only filed on 10 February 2015 when it was already received from counsel on 29 January 2015. It is also disquieting that the condonation for the late filing of the Notice of Appeal was only served and filed on the date of the hearing of the appeal, approximately a month later, following the filing of the Notice of Appeal. This is inexcusable.

[21] I now turn to consider whether Cargo Motors had demonstrated good prospects of success which would compensate for the substantial delay. The thrust of its argument is that the NCCC did not take into account that the NCC was not entitled to issue the Notice of non-referral because the issuance thereof was contrary to the peremptory provisions of the CPA which prohibited a referral of a dispute to any other forum where there is an Ombud with jurisdiction (MIO). Cargo Motors further contended that, regard being had to the peremptory provisions of the CPA and authorities, it was not necessary to set aside the Notice of non-referral because it was a nullity and of no force or effect. It further argued that the NCCC itself was not statutorily mandated to grant Mr Dipico leave to refer his dispute to that court because of the invalid Notice of non-referral issued by the NCC. It too lacked jurisdiction due to the existence of the MIO, the argument went.

[22] In support of his argument, Mr Louw, for Cargo Motors, relied heavily on the provisions of s 69 of the CPA, which provides:

“69 Enforcement of rights by consumer:

A person contemplated in section 4 (1) may seek to enforce any right in terms of this Act or in terms of a transaction or agreement, or otherwise resolve any dispute with a supplier, by-

- (a) referring the matter directly to the Tribunal, if such a direct referral is permitted by this Act in the case of the particular dispute;
- (b) **referring the matter to the applicable ombud with jurisdiction, if the supplier is subject to the jurisdiction of any such ombud;**
- (c) **if the matter does not concern a supplier contemplated in paragraph (b)-**
 - (i) referring the matter to the applicable industry ombud, accredited in terms of section 82 (6), if the supplier is subject to any such ombud;
or
 - (ii) applying to the consumer court of the province with jurisdiction over the matter, if there is such a consumer court, subject to the law establishing or governing that consumer court;
 - (iii) referring the matter to another alternative dispute resolution agent contemplated in section 70; **or**
 - (iv) filing a complaint with the Commission in accordance with section 71; **or**
- (d) approaching a court with jurisdiction over the matter, if all other remedies available to that person in terms of national legislation have been exhausted.”

[23] Mr Louw also relied on the decision of the National Consumer Tribunal (NCT) in *Clientele General Insurance Ltd v National Consumer Commission* (NCT/4671/2012/60(3) and 101(1)(P)[2013] ZANCT 7 (15 April 2013), reported on SAFLII, which concerned the review and cancellation of a compliance notice in terms of s 101(1)⁶ of the CPA that had been issued to Clientele General by the NCC. In that case the complainant had referred his complaint to the NCC. Parallel to that process he also lodged his complaint with the Ombudsman for Short-term Insurance. Unquestionably, two distinct dispute resolution fora. Clientele General refunded the complainant an amount it claimed to

⁶ Section 101 (1) provides that “ Any person issued with a notice in terms of section 100 (Compliance Notice) 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.”

have been the total amount of his premium. The complainant accepted the payment in full and final settlement of the dispute arising out of the complaint. The Ombudsman for Short-term Insurance referred the matter to the Ombud for Financial Services Providers (FAIS Ombud) which dismissed the complaint. However, it so happened that two days prior to the dismissal of the complaint, in a different forum, the NCC had issued a compliance notice in terms of which Clientele General was directed to refund the complainant.

On review one of the issues before the Tribunal was whether the compliance notice issued by the NCC was issued in accordance with the law. It was contended *inter alia* that the NCC lacked jurisdiction by virtue of the provisions of s 69(b) of the CPA. The NCT held that in terms of s 69 of the CPA the complaint fell within the jurisdiction of the Ombud for Short-term Insurance, whose decision Clientele General abided by and resolved the dispute. It further held that the NCC should not have dealt with the matter.

Clientele General's decision should be understood against the backdrop of forum-shopping that was patently at play. The circumstances prevailing in Mr Dipico's situation are markedly different from the factual matrix in *Clientele General* and therefore distinguishable. Mr Dipico referred his complaint to the MIO around November 2012. It remained unresolved and decided to approach the NCC which issued a Notice of non-referral.

- [24] Essentially this statutory review application concerns the interpretation of s 69 of the CPA. The CPA is a social justice piece of legislation which, apparent from its lengthy pre-amble, *inter alia*, aims to protect the interest of all consumers and ensures accessible, transparent and efficient redress for consumers who are subjected to abuse or exploitation in the marketplace.

[25] The purposes of the CPA are to promote and advance the social and economic welfare of consumers in South Africa by, amongst others, providing a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions; and an accessible, consistent, harmonised, effective and efficient system of redress for consumers⁷.

[26] The CPA must be interpreted in a manner that gives effect to the purposes set out in s 3.⁸ In *Daniels v Campbell NO and Others* 2004 (5) SA 331 (CC) at 350 para 43, the Court held:

“[43] Section 39(2) of the Constitution contains an injunction on the interpretation of legislation. It requires courts when interpreting any legislation to ‘promote the spirit, purport and objects of the Bill of Rights’. Consistent with this interpretive injunction, where possible, legislation must be read in a manner that gives effect to the values of our constitutional democracy. These values include human dignity, equality and freedom. Thus where legislation is capable of more than one plausible construction, the one which brings the legislation within constitutional bounds must be preferred.”

[27] In my view s 69 should be read contextually, in conjunction with s 70 of the CPA and the purpose of the statutory enactment. Section 70 provides:

“Alternative dispute resolution:

(1) A consumer may seek to resolve any dispute in respect of a transaction or agreement with a supplier by referring the matter to an alternative dispute resolution agent **who may be-**

- (a) an ombud with jurisdiction, if the supplier is subject to the jurisdiction of any such ombud;
- (b) an industry ombud accredited in terms of section 82 (6), if the supplier is subject to the jurisdiction of any such ombud;
- (c) a person or entity providing conciliation, mediation or arbitration services to assist in the resolution of consumer disputes, other than an ombud with jurisdiction, or an accredited industry ombud; **or**
- (d) applying to the consumer court of the province with jurisdiction over the matter, if there is such a consumer court, subject to the law establishing or governing that consumer court.

⁷ See s 3 (1)(g) and (h) of the CPA

⁸ See s 2(1) of the CPA.

(2) If an alternative dispute resolution agent concludes that there is no reasonable probability of the parties resolving their dispute through the process provided for, the agent may terminate the process by notice to the parties, whereafter the party who referred the matter to the agent may file a complaint with the Commission in accordance with section 71.

(3) If an alternative dispute resolution agent has resolved, or assisted parties in resolving their dispute, the agent may-

- (a) record the resolution of that dispute in the form of an order, and
- (b) if the parties to the dispute consent to that order, submit it to the Tribunal or the High Court to be made a consent order, in terms of its rules.

(4) With the consent of a complainant, a consent order confirmed in terms of subsection (3) (b) may include an award of damages to that complainant”.

[28] Section 70 puts paid to any doubt on whether the CPA seeks to introduce the hierarchical system of dispute resolution in s 69. It makes plain that a consumer may seek to resolve any dispute in respect of a transaction or agreement with a supplier by referring the matter to an alternative dispute resolution agent **who may be** any of the institutions listed in the section.

[29] On a plain reading of s 69(b) a consumer may seek to enforce any right in terms of the CPA or in terms of a transaction or agreement, or otherwise resolve any dispute with a supplier, by: (1) referring the matter directly to the Tribunal, if such a direct referral is permitted by the Act in the case of the particular dispute; (2) **referring the matter to the applicable ombud with jurisdiction, if the supplier is subject to the jurisdiction of any such ombud.** If the supplier is not subject to the jurisdiction of any such an ombud the consumer has various alternative dispute resolution mechanisms set out in Section 69(c). I say this because the word “or” in s 69(c) postulates that interpretation. Put differently, the word “or” points to alternative dispute resolution structures available to the consumer, which are mutually exclusive or disjunctive as opposed to conjunctive.

- [30] In my view, it could never have been the intention of the legislature that consumers subject to the ombud with jurisdiction are denied access to various other dispute resolution mechanisms accorded to other consumers. Such a construction would not be in conformity with the purpose of the CPA which, as already mentioned, is to provide for an accessible, consistent, harmonised, effective and efficient system of redress for consumers. I am of the view that had the legislature intended that a particular category of consumers submit to the jurisdiction of a specific dispute resolution forum only it would have expressly said so.
- [31] The principle is that a litigant who has a single claim that is enforceable in two courts that have concurrent jurisdiction must necessarily make an election concerning which court to use⁹. Ordinarily where a dispute is referred to an ombud with jurisdiction or to an alternative dispute resolution forum it ought to be finalized in that forum. Forum-shopping by litigants is not desirable¹⁰.
- [32] The learned author C van Heerden on *Commentary on the Consumer Protection Act* (Original Service 2014) 'Section 69' in Naudé & Eiselen (eds) at 69-19 para 33 makes the following persuasive concluding remarks:
- "Thus it is clear that where ombuds exist, whether ombuds with jurisdiction or industry ombuds, they are to be preferred to approaching other dispute resolution agents. Alternatively to approaching the above alternative dispute resolution bodies a consumer may approach a consumer court of the province with jurisdiction, if there is such a consumer court. **Therefore if a consumer resides in a province where there is a consumer court, such consumer is not barred from approaching the consumer court even if an ombud with jurisdiction exists.** However, there is a distinct possibility that the consumer court may decline to hear the matter and refer the dispute to the ombud with jurisdiction instead, on the basis that such ombud has the appropriate expertise to deal with the matter. In principle civil courts should

⁹ See *Makhanya v University of Zulu Land* 2010 (1) SA 62(SCA) at 78 para 61.

¹⁰ *Gcaba v Minister For Safety and Security and Others* 2010(1) SA 238 (CC) at 257 para 57.

be approached as an option of last resort in order to deal with a dispute between a consumer and a supplier, except in instances where it is clear that such court either has exclusive jurisdiction to deal with the matter or to make a specific order such as a damages award or would otherwise be best suited to improve the realisation and enjoyment of consumer rights as contemplated by s 4(3)."

- [33] The interpretation which Cargo Motors accords to s 69 would, in my view, frustrate the intention of the legislature and runs counter to the legislative purpose set out in the CPA.
- [34] There can be no question that Mr Dipico has been through a protracted and problematic course in an attempt to have his dispute resolved with Cargo Motors. His legal battle should also be seen in light of s 34 of the Constitution of the Republic of South Africa, Act 108 of 1996, which provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a Court or where appropriate, another independent and impartial tribunal or forum.
- [35] The National Consumer Commission (NCC) plays a central role in the enforcement of the CPA.¹¹ One of its many statutory obligations is to liaise with any provincial consumer protection authority or other regulatory authority on matters of common interest and, *without limiting the generality of this power*, may monitor, require necessary information from, exchange information with, and receive information from, any such authority pertaining to matters of common interest; or a specific complaint or investigation¹². The NCC is responsible for monitoring, *inter alia*, the effectiveness of accredited consumer groups, service delivery to consumers by organs of state, and any regulatory authority exercising jurisdiction over consumer matters within a

¹¹ Regard being had to its functions as set out in ss 92 to 101 of the CPA.

¹² Section 97(1)(a)

particular industry or sector¹³. The ombuds fall squarely within the definition of a regulatory authority¹⁴.

[36] The issuance of the Notice of non-referral by NCC was inevitable in view of the inaction on the part of the MIO to dispose of Mr Dipico's complaint. The NCC has an oversight role over the efficiency of the MIO or any other regulatory authority exercising jurisdiction over consumer matters within a particular industry or sector. There is no merit in the argument that the NCC lacked jurisdiction to issue the Notice of non-referral.

[37] I now turn to consider whether the NCCC had jurisdiction to entertain Mr Dipico's complaint. Section 6 of the NCCPA provides in part:

- “(2) A person contemplated in section (4)(1) of the Consumer Protection Act who seeks to enforce any right in accordance with section 69(c)(iii) of that Act by applying directly to the Consumer Court, may do so only-
- (a) If a complaint has beforehand been filed with and investigated by the Authority; and
 - (b) The Authority has issued a notice of non-referral to the person.”

Section 11(1) of the NCCPA provides:

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

[38] Provincial Consumer Protection Authority (PCPA) is the “Authority” referred to in s 6 and 11 of the NCCPA¹⁵. Clearly the Notice of non-referral was not issued by PCPA as contemplated by ss 6 and 11 of the NCCPA but by the NCC. However, it is important to bear in mind

¹³ See s 99(c)(ii) of the CPA

¹⁴ The regulatory authority is defined in the CPA as an organ of state or entity established in terms of national or provincial legislation responsible for regulating an industry, or sector of an industry.

¹⁵ Section 1 of the NCCPA defines “Authority” as Provincial Consumer Protection Authority established by section 4 of the NCCPA.

that s 83 of the CPA provides for a system of co-operative exercise of concurrent jurisdiction between the NCC and the PCPAs. The NCC has jurisdiction throughout the Republic¹⁶.

[39] There has been in this case substantial compliance with ss 6 and 11 of the NCCPA by Mr Dipico. More pertinently, s 75 (1) of the CPA put an end to any uncertainty on the jurisdiction of the NCCC. It provides that if the NCC issues a Notice of non-referral in response to a complaint, other than on the grounds contemplated in section 116¹⁷, the complainant concerned may refer the matter directly to, *inter alia*, the consumer court, if any, **in the province within which the complainant resides, or in which the respondent has its principal place of business in the Republic, subject to the provincial legislation governing the operation of that consumer court.** There can be no question that on the basis of these statutory prescripts the NCCC has jurisdiction to entertain Mr Dipico's complaint.

[40] Belatedly, Cargo Motors took issue with the territorial jurisdiction of the NCCC. Mr Louw contended that Cargo Motors' business is situated outside the jurisdiction of the NCCC. In addition, the sale agreement in issue was concluded outside the Northern Cape Province. Counsel argued that the Chairperson's dismissal of the appeal was inconsistent with his remark to the effect that Mr Dipico's dispute had its origin outside the borders of the Northern Cape. He ought to have upheld the appeal, the argument went. Counsel contended that s 3 of the NCCPA limits the jurisdiction of the NCCC to activities within the Province.

¹⁶ See s 85(2)(a)

¹⁷ See footnote 3.

[41] Section 3 of the NCCPA provides that:

“Subject to the exemptions set out in section 5 of the Consumer Protection Act, this Act applies within the Province to all activities referred to in **that** section to which **that** Act applies”.

[42] A mere reading of s 3 does not support Mr Louw’s argument. The NCCPA applies to the Northern Cape. However, its application is not limited to activities within the province because it applies to all the activities referred to in s 5 of the CPA¹⁸. In any event this argument founders in the face of s 75(1)(a) of the CPA referred to in para 39 of this judgment.

CONCLUSION

[43] On the whole, insofar as the Chairperson expressed his doubt that the appeal had no reasonable prospects of success, he cannot be faulted. There is, in my view, a rational connection between the ultimate decision he arrived at and the material before him. The corollary of this is that the review application must fail. Costs are to follow the result.

[44] In the result:

THE ORDER:

1. The Review Application is dismissed with costs.

¹⁸ Section 5 lists a number of instances to which the CPA applies to. Of importance, for present purposes, is that s 5 (1)(a) provides that the CPA applies to every transaction occurring **within the Republic**, unless it is exempted by subsection (2), or in terms of subsections (3) and (4);

MV PHATSHOANE

JUDGE

I agree

MC MAMOSEBO

JUDGE

<u>On behalf of Appl:</u>	Adv. C. Louw (oio Mervyn Joel Smith (Symington & De Kok))
<u>On behalf of 1st Resp:</u>	Adv. J.G. Coetzee (oio Hugo Mathewson (Venn Attorneys, Jhb))