

SOUTH AFRICA / JUDGMENT

**Anjo Property and Investments CC v Mitsubishi East
Rand, A Division of Imperial Group Ltd In re Anjo
Property and Investments CC v Mitshibishi East Rand,
A
Division of Imperial Group Ltd
(NCT/127479/2019/148(1))
[2019] ZANCT 156 (22 May 2019)
[2019] ZANCT 156**

COURT

National Consumer Tribunal

BEFORE

J Simpson, D Terblanche, B Dumisa

CASE / FILE NUMBER

NCT/127479/2019/148(1)

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case number: NCT/127479/2019/148(1)

In the matter between:

ANJO PROPERTY AND INVESTMENTS CC

APPELLANT

And

MITSUBISHI EAST RAND,

A DIVISION OF IMPERIAL GROUP LTD

RESPONDENT

In re

ANJO PROPERTY AND INVESTMENTS CC

APPLICANT

MITSHIBISHI EAST RAND,

Coram

Adv J Simpson

Presiding Tribunal Member

Ms D Terblanche

Tribunal Member

Prof B Dumisa

Tribunal Member

Date of Hearing

15 May 2019

Date of Judgment

22 May 2019

THE PARTIES

1. The Appellant is Anjo Property and Investment CC, a close corporation located in Olympia, Windhoek in Namibia. The close corporation was represented at the hearing by Mr JB Ireland the member and chief executive (hereinafter referred to as "the Appellant".)
2. The Respondent is Mitsubishi East Rand, a division of Imperial Group Ltd, a company duly registered and incorporated in terms of the company laws of the Republic of South Africa, with its place of business at the corner of Rondebult road and K94 East Rand Road in Boksburg, Gauteng (hereinafter referred to as "the Respondent"). At the hearing the Respondent was represented by Mr P Jacobs, Internal Legal Counsel for Motus Group Ltd. The Respondent placed on record that Imperial Group Ltd changed its name to Motus Group Ltd in 2018. The Respondent confirmed that the name change does not have any effect on its status as the Respondent.

APPLICATION TYPE

3. This is an appeal against a decision of a single member (hereinafter referred to as "the Member") of the National Consumer Tribunal (hereinafter referred to as "the Tribunal") to a three-member panel of the Tribunal.
4. The Appellant is appealing the Member's refusal to grant condonation for the late filing of the application for leave to refer.
5. The Appellant lodged the appeal in terms of section 148(1) of the National Credit Act, Act 34 of 2005 (hereinafter referred to as "the NCA").
6. Section 148(1) provides 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."

BACKGROUND

TO THE MAIN APPLICATION

7. During December 2015 the Appellant had his Mitsubishi Pajero vehicle serviced by the Respondent. It was a 180 000km scheduled service. After driving 1347km the vehicle broke down. He had it towed to a Mitsubishi agent in Port Elizabeth (Maritime motors). Maritime motors informed the Appellant that one of the butterfly fuel flaps had broken off and was lodged in the engine block. While repairing the engine they found one of the seven bolts on the inlet manifold was missing. The manifold needs to be removed when the spark plugs are replaced. The missing bolt is adjacent to the fuel flap which broke. He paid R19 000.00 for the repair. He was told that some of the broken butterfly flap parts might still be in the engine but the cost of removing these parts would amount to a further R20 000.00. He decided not to have the engine totally stripped to find the broken parts. He drove the vehicle back to Johannesburg on 5 January 2016.
8. On 30 January 2016 the vehicle misfired. The vehicle was taken to the Respondent. The Respondent informed the Appellant that the cost of repairing the vehicle would be R46 000.00. A dispute then arose between the parties as to the liability for this cost.
9. The Appellant commissioned a mechanical expert (Tommy Rootman) to assess the cause of the damage to the engine. In a report dated 8 April 2016 the expert appears to have concluded that the Respondent was not responsible for the damage to the engine. The Appellant did not agree with the findings in the report and engaged the services of another expert. In a report by JPA Mechanical Appraisals CC dated 9 May 2016 the expert concluded that there was no basis to suspect poor workmanship by the Respondent.
10. The Appellant disagreed with the conclusions reached by both the experts. In his opinion the damage was caused by the missing bolt on the manifold. The missing bolt, adjacent to the fuel flap, caused air to be drawn into the flap and caused it to vibrate and then fail. He then asked for an opinion on a web based forum. A person professing to be a Mitsubishi mechanic confirmed the Appellant's view that the missing bolt on the manifold could have caused the butterfly flap to fail.
11. A mediation institution called SA Consumer complaints tried to mediate the dispute between the parties. An undated report by Mr Odendaal confirmed that the dispute could not be resolved.

12. At some stage the Appellant lodged a complaint with the Motor Industry Ombudsman of South Africa (MIOSA). In a report dated 21 February 2017 MIOSA found that the butterfly flap failure was due to normal wear and tear. It was unable to make a recommendation in the Appellant's favour. The Appellant lodged a complaint with the National Consumer Commission (NCC) on 30 June
2018. The NCC issued a Notice of Non-referral dated 27 August 2018. The letter attached to the Notice stated that the complaint was subject to a dispute of facts, which made the matter more suited to adjudication. It would therefore not be pursuing the complaint further.
13. The Appellant lodged the main application with the Tribunal on 26 November 2018. The Appellant lodged the application in terms of section 75(1)(b) of the CPA, applying for leave from the Tribunal to hear his complaint. The application was filed outside the 20 day period after the NCC Notice of Non-referral. The Appellant therefore applied for condonation for the late filing. The Respondent did not oppose the application for condonation. The condonation was considered by a single Member of the Tribunal and a judgment was issued on 11 February 2019. The single Member refused the application for condonation due to a lack of reasonable prospect of success. The Presiding Member found that the views of the experts contradicted the view of the Appellant as to the liability of the Respondent for the damage to the engine. Both the reports stated that the Respondent was not negligent.
14. The Appellant filed an appeal against the judgment of the single Member and asks that the ruling be set aside.
15. The status of the Appellant as a "Consumer" under the Consumer Protection Act 68 of 2008 ("the CPA") was dealt with in the condonation judgment but for the purposes of completeness it will be reiterated. Section 5(2)(b) of the CPA states that the CPA does not apply to any transaction where the consumer is a juristic person with an annual turnover exceeding R2 million per annum[1]. The Appellant attached a statement by its auditor confirming that its turnover was N\$1 178 588.00 for the financial year ending February
2016. At an approximate exchange rate of N\$1 to R1 this equates to an approximate turnover of R 1 178 588.00. Therefore the Appellant falls within the threshold determined by the CPA.
16. The Appellant further submitted a Resolution by the members of the CC confirming that Mr John Ireland was authorised to represent the CC in this action. This satisfies the requirement in Rule 4(3) of the Rules[2] requiring the Appellant to lodge a board resolution or other proof of authority.

GROUNDS OF APPEAL

17. The grounds of appeal are not set out in any clear order with subheadings. The Appellant is asking the Tribunal to make an order that the Respondent repair the vehicle, refund the cost of repairs done by Marine Motors, refund the cost of renting a vehicle and further compensation for stress and damages suffered due to not having had use of the vehicle for three years.
18. The Appellant essentially alleges that the expert reports contradict each other and contain incorrect information. He further alleges that the view of the web based Mitsubishi technician was not considered by the Member. The Appellant referred to Appendix 1 of his main application. Appendix 1 is a discussion type document by the Appellant that contains numerous references to the expert reports. It contains numerous submissions as to why the findings made in the reports are incorrect.
19. The Respondent filed an affidavit opposing the grounds of appeal. The Respondent essentially submits that no error was made in refusing the application for condonation. There is no evidence that the Mitsubishi technician referred to is in fact an expert. The technician did not inspect the vehicle. The views of the experts commissioned by the Appellant have not been contradicted in any way by another expert.
20. During the hearing the Appellant confirmed that he is not an expert in the field of motor engines. He submitted that he does however have a working knowledge of mechanics. He confirmed that his entire submission was based on proving that the Respondent failed to insert the missing manifold bolt and that the missing bolt caused the butterfly flap to fail. He did not have any expert evidence to support this conclusion. He however submitted that his view is supported by various other experts and he could bring them to testify if required.

CONSIDERATION OF THE EVIDENCE

21. The appeal panel has to consider whether the decision and reasons of the Member in refusing the application for condonation can be sustained.
22. It must be noted that the appeal panel will only evaluate the evidence in the broad context of determining whether there is any reasonable prospect of the Appellant succeeding in his claim against the Respondent. The appeal panel will not make any determination on the evidence for the purposes of determining liability. It is only if leave to refer is granted that the matter is then referred for a full hearing before a three member panel. It is only then that the complete evidence is considered and a finding is made, based on the CPA.
23. It must further be noted that the appeal panel is not restricted to the record of the proceedings that served before the Member. Rule 27 of the Rules provides that-
"(1) The appeal panel may refer any matter to a panel appointed by the Chairperson for reconsideration or for such action as the appeal panel may decide.
(2) The appeal panel is not restricted to the record of the proceedings before a single member ...
"

24. In this context the appeal panel may approach the matter holistically and is not restricted to only evaluating the specific findings made by the Member in the condonation judgment.
25. The basic facts relating to the damage to the engine are essentially not in dispute. It is not in dispute that the broken butterfly flap caused the damage to the engine. The Appellant confirmed that the only two disputes are whether the Respondent failed to insert the seventh manifold bolt and whether this missing bolt caused the butterfly valve to fail.
26. As it stands, the reports by the Appellant's experts confirm that the Respondent was not negligent and the missing bolt could not have caused the butterfly to fail. It is only the Appellant's personal view and that of an alleged Mitsubishi technician that offer a contrary possibility. However logical his arguments may be, the Appellant is not an expert mechanic. There is no evidence before the Tribunal that the alleged Mitsubishi technician is who he professes to be or is an expert. There is further no evidence that the Respondent failed to insert the missing bolt.
27. The appeal panel must therefore ask whether there is any reasonable prospect of the Appellant being able to prove that the Respondent failed to insert the bolt and that this missing bolt caused the butterfly flap to fail. Based on the evidence presented, there is no reasonable possibility of this being proven. While it may be possible that the Appellant could obtain further expert opinions and possibly cross examine the experts to devastating effect, this mere possibility is not sufficient. The Appellant is required to provide sufficient evidence to support his contention and must lay a clear foundation for a reasonable prospect of succeeding

in his claim. The Appellant has not provided this foundation.

28. In the matter of Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others (60912012) [2013] ZASCA 68; 2013 (4) SA 539 (SCA); [2013] 3 All SA 303 (SCA) (27 May 2013) the court considered the meaning of "reasonable prospect". Although the context related to judicial management, the principle is still applicable.

"This leads me to the next debate which revolved around the meaning of 'a reasonable prospect'. As a starting point, it is generally accepted that it is a lesser requirement than the 'reasonable probability' which was the yardstick for placing a company under judicial management in terms of s 427(1) of the 1973 Companies Act (see eg Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd 2012

- (2) SA 423 (WCC) para 21). On the other hand, I believe it requires more than a mere prima facie case or an arguable possibility.

Of even greater significance, I think, is that it must be a reasonable prospect - with the emphasis on 'reasonable'

- which means that it must be a prospect based on reasonable grounds. A mere speculative suggestion is not enough. Moreover, because it is the applicant who seeks to satisfy the court of the prospect, it must establish these reasonable grounds in accordance with the rules of motion proceedings which, generally speaking, require that it must do so in its founding papers."
- 29. The Tribunal will often be generous in finding reasonable prospects of success, as long as the facts of the application fall within the provisions of the CPA. However, the Tribunal cannot allow matters to be considered if there is little prospect of the application succeeding and merely to grant an applicant an opportunity to be heard. This would amount to an abuse of the process and would not be in the interests of justice.

CONCLUSION

- 30. The appeal panel finds that there is no reasonable prospect of the Appellant's main application succeeding. There is no basis for the Member's ruling in the condonation judgment to be set aside.

ORDER

- 31. The Tribunal accordingly makes the following order-

31.1 The Appeal is dismissed; and

31.2 No order is made as to costs.

Dated at Centurion this 22nd day of May 2019

[Signed]

Adv J Simpson

Presiding Tribunal Member

Case Number: NCT/127479/2019/148

Date, 24 May 2019

Ms D Terblanche (Tribunal member) and Prof B Dumisa (Tribunal member) concurring

[1] Government Gazette No. 34181 - Notice 294 of 2011

[2] Regulations for matters relating to the functions of the Tribunal and Rules for the conduct of matters before the National Consumer Tribunal, 2007 published under GN 789 in Government Gazette 302252 on 28 August 2007, as amended.

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