

SOUTH AFRICA / JUDGMENT

Bester v Lin-Shaw Properties (Pty) Ltd (NCT/233130/2022/75(1)(b))

[2022] ZANCT 63 (26 November 2022)

[2022] ZANCT 63

COURT

National Consumer Tribunal

BEFORE

MC Peenze, K Moodaliyar, P Manzi-Ntshingila

CASE / FILE NUMBER

NCT/233130/2022/75(1)(b)

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IN

THE NATIONAL CONSUMER TRIBUNAL

HELD

IN CENTURION

Case

Number: NCT/233130/2022/75(1)(b)

In

the matter between:

MICHAEL
JOHANNES BESTER
APPLICANT
and
LIN-SHAW
PROPERTIES (PTY) LTD
(trading
as Sonpark Motors)
RESPONDENT

Coram:

Dr.

MC Peenze:

Presiding Tribunal
member
Prof.

K Moodaliyar:

Tribunal member
Ms.
P Manzi-Ntshingila: Tribunal member
Date

of hearing: 24 November 2022
Date

of judgment: 26 November 2022

JUDGMENT

AND REASONS

INTRODUCTION

1. The Applicant is Michael Johannes Bester (the Applicant), an adult male and a consumer as defined in the Consumer Protection Act 68 of 2008 (the CPA), who resides in Gauteng.
2. The Respondent is Lin-Shaw Properties (Pty) Ltd, trading as Sonpark Motors (the Respondent). The Respondent is a private company registered in terms of the company laws of the Republic of South Africa, with company registration number 2014/09180/07. The Respondent's registered address is 3A Silva Street, Nelspruit, Mpumalanga. The Respondent is a dealer and supplier of motor vehicles to members of the public.
3. At the hearing of this matter, the Applicant represented himself. The Respondent did not oppose the application but attended the hearing without placing itself on record.
4. The Tribunal conducted the hearing via a Teams technology link.

JURISDICTION

5. Section 27(1)(a)(iii) of the National Credit Act, 2005 (the NCA) empowers the Tribunal or a Tribunal member acting alone to adjudicate allegations of prohibited conduct by determining whether prohibited conduct has occurred and, if so, by imposing a remedy provided for in the NCA. Section 150 of the NCA empowers the Tribunal to make an appropriate order concerning prohibited or required conduct under the NCA or the CPA. The Tribunal, therefore, has jurisdiction to hear this application.

TERMINOLOGY

6. A reference to a section in this judgment refers to a section in the CPA. A reference to a regulation refers to the CPA Regulations, 2011 (the Regulations).[1] Moreover, a reference to a rule refers to the Tribunal Rules.[2]

APPLICATION TYPE AND RELIEF SOUGHT

7. The Applicant makes this application in terms of section 75(1)(b). That section provides that if the National Consumer Commission (the NCC) issues a notice of non-referral in response to a complaint, the complainant may refer the matter directly to the Tribunal, with leave of the Tribunal. On 5 September 2022, the Tribunal granted the Applicant leave to refer his complaint directly to the Tribunal.

8. The Applicant alleges the Respondent contravened section 55(2) and that the Respondent is obliged to provide redress as set out in terms of 56(3)(b).
9. The Applicant sought an order for the following relief:
 - 9.1. To declare the purchase agreement null and void;
 - 9.2. To refund the vehicle's purchase price plus interest;
 - 9.3. To refund the rear tires in the amount of R1 7000.00;
 - 9.4. To refund the unnecessary traveling costs of R1 300.00;
 - 9.5. To refund administration costs and general damages of R65 000.00;
 - 9.6. Indemnity from any further inconvenience and emotional strain;
 - 9.7. Indemnity from future claims resulting from having been registered as the owner of the vehicle in question;
 - 9.8. Removal of his name from the owner list of this vehicle; and
 - 9.9. Payment of the minimum amount of R170 000.00.
10. The panel explained the Tribunal's jurisdictional limitation to grant general damages or consider fraud and other criminal charges at the hearing.

BRIEF

BACKGROUND

11. On 12 October 2021, the Applicant visited the Respondent's premises to purchase a pre-owned 2006 model Volkswagen Touran (the vehicle) from the Respondent. The Applicant identified a severe oil leak and other defects. The Respondent undertook to repair such defects by 14 October 2021. In good faith, the Applicant made payment of the vehicle's purchase price, R95 000.00, on 13 October 2021. He also paid an amount of R1 700.00 for two rear tires to be replaced. The Applicant made payment of the vehicle's purchase price with the understanding that the severe oil leak, as identified prior to purchase, would be repaired immediately.
12. The Applicant subsequently visited the Respondent's premises on 13 October 2021 and noticed that repairs to the vehicle had yet to progress. Due to transport challenges, the Applicant was allowed to use the vehicle to return home on 13 October 2021, with the mutual understanding that he would return the vehicle the next day. The Applicant returned the vehicle on 14 October 2021 as agreed and mentioned various additional defects to the Respondent.

13. The Respondent outlined that the oil leak would only be finalized by 20 October 2021. The Respondent also expressed the unwillingness to repair the additional defects as outlined by the Applicant.
14. The Applicant forthwith expressed his dissatisfaction with the vehicle's condition and his decision to return the vehicle. The Applicant requested a refund, but the Respondent refused. Subsequently, on 15 October 2021, the Applicant confirmed his request in writing for a refund based on the vehicle's poor condition.
15. On 15 October 2021, the Applicant lodged a complaint with the Motor Industry Ombudsman of South Africa (MIOSA). MIOSA issued a ruling on 29 March 2022, advising that the Applicant must collect the vehicle from the Respondent. On 1 April 2022, the Applicant went to fetch the vehicle but realized that the Respondent still needed to repair the oil leak and other defects. On 8 April 2022, the Applicant lodged a complaint with the NCC, and the latter issued a notice of non-referral on 8 June 2022.
16. On 24 June 2022, the Applicant filed his application with the Tribunal. The application was served on the Respondent via registered mail.

HEARING OF THE MATTER ON A DEFAULT BASIS

17. On 1 July 2022, the Registrar of the Tribunal (the Registrar) issued a notice of filing to the parties. In terms of Rule 13, the Respondent had 15 business days to serve an answering affidavit and file it with the Registrar. The Respondent failed to do so.
18. On 5 September 2022, the Registrar issued a leave to refer judgment to the parties granting the Applicant leave to refer the matter to the Tribunal. The Applicant did not file an application for a default order in terms of Rule 25(2).
19. On 11 October 2022, the Registrar issued a notice of set down to all the parties, setting the matter down for hearing on a default basis due to the pleadings being closed.
20. At the hearing, the Presiding Tribunal member was satisfied that the notice of set down was adequately served on the Respondent. The Respondent joined the Teams link but did not place itself on record. The matter proceeded on a default basis.
21. Rule 13(5) provides that:
"Any fact or allegation in the application or referral not specifically denied or admitted in the answering affidavit will be deemed to have been admitted."
22. Therefore, in the absence of an answering affidavit filed by the Respondent, the Applicant's application and all the allegations contained therein are deemed to be admitted.

ISSUES

TO BE DECIDED

23. The Tribunal is required to consider and decide the following issues:

23.1. Whether the Applicant has proved a contravention under the Act; and

23.2. Whether the Applicant is entitled in law to the relief sought.

THE LAW APPLICABLE TO THE APPLICATION

24. The Applicant's complaint relates to the right to safe, good quality products and the implied warranty on products, as outlined in section 56 read with section 55. Below, we consider the sections that apply to this case.

25. Section 53 (1)(a) defines a "defect" as –

(i) "any material imperfection in the manufacture of the goods or components, or performance of the services, that renders the goods or results of the services less acceptable than persons generally would be reasonably entitled to expect in the circumstances; or

(ii) any characteristic of the goods or components renders the goods or components less useful, practicable or safe than persons generally would be reasonably entitled to expect in the circumstances."

26. Section 55 (2) states that –

"Except to the extent contemplated in subsection (6), every consumer has a right to receive goods that –

(a) are reasonably suitable for the purposes for which they are generally intended;

(b) are of good quality, in good working order and free of any defects;

(c) will be useable and durable for a reasonable period of time, having regard to the use

to which they would normally be put and to all the surrounding circumstances of their supply; and

(d) comply with any applicable standards set under the Standards Act, 1993 (Act 5 No. 29 of 1993), or any other public regulation."

27. Section 56 of the CPA states that –

"(1) 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.

(2) Within six months after the 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.
- (3) If a supplier repairs any particular goods or any component of any such 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
- (b) refund to the consumer the price paid by the consumer for the goods.
- (4) The implied warranty imposed by subsection (1), and the right to return goods set out in subsection (2), are each in addition to –
 - (a) any other implied warranty or condition imposed by the common law, this Act or any other public regulation; and
 - (b) any express warranty or condition stipulated by the producer or importer, distributor or retailer, as the case may be.”

ANALYSIS

OF THE EVIDENCE

28. Given the fact that these are motion proceedings, the Tribunal took guidance from the Plascon Evans rule[3], in considering the evidence presented. The Plascon Evans rule, as articulated by the honourable judge in Dwele v Phalatse and Others[4] states that –

“In motion proceedings a final order may be granted if those facts averred in the Applicant's affidavits, which have been admitted by the Respondent, together with the facts alleged by the Respondent, justify such an order. In certain instances the denial by a respondent of a fact alleged by the Applicant may not be such as to raise a real, genuine or bona fide dispute of fact. It is bona fide disputes in motion proceedings which fall to be determined on the facts contained in the opposing papers which must be preferred in accordance with the rule in Plascon-Evans Paints Ltd v. Van Riebeeck Paints (Pty) Ltd”.

29. In this matter, the Applicant’s founding affidavit and his verbal testimony under oath were accepted as reliable and true, more particularly as follows:

29.1. The date and nature of the sale: The Applicant bought the vehicle on 13 October 2021 from the Respondent.

29.2. The Applicant identified various defects in the vehicle within the first day of purchase. Mr. Bosch,⁵ who inspected the vehicle after MIOSA advised the Applicant to collect the vehicle, outlined the defects in a report dated 1 April 2022.

29.3. The following defects were detailed in the report and confirmed by the Applicant:

- 29.3.1. Serious oil leak;
 - 29.3.2. Flywheel not firmly in place;
 - 29.3.3. Sludge in the bottom of the coolant reservoir;
 - 29.3.4. Cam positioning sensor-timing dysfunctional;
 - 29.3.5. Poor cambelt condition;
 - 29.3.6. Camshaft positioning sensor faulty;
 - 29.3.7. Rear right door small speaker not working;
 - 29.3.8. Right rear numberplate light defective;
 - 29.3.9. Right front mirror flicker light glass cracked;
 - 29.3.10. Sun-visor removed;
 - 29.3.11. Factory fitted glove compartment removed;
 - 29.3.12. Air cleaner defective; and
 - 29.3.13. Defect on the brake and clutch system.
- 29.4. The Applicant noticed defects in the vehicle within the first day of purchase and brought that to the Respondent's attention.
- 29.5. The Applicant paid for two rear tyres, and the Respondent agreed to repair the severe oil leak.
- 29.6. The Respondent failed to repair the oil leak and refused to repair any other defects.
- 29.7. The Applicant requested a refund within the statutory warranty period of 6 months.
- 29.8. The Respondent refused to refund the Applicant and remained in possession of the vehicle.

ANALYSIS

- 30. From the evidence before the Tribunal, the Respondent showed no sympathy or understanding for the Applicant when the Applicant brought the vehicle's defects to its attention. The Respondent failed to assist the Applicant in all respects and eventually sold the vehicle to a third party without the Applicant's consent. The Applicant outlined that his signature was imitated by the Respondent in various instances, which imitation the Applicant alleged to constitute fraud.
- 31. Before the sale, the Respondent advised the Applicant that the vehicle was in very good condition and that he would repair the oil leak immediately. However, the Respondent failed to repair the oil leak, and the vehicle showed signs of being in poor working order. The Applicant brought the poor and unsafe condition of the vehicle to the attention of the Respondent, but the Respondent refused to accept liability for repairing the vehicle.

Irrespective, the Respondent refused to refund the Applicant, and the vehicle remained in the Respondent's possession.

32. The Tribunal found the Applicant was a reliable and convincing witness. The Applicant had put up a convincing case that the vehicle's oil leak was of grave concern to him and that the repair thereof was conditional to the agreement. As the Respondent failed to repair the vehicle, the Applicant requested a refund, which request was within six months after purchase.
33. Even though a vehicle is pre-owned, the consumer has the right to a useable and durable vehicle for a reasonable period. In this case, it is evident that the vehicle was unsafe and in poor condition from the day of purchase and not fit for purpose.
34. Section 56(2) says the consumer may return the goods and then direct the supplier to refund, repair or replace the unsafe or defective goods or refund the consumer the purchase price. The evidence before the Tribunal shows that the Applicant returned the vehicle but never received a refund, as requested. Accordingly, the Applicant was unable to utilize the vehicle, and the impact of not receiving a refund impacted hugely on him.
35. It is further essential to point out, as emphasized by Barnard (2020)[5], that section 55(6) is not an endorsement of the voetstoets (selling goods "as is") clauses that were prevalent to these types of agreements prior to the promulgation of the CPA and that any attempt to exclude liability when transacting, goes against the letter and spirit of the CPA.
36. Thus, as stated above, the Applicant would have been entitled to return the vehicle without penalty and at the Respondent's risk and expense if the vehicle was defective and satisfied the requirements of section 56. The Tribunal will forthwith determine if the evidence before it satisfies the requirements of section 56.
37. The Tribunal conducts its analysis against the backdrop that Parliament introduced the CPA into the South African consumer landscape to promote consumers' social and economic welfare. The CPA has established a legal framework to achieve and maintain, amongst other things, a fair and efficient consumer market responsible for the benefit of consumers. In realizing consumer rights, the Tribunal or a court must develop the common law and promote the spirit and purpose of the CPA. It must also make appropriate orders to give effect to a consumer's right of access to redress.⁷
38. The essential basis for the Applicant's claim is that the Respondent sold him a vehicle that failed to perform as it should have, and the Respondent did not meet the requirements of section 56(2). As a result, the Applicant could not enjoy his rights under section 55(2). Even though the vehicle was not new, it should have at least been able to function properly and drive in an intended manner.

39. The Applicant further stated that the Respondent was aware of these failures but did not act to repair these effectively to remedy the failures. The Respondent reassured the Applicant that he would execute the repairs but didn't do so. Consequently, the Applicant relied on section 56(3)(b) for a refund from the supplier.
40. The Tribunal confirms its jurisdiction to order a refund of the purchase price and the costs of the rear tyres. However, the Tribunal does not have the jurisdiction to order general damages or rule on the allegations of fraud, as requested.
41. The Applicant requested that the Tribunal makes an order interdicting the Respondent from engaging in prohibited conduct in the future. Given the Act's provisions, the interdict will serve no purpose because the Respondent may not engage in prohibited conduct. Further, the Tribunal is not mandated to issue orders indemnifying the Applicant from future loss.

FINDING

42. The Tribunal finds that the Respondent had contravened sections 55(2) and 56(2) when it supplied the defective vehicle to the Applicant.
43. These contraventions constitute prohibited conduct. On this basis, the Tribunal finds that the Respondent engaged in prohibited conduct. A finding of prohibited conduct by the Tribunal means that the Applicant may apply for a certificate from the Chairperson of the Tribunal, which he can submit to a civil court to claim his damages.

ORDER

44. Accordingly, the Tribunal makes the following order:
 - 44.1. The Respondent contravened section 55(2) and 56(2) of the CPA;
 - 44.2. The contraventions are declared prohibited conduct in terms of section 150(a) of the NCA;
 - 44.3. The Respondent is ordered to pay R96 700.00 (ninety-six thousand and seven hundred rands), being the purchase price of the vehicle and the cost for two rear tyres, to the Applicant within 15 business days
after issuing of this judgment;
 - 44.4. The Applicant may request a certificate from the Chairperson of the Tribunal to claim his damages in a court of law; and
 - 44.5. There is no cost order.

Dated at Centurion on 26 November 2022.

DR. MC PEENZE PRESIDING MEMBER

Prof. K Moodaliyar and Ms. P Manzi-Ntshingila concur.

[1] Published under Government Notice R293 in Government Gazette 34180 of 1 April 2011.

- [2] 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.

- [3] Plascon-Evans Paints Ltd. v Van Riebeck Paints (Pty) Ltd [1984]. ZASCA 51 [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634E to 635C.
- [4] Dwele v Phalatse and Others (11112/15) [2017] ZAGPJHC 146 (7 June 2017). 5 See page 30 of the Tribunal Bundle.
- [5] Barnard, J. (2020). Suppliers, consumers and redress for defective vehicles — The reach of the National Consumer Tribunal. 7 Section 4 (2) of the CPA.

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