

SOUTH AFRICA / JUDGMENT

Curtis v Validus Trading 100CC t/a Signature Motors & Wholesalers (NCT/89986/2017/75(1)) [2018] ZANCT 11 (26 January 2018)

[2018] ZANCT 11

COURT
National Consumer Tribunal

BEFORE
L. Best

CASE / FILE NUMBER
NCT/89986/2017/75(1)

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IN
THE NATIONAL CONSUMER TRIBUNAL
HELD
IN CENTURION
Case
number: NCT/89986/
2017/75(1)
In

the matter between: CHARMAINE
 MAY
 CURTIS APPLICANT
 and
 VALIDUS
 TRADING 100CC T/A SIGNATURE MOTORS &
 WHOLESALERS RESPONDENT

Coram: Dr L. Best – Presiding Member
 Date
 of hearing: 29 January 2018

RULING**AND REASONS****THE PARTIES**

1. The Applicant is Charmaine May Curtis, an adult female residing in Farrarmere, Benoni (the Applicant).
2. The Respondent is Validus Trading 100CC t/a Signature Motors & Wholsalers, conducting business from 151 Northrand Road, Boksburg (the Respondent).

THE HEARING

3. A hearing was held on 29 January 2018 in Centurion. The Applicant represented herself. The Respondent was represented by an attorney,

Mr Nothnagel, of AC Nothnagel Attorneys.

THE APPLICATION

4. This is an application by the Applicant for leave to refer her complaint, which was non-referred by the National Consumer Commission

(the “NCC” or “Commission”), directly to the National Consumer Tribunal (the “Tribunal”) in terms of section 75(1)(b) of the Consumer Protection Act, 2008 (the “CPA”). The Respondent opposed the application. The Application for leave to refer the matter to the Tribunal was filed with the Tribunal on 12 September 2017.

5. Section 75 (1) of the Act states as follows:

Referral to Tribunal

“(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) ...;or
 - (b) the Tribunal, with leave of the Tribunal.
- (2)...
- (3) A referral to the Tribunal, whether by the Commission or by a complainant in terms of subsection (1), must be in the 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 applicable order contemplated in this Act or in section 150 or 151 of the National Credit Act, read with the changes required by the context.

(5)..."

6. The Commission issued a notice of non-referral, dated 27 August 2017, ref 12/1/1/04-17/07133 stating that "the complaint does not allege any facts, which, if true, would constitute grounds for a remedy under the Consumer Protection Act, 2008".
7. The Tribunal must in accordance with s75 (1) (b) determine whether to grant the Applicant leave to refer the matter to the Tribunal. The purpose of the hearing held on 29 January 2018 was to determine this issue and this judgment relates only to the issue of whether to grant leave to refer and does not deal with the merits of the matter, save only as far as these may relate to the issue of leave to refer.

BACKGROUND

8. Despite the fact that this judgment does not deal with the merits of the complaint that the Applicant has against the Respondent, it is appropriate to set out a brief background and the context of the issues in dispute between the parties.
9. The Applicant purchased a used Ford Figo 2010 model from the Respondent and took receipt of the vehicle on 24 January 2015. From

day one, there was black smoke coming from the exhaust pipe but the Respondent indicated that the vehicle had been standing for a while and the Applicant would need to "drive it in" for the smoke emission to lessen. When this did not happen, the Respondent collected the vehicle ostensibly to attend to the problem,

and returned it to the Applicant on the same day. In the view of the Applicant, the performance of the motor vehicle did not improve but in fact it became worse. On certain occasions after this, the Applicant took the vehicle back to the Respondent to fix the problems the Applicant was experiencing with the vehicle's performance. Despite this, the performance did not improve.

10. On 22 May 2015 the vehicle stopped functioning whilst being driven and was towed to the Respondent's dealership.
11. On 1 June 2015, the Applicant received a letter from the Respondent stating that the damage to the engine was due to driver negligence and hence the Respondent was not responsible for this.
12. The Applicant was of the view that in terms of section 55 of the Consumer Protection Act No. 68 of 2008 (the Act), she had the right

to "receive goods that.... (b) are of good quality, and in working order and free of any defects.... And (c) will be useable and durable for a reasonable period of time....." Further that she could invoke her rights in terms of section 56

(2) of the Act, since it was less than six months since she had purchased the vehicle and return the vehicle to the Respondent for repair. Alternatively cancel the sales transaction for a full purchase refund. As a result, the Applicant filed a complaint against the Respondent with the Motor Industry Ombudsman of South Africa (MIOSA) on 3 June 2015.

13. MIOSA only issued their conclusions regarding the Applicant's complaint almost two years later on 14 February 2017. Because the Applicant needed to use the vehicle for work purposes, and because the Respondent continued to deny responsibility, the Applicant felt she had no option but to have the vehicle repaired at her own expense in the interim whilst awaiting the outcome from MIOSA.

14. The Applicant and Respondent remain in dispute, which is the essence of the main matter

CONSIDERATION OF THE MERITS OF THE APPLICATION FOR LEAVE

15. The Tribunal set out the factors that must be evaluated in order to ascertain whether to grant leave in *Coertze and Burger v Young*. [1] In that case, which has been referred to by the Tribunal in a number of other decisions,[2] the Tribunal held that the following two factors should be considered:

- (a) The Applicant's reasonable prospects of success with the referral; and
- (b) Whether the matter is of substantial importance to the Applicant or the Respondent.

16. It is firstly abundantly clear that the matter is of substantial importance to the Applicant. As an ordinary consumer without the

means to access legal expertise and advice, she has gone to great lengths to attempt to resolve the matter with the Respondent, to lodge the complaint with the MIOSA and the Commission and to pursue it further with the Tribunal.

17. The cause of action took place in 2012 which is after the Act came into operation. Section 54 of the Act deals with the consumer's

rights to demand quality service. This matter therefore clearly falls within the ambit of the Act.

18. The clear intention of the Act is to ensure that the rights of consumers are protected. There are numerous sections in the Act where

this intention is made very clear. The Act's Preamble explains that the promotion and protection of the interests of

consumers are the very reasons why the Act was introduced. Further section 4(2)(b)(2) provides that in any matter brought before the Tribunal or a court in terms of this Act 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]

19. Section 4 (3) provides that if any provision of the Act, 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 the Act, and will best improve the realisation and enjoyment of consumer rights.

20. An extremely important aim of consumer protection legislation is access to justice. The improvement of access to justice is regarded as one of the 'over-arching goals of consumer protection legislation'.[4] In the policy document setting out the reasons why the South African legislature deemed it necessary to introduce consumer protection

legislation, the drafters highlighted in particular the difficulties that South African consumers face when it comes to accessing

justice.[5] This includes having to approach the normal civil courts if suppliers fail to deal with legitimate complaints.[6] Even when claims are sufficiently large to be of some serious concern to consumers, approaching the civil courts is notoriously expensive.[7] Litigation is also very intimidating and most consumers have no idea about how to launch civil proceedings. Consumers who do take the time to complain often find that their complaints are ignored and they do not know who to turn to next.[8] In the case of *Imperial Group (Pty) Ltd t/a Cargo Motors Klerksdorp v Dipico* and another[9] the court pointed out that "the purposes of the Act are to promote and advance the social and economic welfare of consumers in South Africa by, amongst others, providing a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions; and an accessible, consistent, harmonised, effective and efficient system of redress for consumers.[10] The Applicant in this matter is precisely the kind of consumer for whom this legislation was enacted and the evidence before the Tribunal indicates just how difficult it has been for her to resolve the problems she has experienced with her motor vehicle.

21. The Applicant's prayer in relation to what redress the Applicant may be afforded, is for consideration during the main matter.

22. In considering the reasonable prospects of success the Tribunal is satisfied that the Applicant has laid a foundation for a complaint

in terms of the Act which the Respondent must answer to. There are matters of fact which are in dispute and such matters can only be dealt with through a full hearing before the Tribunal into the merits of the matter.

23. The Tribunal therefore grants leave for the matter to be heard.

DATED at PORT ELIZABETH on this 3rd day of February 2018.

—[signed]—.

Dr L. Best

Presiding Member

[1] NCT/7142/2012/75(1)(b)&(2).

[2] See also Mbekeni v Freeway Toyota (NCT/36177/2015/75(1)(b) [2016] ZANCT 18 (1 April 2016) and Papo v Standard Bank of South Africa Ltd (NCT/69527/2016/14

[2017] ZANCT 81 (27 July 2017).

[3] See also Lazarus and Another v RDB Project Management CC t/a Solid and Another (NCT/36112/2016/75(1)(b)) [2016] ZANCT 15 (9 June 2016) and Van Heerden v Bryanstan Executive Cars Case number: NCT/69249/ /2016/73(3) &75(1)(b) handed down on 25 May 2017.

[4] Rickett & Telfer, 'Consumer access to justice, an introduction' in Rickett & Telfer (eds), International Perspectives on Consumers' Access to Justice (Cambridge

2003) 1.

[5] DTI, Draft Green Paper on Consumer Policy Framework GN 1957 in GG 26774 of 9 September 2004 at 40.

[6] See Woker, 'Why the need for consumer protection legislation? A look at some of the reasons behind the promulgation of the National Credit Act and the Consumer Protection Act' (2010) 31(2) Obiter 217.

[7] See Business Practice Committee, Consumer Codes (Report No 15) GN R444 in GG 13988 of 18 May 1992 at 35 and Van Heerden & Barnard, 'Redress for consumers in terms of the Consumer Protection Act 68 of 2008: a comparative discussion'(2011) 6(3) Journal of International Commercial Law and Technology 131 at 132.

[8] Business Practice Committee Report No 15 at 35.

[9] Northern Cape Division Kimberley Case No 1260/2015 handed down on 1 April 2016.

[10] See para 25 of the judgment where the court quoted s3 (1) (g)-(h) of the Act.

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