

SOUTH AFRICA / JUDGMENT

Berndt v JDVM Trading & Consultancy Services CC t-a MBA Auto (NCT/222929/2022/75(1)(b)) [2022] ZANCT 70 (9 December 2022) [2022] ZANCT 70

COURT

National Consumer Tribunal

BEFORE

S Mbhele, M Peenze, C Sassman

CASE / FILE NUMBER

NCT/222929/2022/75(1)(b)

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IN

THE NATIONAL CONSUMER TRIBUNAL

HELD

IN CENTURION

CASE

NUMBER: NCT/222929/2022/75(1)(b)

In

the matter between:

CLAUDIA
BERNDT
APPLICANT
and
JDVM TRADING &
CONSULTANCY SERVICES CC
RESPONDENT
t/a
MBA AUTO

Coram: Mr.
S Mbhele
- Presiding Tribunal member
Dr.
M Peenze
- Tribunal member
Adv
C Sassman
- Tribunal member
Date
of hearing - 21 November
2022
Date
of judgment - 9 December 2022

JUDGMENT

AND REASONS

THE PARTIES

1. The Applicant is Claudia Berndt, an adult female currently residing in Pretoria, Gauteng.
2. At the hearing, the Applicant was represented by Mr. Janusz Luterek, an attorney with Hahn & Hahn Attorneys.
3. The Respondent is JDVM TRADING AND CONSULTANCY CC/ t/a MBA AUTO, a close corporation duly registered in terms of the close corporation laws of the Republic of South Africa, conducting business at its physical address at 74 Duke Close, Silver Stream Estate, Silver View Ridge, Pretoria, Gauteng. MBA Auto's company registration number is 2009/063373/23.
4. At the hearing, the Respondent was represented by Mr. Louis Rautenbach, an attorney with Rautenbach Attorneys.

THE APPLICATION TYPE AND RELIEF SOUGHT

5. The Applicant is seeking relief in terms of section 56 of the Consumer Protection Act, 2008 ("the CPA") by way of a refund of the money already paid to the Respondent and the costs incurred for the unnecessary warranty and repairs to the vehicle before its disposal.
6. Section 75 of the CPA deals with referrals to the Tribunal. It provides as follows:

- (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, on 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, or
 - (b) the Tribunal, with the leave of the Tribunal.
- (2) If a matter is referred directly to the consumer court in terms of subsection (1), the respondent may apply to the Tribunal, in the prescribed manner and form and within the prescribed time, for an order that the matter be referred to the Tribunal, and the provisions of section 73(4) apply to such an application.
- (3) A referral to the Tribunal, whether by the Commission or by a complainant in terms of subsection (1), must be in a prescribed form.
- (4) The Tribunal-
 - (a) must conduct a hearing into any matter referred to it under this Chapter, in accordance with the requirements of this Act, and the applicable provisions of the National Credit Act pertaining to the proceedings of the Tribunal, and
 - (b) may make any application contemplated in this Act in section 150 or 151 of the National Credit Act, read with the changes by thecontext.

BACKGROUND

7. The National Consumer Commission (“the NCC”) issued a letter of non-referral, dated 2 March 2021, to the Applicant on the basis that it assessed her complaint and determined that the redress cannot be provided for in terms of the CPA. On 29 March 2022, the Applicant’s attorneys, Hahn & Hahn, filed the application for leave to refer the complaint directly to the Tribunal with the Tribunal’s Registrar (“the Registrar”) by email using the prescribed form for filing documents with the Tribunal: TL. r30A. The application documents were served on the Respondent and the NCC by registered mail. The relief sought by the Applicant is a “refund of money already paid in terms of section 56 of the CPA”.
8. The Applicant stated that a confidant, Mr. De Villiers, has been her neighbour for over a decade and is a director of the Respondent. She discussed purchasing a new Haval motor vehicle with him as a sign of neighbourly support. He discouraged her from doing so on the basis that the Haval brand was not a wellknown brand and that she would be better off buying a well-known, established brand. She purchased a white 2016 Nissan Qashqai (“the vehicle”) from the Respondent for R260 000.00. She did not test drive the vehicle before purchasing it because she trusted that Mr. De Villiers would sell her a vehicle that was in

good condition. She saw the vehicle for the first time when she signed a Delivery and Acceptance form for the vehicle on about 18 January 2020. She noticed a rapid clicking sound “akin to that of a sowing machine coming from the engine of the vehicle” and felt that the vehicle had little power. She drove the vehicle for the first time on 9 February 2020. On 18 February 2022, she called Mr. De Villiers, who advised her that there was nothing wrong with the vehicle and that she felt it did not have sufficient power because she was used to driving vehicles such as a Porsche Boxter and Ford Territory, which have larger engine capacities. He said the vehicle had full-service history, but he did not provide her with documents relating to the full vehicle inspection.

9. The Applicant submitted that the vehicle was not driven a lot between the end of March and the end of August 2020. On 8 September 2022, the Applicant drove the vehicle for a longer distance for the first time since February 2020. The Applicant submitted that while driving on the N4 Highway, the vehicle lost power completely, and the engine stopped running. She tried to restart it in vain. She called Mr. De Villiers, who informed her that the Respondent was not able to help as it did not have a flatbed truck. After some time, she restarted the vehicle and subsequently took it to Talladega Auto Clinic BCS (“Bosch”) for a diagnostic test.
10. On 23 September 2020, the vehicle was inspected in the presence of the Applicant and the Respondent’s representative. After a short inspection, the Bosch mechanic remarked that it was clear that the engine had been worked on as some screws and bolts were evidently not original. The original harness had been covered with insulation tape, which was not original. On 15 October 2020, the Applicant collected the vehicle from Bosch, and she was invoiced for a substantial amount of money. The vehicle continued to present a litany of mechanical defects, and the Applicant did not return the vehicle to the Respondent for repair, replacement, and a refund of the purchase price of the vehicle within a six-month period after purchasing it.
11. The Applicant submitted that on 5 February 2021, she instructed her attorneys to send a letter of demand dealing with all her complaints to the Respondent. On 21 May 2021, the Applicant submitted her complaint to the NCC. On 7 March 2022, the NCC reverted to her, advising that it had determined her complaint and found that the redress could not be provided in terms of the CPA due to insufficient evidence.
12. Ultimately, the Applicant opted to sell the vehicle for R50 000.00 to Motormark. The Applicant is now claiming damages suffered, including the purchase price of the vehicle, without returning the vehicle to the Respondent.

POINT IN LIMINE

THE RESPONDENT’S

SUBMISSIONS

13. The Respondent raised a point in limine that the Applicant did not comply with section 56(2)(a)(b) of the CPA. The Respondent argued that the Applicant took the vehicle to Bosch and authorized them to replace the turbocharger. The Applicant also took the vehicle to various other specialists, RDG Pretoria, and Motomark, who conducted massive work on the vehicle.
14. At all times, the Respondent was never given an option by the Applicant to comply with the CPA by either repairing or replacing the defective vehicle or to refund the Applicant the price paid for the vehicle as provided for in the Act. The Applicant's failure to return the vehicle to the Respondent within a reasonable time is, according to the Respondent, in contravention of section 56(2) of the CPA.
15. The Respondent submitted that the Tribunal has no jurisdiction to hear this application. A complaint should have been lodged within a six-month period from the date of purchase of the vehicle. The Respondent contended that the claim for damages sought by the Applicant is more than one year after taking delivery of the vehicle. The six-month period to institute legal action ended on 18 August 2020.
16. The Respondent argued that the CPA provides for the repair and replacement of defective goods by the supplier. Alternatively, the return of the goods and a refund to the consumer for the purchase price. The Respondent submitted that

at no stage in the exchange of WhatsApp messages did the Applicant opt to exercise her right in terms of section 56(2) of the CPA.

17. The Respondent submitted that nowhere in the papers did the Applicant request the Respondent to either repair or replace the vehicle except for approaching a third party. Moreover, mechanical issues with the

vehicle surfaced after the expiry of the six-month period.

THE APPLICANT'S

SUBMISSIONS

18. The Applicant submitted that she informed the Respondent about the clicking noise in the motor vehicle, but the Respondent did nothing about it. The Applicant submitted that COVID-19 restrictions made it

difficult to return the vehicle to the Respondent.

19. The Applicant submitted that the Respondent did not inform her of mechanical problems with the vehicle. The Applicant argued that the mechanical problems with the vehicle were reported to the Respondent on 18 February 2020 and 8 September 2020, respectively.

20. The Applicant submitted that she lodged her complaint with the Respondent on 18 February 2020. The Applicant argued that even 8 September 2020 would still be within the six-month period had it not been for Covid restrictions. The Applicant further conceded that she never tendered to return the vehicle to the Respondent.

CONSIDERATION OF THE POINT IN LIMINE

21. The questions to be considered are whether:
- 20.1. The Applicant complied with the provisions of section 56(2) of the CPA.
- 20.2. The Respondent has contravened the provisions of the CPA.
- 20.3. The Applicant is entitled to the relief sought under the CPA.

ANALYSIS OF APPLICABLE LAW

21. The Applicant alleged in her documents annexed to the founding affidavit that the Respondent contravened the following sections of the CPA:
- 21.1. Section 56(1), which provides as follows:
- “In any transaction or agreement pertaining to the supply of goods to a consumer, there is an implied provision that the producer or importer, the distributor, and the retailer each warrant that the goods comply with the requirements and standards contemplated in section 55, except to the extent that those goods have been altered contrary to the instructions, or after leaving the control, of the producer or importer, a distributor or the retailer, as the case may be.”*
- 21.2. Section 55(2) gives a consumer the right to receive goods that are reasonably suitable for their intended purpose and are of good quality, in good working order, free of defects, and ‘plainly’ useable and durable for a reasonable time.
22. The Applicant’s attorney submitted that the Applicant purchased the vehicle from the Respondent, and within a month from the date of purchase, she encountered numerous defects in the vehicle. According to the Applicant, she reported the clicking noise to the Respondent.
23. Section 56(2) provides:
- “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 the 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. Section 56(3) provides:

“If a supplier repairs any particular goods or any component of any such [defective] goods; and within three months after that repair, the failure, defect or unsafe feature has not been remedied, or a further failure,

defect or unsafe feature is discovered, the supplier must –

(a) replace the goods, or

25. Based on the evidence before the Tribunal, the above sections will apply.

ANALYSIS OF THE EVIDENCE

26. Based on the information before the Tribunal, the following evidence does not appear to be in dispute:

26.1. The Respondent denied being contacted to attend to mechanical problems with the vehicle.

26.2. The Applicant took the vehicle to various third parties for repair.

26.3. The Applicant sold the vehicle to one of the service providers.

26.4. the Applicant did not return the vehicle to the Respondent for repairs.

26.5. The implied warranty in terms of section 56(2) had prescribed on 18 August 2020.

26.6. The Applicant failed to provide authority confirming that Covid restrictions interrupted prescription.

27. It appears the aspect in dispute is whether, within six months from the delivery of the vehicle, the Applicant directed, requested, or instructed the Respondent to replace the vehicle or to refund the purchase price.

28. The Respondent did not dispute the nature of the mechanical problems diagnosed by Bosch but denied ever being approached by the Applicant to attend to such problems.

29. At the core of this dispute is the Respondent's contention that the Applicant failed to exercise her rights in terms of demanding a repair, refund, and or replacement of the vehicle within the prescribed period of six months. As a result, the Applicant did not fulfil the requirements of section 56(2).

30. The evidence before the Tribunal supports this contention, as the Applicant could not furnish any proof that she insisted on either the repair, refund, or replacement of the vehicle when she was dissatisfied and frustrated with the recurrence of a litany of mechanical problems. The only aspect mentioned by the Applicant is that she held several discussions with the Respondent about the challenges she encountered with the vehicle.

31. The Applicant admitted that she had sold the vehicle for R50 000.00 to one of the service providers instead of returning it to the Respondent.

32. The Applicant opted for third parties to fix the components of the vehicle that caused problems, and the cost was borne by herself.

LEGAL AUTHORITY

33. In *Vousvoukis v Queen Ace CC t/a Ace Motors*,^[1] Pickering J held as follows:

“The Legislature, for whatever reason, has expressly decreed a limitation period of six months for the return of any goods in section 56(2). There is no question of section 56(2) being ambiguous in any way. In my view, it is not open to the court, under the guise of making an “innovative order,” to extend this period. Any innovative order made under section 56(2) must be made within the constraints of the legislation and cannot afford consumers more rights than those specifically provided to them in terms of the Act”.^[2]

34. The Tribunal accepts Pickering J’s approach and interpretation of section 56(2).

The six-month period cannot be extended.

35. Furthermore, Naude (et al.) state,^[3]

In summary, the position is that the remedies provided for section 56(2) will only be available for the first six months after delivery of the goods. After the expiry of this period, the consumer will be able to rely on the residual common-law remedies and, should harm have arisen from the ‘defect’ in the goods, a claim for damages under either the common law or s 61 of the Act...⁴

36. As stated above, the Applicant failed to produce evidence demonstrating that she insisted on the repair, refund, or replacement of the vehicle before the expiry of the six-month period, which should have been on or before 16 July 2020.
37. Based on the above evidence, the Tribunal finds that the Applicant could not prove that she exercised her right to claim a replacement, repair, or refund within a six-month period after purchasing the vehicle. She continually allowed third parties to repair the defects to the vehicle instead of insisting on the return of the vehicle to

the Respondent for repair or refund.

CONCLUSION

38. The Applicant failed to prove that she exercised her right that the Respondent repair, refund, or replace the vehicle after purchasing it. She only demanded a refund or a replacement of the vehicle after the six-month period had expired. Consequently, the Respondent’s obligations under section 56(2) do not arise and it is unnecessary to proceed to determine the merits of the matter.

ORDER

39. Accordingly, the Tribunal makes the following order:

39.1. The Respondent’s point in limine is upheld.

39.2. The relief sought in terms of section 56 of the CPA of a refund of the money already paid to the Respondent is refused.

39.3. There is no costs order.

DATED ON 9 DECEMBER 2022.

SI Mbhele

Presiding Member

Dr M Peenze (Tribunal member) and Adv C Sassman (Tribunal member) concur.

[1] 2016 (3) SA 188 (ECG).

[2] Para 110.

[3] Van Heerden, C., Eiselen, S. and Naudé, T., 2014. Commentary on the Consumer Protection Act>. Juta, Claremont. 4 Ibid, page 56.

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