

SOUTH AFRICA / JUDGMENT

Afca Trading and Supply (Pty) Ltd v City Square Trading and Supply 604 (Pty) Ltd (227/2018) [2021] ZAFSHC 29 (18 February 2021)

[2021] ZAFSHC 29**COURT**

Free State High Court, Bloemfontein

BEFORE

Chesiwe

CASE / FILE NUMBER

227/2018

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**IN THE HIGH COURT OF SOUTH
AFRICA,
FREE STATE DIVISION,
BLOEMFONTEIN**

Reportable:

NO
Of
Interest to other Judges: NO
Circulate
to Magistrates: NO
Case
number: 227/2018
In

the matter between:

AFCA
TRADING & SUPPLY (PTY)
LTD
Plaintiff
And
CITY
SQUARE TRADING 604 (PTY) LTD
Defendant

JUDGMENT

BY: CHESIWE, J

HEARD ON: 24 NOVEMBER 2020

DELIVRED ON: 18 FEBRUARY 2021

- [1] The plaintiff instituted action against the defendant for a Toyota Landcruiser pick-up vehicle, purchased on 27 September 2017 which had latent defects. The purchase price was R194 890-00. The parties concluded a sale agreement with a warranty of six months pertaining to the defects. The defendant filed a notice to defend.
- [2] In terms of the sale agreement, even before entering into the agreement, the plaintiff through its representative Mr. Flemix (director of the plaintiff) inspected the vehicle and drove it for three (3) days in excess of 300 kilometres. The expressed terms of the agreement are that:
- (a) The vehicle will be safe for the use thereof on public roads.
 - (b) The vehicle will be fit for the purpose for which it was bought, being the use thereof on public roads and furthermore to be used as a towing vehicle.
 - (c) The vehicle will be free of any defects rendering it unsafe and prohibiting the purpose for which it was bought, being the use thereof on public roads and furthermore to be used as a towing vehicle.”
- [3] After the inspection of the vehicle, the plaintiff paid the purchase price and took delivery of the vehicle on 27 September 2017.
- [4] The plaintiff experienced latent defects on the vehicle and took it to Nel’s Panelbeaters, annexure B, page 13 which diagnosed the vehicle as follows:
- “Na ondersoek van bogenoemde voertuig, is die onderstel van die voertuig geroes en nie geskik vir enige sleep doeleindes nie.” A quotation for the repairs to the vehicle is attached as Annexure “C” amounting R178 616.30.*
- [5] The defendant filed a special plea in terms of the Consumer Protection Act, 68 of 2008 (hereafter referred to the CPA) that the plaintiff has not exhausted all remedies and that the court’s jurisdiction is limited in terms of section 69(d) of the Act.
- [6] The issue for determination is whether the court has jurisdiction of the matter and whether the plaintiff has failed to comply with section 4(1) of the CPA.
- [7] Adv. Reinders, Counsel on behalf of the defendant submitted that the court has no jurisdiction over the matter, as well as the non-compliance with section 69 of the CPA that the claim be struck and plaintiff to pay the costs.

[8] Adv. Louw, Counsel on behalf of the plaintiff in oral argument submitted that the plaintiff's claim is two-fold in terms of paragraph 5 and 6 of the particulars of claim. He disputed that the court has no jurisdiction on the action and submitted that the plaintiff relied on common law.

[9] It is common cause that the plaintiff is a consumer and the defendant is a supplier as provided for in the CPA.

[10] Section 69 of CPA provides as follows:

“A person contemplated in section 4(1) may seek to enforce any rights in terms of this Act or in terms of a transaction or agreement, or otherwise resolve any dispute with the 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.”

[11] Section 4(2) 3 and 4 of the CPA provides as follows:

“(2) In any matter brought before the Tribunal or a court in terms of this Act-

- (a) the court must develop the common law as necessary to improve the realisation and enjoyment of consumer rights generally, and in particular by persons contemplated in section 3 (1) (b); and
- (b) the Tribunal or court, as the case may be, must-
 - (i) promote the spirit and purposes of this Act; and
 - (ii) make appropriate orders to give practical effect to the consumer's right of access to redress, including, but not limited to-

- (aa) any order provided for in this Act; and
 - (bb) any innovative order that better advances, protects, promotes and assures the realisation by consumers of their rights in terms of this Act.
- (3) If any provision of this Act, read in its context, can reasonably be construed to have more than one meaning, the Tribunal or court must prefer the meaning that best promotes the spirit and purposes of this Act, and will best improve the realisation and enjoyment of consumer rights generally, and in particular by persons contemplated in section 3 (1) (b).
- (4) To the extent consistent with advancing the purposes and policies of this Act, the Tribunal or court must interpret any standard form, contract or other document prepared or published by or on behalf of a supplier, or required by this Act to be produced by a supplier, to the benefit of the consumer-
- (a) so that any ambiguity that allows for more than one reasonable interpretation of a part of such a document is resolved to the benefit of the consumer; and
 - (b) so that any restriction, limitation, exclusion or deprivation of a consumer's legal rights set out in such a document or notice is limited to the extent that a reasonable person would ordinarily contemplate or expect, having regard to-
 - (i) the content of the document;
 - (ii) the manner and form in which the document was prepared and presented; and
 - (iii) the circumstances of the transaction or agreement.

[12] The plaintiff in the affidavit in support for summary judgment did not allege any remedies that were attempted to resolve the matter other than claiming an amount of R194 890. The defendant in the opposing affidavit resisting summary judgment made mention that the plaintiff failed to comply with section 69 of the CPA. The defendant immediately raised a special plea which was filed accordingly. I pause to further mention that the plaintiff did not take the court into its confidence by not mentioning that the vehicle was taken for a period of three (3) days to test drive it and that the plaintiff made various changes to the vehicle. Indeed, it does appear from the papers that the plaintiff did not exhaust all the remedies in terms of section 69 of the CPA. The mention section is clear on when a person may approach court, that is, if all available remedies have been exhausted. The plaintiff provided no evidence of any remedies that were exhausted.

[13] In *Chirwa v Transnet Limited and Others*[1], the following was said:

“Where a matter is required by statute to be dealt with by a specialist tribunal, it is that tribunal that must deal with such a matter in the first instance” (my emphasis)

- [14] The tribunal as set up by the CPA is a statutory body that can deal with disputes between a consumer and a supplier. The legislature has considered it appropriate to give it jurisdiction to deal with such disputes. Section 69 is clear and unambiguous. It specifically stated that the consumer may approach the court if all remedies have been exhausted. In terms of section 82(b), the Motor Industry Ombudsman of South Africa (MIOSA) deals with dispute resolution between consumers and the motor industry. There is no evidence that the plaintiff approached MIOSA.
- [15] In Chirwa[2] supra the Constitutional Court held that where a specialised framework has been created for the resolution of disputes, parties must pursue their claim through such mechanisms.
- [16] Commentary on the Consumer Protection Act (Naude and Eiselen Juta[3]) states as follows:
- “Implied hierarchy. Section 69 does not set out a specific hierarchy or order according to which the bodies or entities mentioned in the section may be approached, save for expressly providing that a (civil) court with jurisdiction over the matter may be approached ‘if all other remedies available to that person in terms of national legislation have been exhausted’. It is, however, submitted that s 69, read in context with various other sections of the Act which impact on it, contains an implied hierarchy. The preferred route to redress in terms of this implied hierarchy is that alternative dispute resolution body should first be approached in an attempt to resolve a dispute before a complaint is filed with the Commission, which can either deal with the complaint or refer it to another body in accordance with the provisions of the CPA, or issue a non-referral.”*
- [17] It is clear from section 69 that a consumer has to exhaust all remedies before approaching a court. As stated in Chirwa that a specialized framework created for dispute resolutions must be pursued. The plaintiff gave no evidence whatsoever that remedies provided for in the CPA were exhausted. The plaintiff approached this court as a court of first instance. As correctly stated by the defendant, the plaintiff did not plea or allege non-compliance with section 69, whereas the defendant in the opposing affidavit raised the non-compliance with section 69. The plaintiff further averred in the Rule 37(4) questionnaire that it was not obliged to exhaust its remedies in terms of the Act. This conduct of the plaintiff is unacceptable.
- [18] In Joroy 4440 CC v Potgieter and Another NNO [4], the court said:
- “I am not of the view that s 69(d) can reasonably be construed to have more than one meaning at all. I am in agreement... that the wording of the said section is clear and unambiguous. It is specifically stated that the consumer may approach the court if all the aforementioned avenues of redress have been exhausted. The legislature was very specific in prescribing the redress that the customer has in terms of this section. I fail to see how any other interpretation can be given to the word ‘if’.”*

- [19] In my view, the plaintiff by claiming that it was not obliged to exhaust all remedies is incorrect. The legislature by prescribing these provisions was to ensure that matters are resolved speedily and are less costly if resolved at the Tribunal. This further ensures that the courts are not overburdened with matters that have a Tribunal to resolve any dispute between parties.
- [20] I am inclined to agree with the defendant that the plaintiff failed to comply with section 69 and that the court has no jurisdiction, where there is an existing Tribunal to resolve the dispute between parties.
- [21] The basic rule is that cost are in the discretion of the court. The defendant as the successful party is entitled to be awarded costs. The defendant raised the special plea immediately its plea on receipt of the summons and the plaintiff persisted to proceed with the litigation before a court. Thus, costs will follow the successful party.
- [22] I accordingly make the following order;
1. The Plaintiff's claim is struck for non-compliance with section 69 of the CPA.
 2. Plaintiff to pay the costs.

CHESIWE, J

On behalf of the Plaintiff: Adv. MC Louw

Instructed by:

Mcintyre Van der Post

BLOEMFONTEIN

On behalf of Defendant: Adv. SJ Reinders

Instructed by: Rossouws Attorneys

[1][2007] ZACC 23; 2008

(4) SA 367 (CC) at para [64]

[2] (Chirwa v Transnet Ltd & Others 2008 (4) 367 (CC); (2008) 29 ILJ 73[2007] ZACC 23; ; 2008 (3) BCLR 251 [2008] 2 BLLR 97 [2007] 2ACC 23.

[3] Naude and Eiselen – Juta – at 69

[4] 2016

(3) SA 465 (FB) at para 8

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Prepared on 12 October 2026 · Esheria