

SOUTH AFRICA / JUDGMENT

Baderon v Volkswagen Claremont (Pty) Ltd (NCT/94930/2017/75(1)) [2018] ZANCT 92 (7 August 2018)

[2018] ZANCT 92

COURT

National Consumer Tribunal

BEFORE

A Potwana

CASE / FILE NUMBER

NCT/94930/2017/75(1)

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IN

THE NATIONAL CONSUMER TRIBUNAL

HELD

IN CENTURION

Case

number: NCT/94930/2017/75(1)

In

the matter between:

MUNEEB
BADEROON
APPLICANT
and
VOLKSWAGEN
CLAREMONT (PTY) LTD
RESPONDENT

Coram:

Mr.
A Potwana -
Presiding
Member
Date
of Hearing -
30 July 2018

JUDGMENT**AND REASONS****APPLICANT**

1. The Applicant in this matter is Mr. Muneeb Baderoon, a major male (hereinafter referred to as "the Applicant or "Mr. Baderoon"). At the hearing the Applicant was assisted by his wife, Mrs. Mariam Baderoon.

RESPONDENT

2. The Respondent is Volkswagen Claremont (Pty) Ltd, a company that is duly registered in terms of the company laws of the Republic of South Africa (hereinafter referred to as "the Respondent"). At the hearing the Respondent was represented by Mr. Scott Hope, the Respondent's Customer Service Manager.

APPLICATION TYPE

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

5. In an application of this nature the National Consumer Tribunal (hereinafter referred to as "the Tribunal") considers

whether it should grant the Applicant leave to bring a complaint to the Tribunal after the National Consumer Commission (hereinafter

referred to as "the Commission") has issued a notice of non-referral in response to a complaint. If the leave is granted then the Tribunal will conduct a separate hearing and consider the merits of the complaint.

JURISDICTION

6. 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:

- (b) an application for leave as contemplated in subsection(1)(b)."
- 7. Accordingly, the Tribunal has jurisdiction to hear this application for leave to refer a complaint to the Tribunal as contemplated under section 75(1)(b).

PROCEDURAL ASPECTS

- 8. During November 2017, the Applicant filed the application with the Tribunal using Form TL 73(3) & 75(1)(b) & (2) CPA together with an affidavit, other supporting documents and proof of service. On 17 January 2018 the Registrar issued a Notice of Complete Filing and sent it by electronic mail to the parties on 19 January 2018.
- 9. In terms of Rule 13 of the Rules of the Tribunal[1], the Respondent had 15 business days to oppose the application by serving an answering affidavit on the Applicant and filing it with the Registrar. The Respondent did not file an answering affidavit within the prescribed period but later sought condonation for filing the same. Condonation was granted and the Respondent was ordered to file the answering affidavit within 15 days of the issuing of the order.
- 10. On 22 June 2018 the Registrar set the matter down for hearing on 30 July 2018 before a single member of the Tribunal in accordance with section 75(5)(b) of the CPA. This section empowers the Chairperson of the Tribunal to assign applications for leave to refer complaints to the Tribunal to be heard by a single member of the Tribunal.
- 11. On 30 July 2018 the hearing proceeded in Cape Town as the Applicant and the Respondent are based in Cape Town.

BACKGROUND

- 12. It appears from the affidavit filed by the Applicant in support of the application for leave to refer that in October 2012 the Respondent

sold him a new Jetta 1.4 tsi comfortline (hereinafter referred to as "the car"). The Applicant complains that he has not been able to enjoy the car. The car came with a full warranty but the warranty has not been honoured. The main issue is that the car became hesitant and vibrated on acceleration within two years of purchase. On numerous occasions the Respondent has tried to fix the car but always failed. After the latest work on the car, "it still doesn't accelerate smoothly, makes horrible 'knock' sounds during cold starts and the engine sounds rough".

- 13. It appears from other documents that the Applicant filed that the Applicant lodged a complaint with the Motor Industry Ombudsman of South Africa (hereinafter referred to as the "MIOSA"). In his complaint to the MIOSA the Applicant mentioned that the engine light came on whilst the car was in motion and it came to a standstill. The Respondent came to

tow the car for fixing and said it was a computer glitch but the problem persisted. After driving the car with a technician present the Respondent picked up the problem through diagnostics tests. The Respondent updated the computer software and changed fuel injectors but the problem persisted and seemed to be slowly worsening.

14. After being without the car for two months and after several parts of the car were changed the Respondent's service provider informed the Applicant that the car was still doing the same thing even after receiving help from VWSA as well as Germany. The Respondent also stated that it found two other cars with the same problem but other similar cars did not exhibit the same problem. After this, the Applicant received an e-mail from the Respondent stating that the Respondent did not think there was any problem with the car because they found two other cars with the same problem and saw no need to repair the Applicant's car.
15. The Applicant believes that he bought a sub-standard car with a serious defect for which both the dealer and the manufacturer will not accept liability even though the car came with a full warranty. The Applicant wants a replacement of the car or a refund of the full purchase price paid for the car.
16. In March 2017 the Applicant submitted a complaint to the MIOSA. In a letter dated 21 August 2017 the MIOSA stated that the Applicant

should take the car back to the Respondent and the latter must diagnose the faults of the car and repair it within 30 days.

17. Apparently, the Respondent did not comply with the MIOSA's decision and towards the end of September 2017 the Applicant lodged a complaint with the Commission. On 20 October 2017 the Commission issued a notice of non-referral and informed the Applicant that they would not be referring their complaint as his complaint "does not allege any fact which, if true, would constitute grounds for a remedy under the CPA".
18. As stated above, during November 2017 the Applicant filed the application for leave to refer his complaint to the Tribunal. After

failing to file an answering affidavit within the prescribed time the Respondent applied for condonation to file an answering affidavit and the application was granted. However, instead of filing an answering affidavit the Respondent filed a letter signed by Mr. Scott Hope, the Respondent's Customer Service Manager, who also represented the Respondent during the hearing.

19. The Respondent submitted that it always assisted the Applicant on every occasion of coming to the Respondent's dealership and would sometimes provide a courtesy car to the Applicant. It also carried all the costs of the repairs. It also offered to take the car to an independent person for an assessment but the Applicant refused.

20. The Respondent denies that it is liable to the Applicant for the replacement of the car or a refund and submitted that it offered the Applicant the option of trading in the car but the Applicant could not take up the offer due to the Applicant's budget

constraints.

APPLICATION FOR LEAVE

21. In the matter of *Coertze and Burger v Yaung*[2] the Tribunal considered the factors which must be evaluated regarding leave. The Tribunal held that the following two factors should be considered:

21.1 The Applicant's reasonable prospects of success with the referral; and

21.2 Whether the matter is of substantial importance to the Applicant or the Respondent.

22. It is very clear that the matter is of substantial importance to both parties. On the one hand, the Applicant paid for a car that he could not fully enjoy. On the other hand, the Respondent is accused of having sold a sub-standard car to the Applicant.

23. Regarding the prospects of success, it is important to note that the relief that the Applicant seeks, namely a replacement of the car or a refund of the full purchase price, is provided for under section 56 of the CPA which states that:

"Within six months after delivery of any goods to a consumer, the consumer may return the goods to the supplier, without penalty and at the supplier's risk and expense, if the goods fail to satisfy the requirements and standards contemplated in section 55, and the supplier must, at the direction of the consumer, either-

- (a) repair or replace the failed, unsafe or defective goods; or
- (b) refund to the consumer the price paid by the consumer, for the goods."

24. Therefore, the fact that the car started to malfunction approximately two years after the Applicant took delivery of the car weighs heavily against the Applicant's prospects of being granted an order for the replacement of the car or a refund of the full purchase price. It should also be noted that, by the Applicant's own admission, the car has already travelled approximately 98 000 kilometres.

CONCLUSION

25. The Applicant does not enjoy reasonable prospects of success.

ORDER

26. Accordingly, the Tribunal makes the following order -

26.1 The application for leave to refer is refused ; and

26.2 There is no order as to costs.

Thus done in Centurion on this 7th day of August 2018.

[signed]

Mr. A Potwana

Presiding Member

[1] GN 789 of 28 August 2007: Regulations for matters relating to the functions of the Tribunal and Rules for the conduct of matters

before the National Consumer Tribunal, 2007 (Government Gazette No. 30225). As amended.

[2] NCT/7142/2012175(1)b)&(2).

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