

SOUTH AFRICA / JUDGMENT

de Beer v CAW Enterprise Solutions (Pty) Ltd and t/a ACD Kleyn's Auto Services (NCT/125346/2019/148(1)) [2019] ZANCT 83 (24 May 2019)

[2019] ZANCT 83

COURT

National Consumer Tribunal

BEFORE

M Nkomo, P Beck, A Potwana

CASE / FILE NUMBER

NCT/125346/2019/148(1)

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IN

THE NATIONAL CONSUMER TRIBUNAL

HELD

IN GEORGE

Case

number: NCT/125346/2019/148(1)

In

the matter between:

ELNA
DE
BEER APPELLANT
and
CAW
ENTERPRISE SOLUTIONS (PTY) LTD
t/a
ACD KLEYN'S AUTO
SERVICES RESPONDENT
Coram
Ms
M Nkomo - Presiding Tribunal Member
Ms
P Beck - Tribunal Member
Mr
A Potwana - Tribunal Member
Date
of Hearing -
02

May 2019
Date
of Judgement –
24
May 2019

JUDGMENT

AND REASONS

THE PARTIES

1 The Appellant is Elna De Beer, an adult female who resides in George, Western Cape province (hereinafter referred to as “the Appellant”). At the hearing, the Applicant represented herself and was assisted by her friend Mr Tinus Harper.

2 The Respondent is CAW Enterprise Solution (Pty) Ltd trading as ACD Kleyn’s Auto Services, a private company duly registered and incorporated in terms of the company laws of the Republic of South Africa, with its principal place of business at 5 Nywerheid Street, George Industria, Western Cape province (hereinafter referred to as "the Respondent"). At the hearing the Respondent was represented by Adv Lourens Joubert, a member of the George Bar and instructed by attorney Kooster Jordaan of Jordaan, Louw and Partners.

APPLICATION TYPE

3 This is an appeal against the ruling of a decision of a single member (hereinafter referred to as "the single Member") of the National Consumer Tribunal (hereinafter referred to as "the Tribunal") to a three-member panel of the Tribunal.

4 The Appellant seeks an order from the Tribunal setting aside a ruling by the single Member; Prof B. Dumisa; issued on or about 15 January 2019; refusing the Appellant’s application for condonation for the late filing of the Appellant’s application for leave to refer a matter non-referred by the National Consumer Commission

(hereinafter referred to as "the Commission" or the “NCC”); directly to the Tribunal.

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"). Section 148(1) provides as follows:

148. 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

6 The Appellant submitted the following background information to the main matter:

6.1 The Appellant alleges that she purchased a 2006 model Volkswagen Transporter 2.5TDI, 15 seater bus;

6.2 The Appellant used this vehicle for scholar transport;

6.3 In January 2018, the car developed mechanical problems and was loosing water with a strong indication of water being present in the sub assembly oil;

6.4 The Appellant then approached the Respondent to repair the vehicle;

6.5 The Respondent diagnosed the faults and gave the Appellant a verbal estimate of between R13 000 000 (thirteen thousand rand) and R15 000 (fifteen thousand rand), which was accepted by the Appellant;

6.6 The Respondent worked on the vehicle at its premises, and on 2 February 2018, the Appellant collected the vehicle after paying the total repair costs of R9 830.79 (nine thousand eight hundred and thirty rand and seventy nine cents);

6.7 The Appellant submitted that the same problems that were experienced on the vehicle before the repairs, started within one kilometre of collecting and driving the car;

6.8 On 12 February 2018, the Respondent collected the vehicle from the Applicant's premises to the Respondent's repair workshop;

6.9 The Appellant is aggrieved that:

6.9.1 She paid for repairs to her vehicle but the vehicle came back the same;

6.9.2 The Respondent proceeded to strip the car for engine diagnosis purposes which resulted in the Respondent estimating the repair cost of R59 278.94 (fifty nine thousand two hundred and seventy eight rand and ninety four cents) for which a deposit of R42 000 (forty two thousand rand) was required;

6.9.3 The Respondent did what it were not requested to do when it stripped the car; and

6.9.4 The wrong diagnosis was done without the Appellant's prior consent;

6.10 The Appellant wants the car to be taken to an independent assessor for an independent mechanic to repair the car; and

6.11 The Appellant also has other claims for consequential damages, alleging that the Respondent owes her for the costs of a replacement car whilst the car remained with the Respondent for repairs during the course of this dispute;

7 The Appellant brought an application to the Tribunal in terms of Section 75(1)(b) (hereinafter referred to as "the main application")

of the Consumer Protection Act, Act 68 of 2008, (hereinafter referred to as "the CPA").The Respondent did not oppose the main application;

8 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.·

9 The Appellant had to apply for leave to bring the complaint to the Tribunal directly after the Commission had issued a notice of non-referral in response to the Appellant's complaint;

10 The Appellant applied for leave to refer the matter to the Tribunal outside the time frames prescribed in the Tribunal Rules, and accordingly had to apply for condonation for non-compliance in terms of rule 34 of the Tribunal;

11 The single Member had to decide whether the Tribunal should grant the Appellant condonation for the late filing of the application for leave to refer.

12 According to the single Member at the hearing of the condonation application, the Tribunal had to assess the following issues.[1] on the condonation application:

12.1 Whether the Tribunal could condone the delays relating to the lodging of the complete papers. The single Member was satisfied that, as a lay person, the Appellant had bona fide reasons for not properly citing the Respondent and not filing the complete papers within the prescribed

time limits this issue could be condoned;[2] and

12.2 Whether it would be in the interests of justice to grant the condonation as applied for; the single Member concluded that when the matter is viewed

holistically, it would not be in the interests of justice to grant condonation. The single Member also concluded that the Applicant did not have high prospects of success should the matter be referred to the Tribunal for a hearing; and

13 On 6 February 2019 the Appellant filed an application in terms of section 148(1) of the Act, appealing the ruling on the condonation

application. This judgement follows a hearing on the appeal.

ISSUE TO BE DECIDED

14 The Appeal Panel of the Tribunal (hereinafter referred to as "the Appeal Panel") has to consider whether the decision and reasons of the single Member for not granting the Appellant condonation for the late filing of her application to refer her complaint directly to the Tribunal can be sustained.

15 In order to arrive at such a determination the Appeal Panel must consider whether the single Member erred in fact and/or in law in refusing the condonation application, taking into account the following factors:

- a) whether the Appellant has any prospects for success in the main application; and
- b) the importance of the matter to the parties.

16 The Appeal Panel will not deal with the degree of lateness and the reasons for the delay, as the single Member has already accepted these.

APPELLANT'S CASE

17 The Appellant submitted the following points in support of her appeal[3]:

17.1 The single Member's ruling was based on "face value", "assumptions" and "automatically" as reflected in paragraphs 21.1; 21.1.1; and 21.1.2 of the condonation judgement are based on "face value" assumptions whereas the CPA has clear and specific directives to Pre-authorisation of repairs or services rendered[4];

17.2 The condonation ruling contains wrongly interpreted facts as reflected in paragraphs 14.5; 14.6; and 16; and the wrong interpretation can negatively influence the actuality of the consumer complaint. The misinterpretation includes the Retail Motor Industry request for an independent assessment being incorrectly attributed to the Appellant;

17.3 The single Member overlooked the crux of the complaint as reflected in the Appellant's founding affidavit, namely, that no pre-authorisation was obtained by the supplier before it embarked on a repair order which left the Appellant with devastating financial difficulties over the past year that the case has been continuing;

17.4 The Appellant authorised the Respondent to attend to the problem for which she had already paid R9 830.70 (nine thousand eight hundred and thirty rand and seventy cents), in line with the provision of the CPA that imposes a three month warranty on repairs. However, the Respondent re-diagnosed the problem and embarked on an expensive stripping of the engine without prior "pre-authorisation verbally, or by means of a set and signed Job Card, or by any other means[5]" by the Appellant, in contravention of the CPA requirements; and

17.5 The Respondent acted recklessly and not in accordance with the requirements of the CPA, resulting in the Appellant experiencing financial distress and her scholar transport business being destroyed.

RESPONDENT'S CASE

18 The Respondent made the following

submissions:

18.1 The single Member has been correct in the findings; as well as the position in Law and in facts;

18.2 The Respondent submitted that “face value” means that the facts presented were considered in an objective, fair and reasonable manner in order to conclude whether “the consumer has approved” the stripping of the vehicle for the repair cost estimation;

18.3 The Appellant did not mention how the facts were interpreted wrongly, and therefore this ground basis of appeal should be struck out;

18.4 The amount of R59 278.91 (fifty nine thousand two hundred and seventy eight rand and ninety one cents) is an estimate of the repair cost and the Respondent did not embark on these repairs as the Appellant had not yet given her consent;

18.5 The agreement between the Appellant and the Respondent did not provide for a guarantee on the Appellant’s vehicle, which had a mileage of about 486 000 kilometres; and the Appellant is not alleging that the Respondent gave her guarantee that the vehicle will be 100% correct after the first repairs;

18.6 The relief sought by the Appellant and the claim for consequential damages has no basis in relation to section 54 of the CPA. In addition; there is no legal ground for the Appellant to have expected the vehicle with the mileage it had, to be fixed the first time around on a quotation of R9 380 (nine thousand three hundred and eighty rand).

LEGAL PRINCIPLES

19 In terms of rule 27 of the Tribunal Rules[6], this is a wide appeal as it is not restricted to the record of proceedings before the single Member.

20 This appeal is a wide appeal. The Panel is not restricted to the record of the proceedings that served before the Member. Rule 27 of the Rules[7] 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 ...
"

21 According to Rule 34(1) and (2) of the Tribunal Rules, a party may apply to the Tribunal for an order to; among other things; condone the late filing of a document or application. The Tribunal may grant the order on good cause shown.

22 Whilst the Act does not provide criteria that may be considered when assessing 'good cause', the Tribunal takes guidance from legal jurisprudence developed over time.

23 For instance, in *Mofokeng v Attorney General*,^[8] it was held that "good cause" means substantially the same as "sufficient cause", meaning that the Tribunal may grant condonation for non-compliance with its Rules where the applicant has demonstrated objectively good reasons for non-compliance.

24 Similarly in *Melane v Sanlam Insurance Company Limited*^[9] when dealing with the question of condonation it was held that among the factors usually relevant are the degrees of lateness, the explanation therefor, the prospects of success and the importance of the case. These facts are inter-related and not individually

decisive. What is needed is an objective conspectus of all the facts, such that a slight delay and a good explanation may help to compensate for prospects of success which are not strong.

Alternatively, the importance of the issue and strong prospects of

success may tend to compensate for a long delay.

25 From these judgments; and the already mentioned factors; the Appeal Panel is expected to arrive at a decision on whether or not to grant condonation.

26 We will now consider the above-mentioned issues to determine whether or not this appeal should succeed.

CONSIDERATION OF FACTORS

27 At this stage, the Tribunal will not pronounce conclusively on the merits of the Applicants' case. This will be dealt with in the hearing of the main matter.

Prospects for success

28 In assessing the Appellant's prospects for success it is necessary to consider some aspects of the main matter, without necessarily making a determination or pronouncement on the merits thereof.

29 In the main matter, the Appellant alleges that the Respondent breached provisions of the CPA in as far as the Respondent failed to obtain pre-authorisation on the stripping of the car, and also on not providing the required quality workmanship. Therefore, there appears to be a case for the Respondent to answer in terms of the following:

29.1 Whether the Respondent disclosed the price for preparing an estimate for performing any diagnostic work, disassembly or re-assembling the

vehicle's engine as required in section 15(3) of the CPA;

29.2 Whether the Appellant approved the price for preparing the estimate for performing any diagnostic work, disassembling ly or re-assembling the vehicle's engine as required in section 15(3) of the CPA;

29.3 Whether the Respondent repaired the Appellant's car in accordance with the provisions of section 54 of the CPA; and

29.4 Whether the Respondent honoured the section 57 statutory three-month warranty for the repairs that it conducted and was paid for; including the repairs of the water pump that had allegedly broken down within 1 km after the vehicle was collected; and which could be regarded as defective.

30 After taking into consideration the Respondent's responses as contained in its opposing affidavit; including but not limited to the fact that the Respondent does not deny that the Appellant's vehicle broke down shortly after the Appellant paid for the repairs, the Respondent's averment that the agreement between the Appellant and the Respondent did not provide for a guarantee on the Appellant's vehicle, the Appeal Panel is of the view that the Appellant enjoys prospects of success of proving her claims. Condonation ought to have been granted.

Importance of the matter

31 This matter has a long history. The Appellant has taken a number of steps by approaching the Retail Motor Industry, the Motor Industry Ombuds of South Africa and the NCC in order to resolve the dispute. The complaint filed by the Appellant has serious implications for both the Appellant and the Respondent. The Respondent has opposed the Appellant's application for leave to refer. In its opposing affidavit; the Respondent stated that "Respondent will not waive the right to lien until all costs for the vehicles engine and gearbox removal and assessment of the cylinder has been paid in full. Nor will the Respondent deliver the vehicle and dismantled parts at his cost to another builder." [10] This clearly shows that the matter is quite important to both parties, and the facts and allegations contained in the main application need to be fully ventilated before the Tribunal, in the interests of justice.

32 The Appellant is also claiming consequential damages from the Respondent. The fact that the Tribunal cannot order damages does not mean that the Tribunal cannot entertain matters where; as a result of a finding of prohibited conduct; a successful party may approach a court with a claim for damages.

33 Even though the Tribunal does not have jurisdiction to award damages; the determination of prohibited conduct is an important step in the process towards a consumer being enabled to approach a court for damages. This is so because section 69 of the CPA provides that-

"A person contemplated in section 4 (1) may seek to enforce any right in terms of this Act or in terms of a transaction or agreement, or otherwise resolve any dispute with a supplier, by-

...

(d) approaching a court with jurisdiction over the matter, if all other remedies available to that person in terms of national legislation have been exhausted."

34 Section 115 of the CPA allows a person who has suffered loss or damage as a result of prohibited conduct, or dereliction of required conduct, to approach the civil court for damages by filing-

...a notice from the Chairperson of the Tribunal in the prescribed form- .. certifying whether the conduct constituting the basis for the action has been found to be a prohibited or required conduct in terms of this Act; ..." [11]

35 In *Joroy 4440 CC v Potgieter and Another NNO* [12] the debate before the High Court turned on the proper interpretation of section 69(d). The Respondent in *Joroy* took the point that the court did not have jurisdiction to hear the matter by virtue of the fact that, properly interpreted, the effect of section 69(d) was that the applicant had not exhausted their other remedies provided for in section 69(a) to section 69(c) of the CPA before approaching the court. The court found that-

·” It is specifically stated that the consumer may approach the court if all the aforementioned avenues of redress have been exhausted. The legislature was very specific in prescribing the redress that a customer has in terms of this section. I fail to see how any other interpretation can be given to the word ·it.””

36 Accordingly, the court found that the mechanisms of the CPA have to be exhausted before the court can be approached. The honourable Judge stated that-

"From the Preamble of the CPA it is evident that the purpose of this act is amongst others to "protect the interests of all consumers" and to "ensure accessible, transparent and efficient redress for consumers who are subjected to abuse or exploitation in the market place."

and that:

"It was held by the Constitutional Court that, where a specialised framework has been created for the resolutions of disputes, parties must pursue their claims primarily through such mechanisms. See: *Chirwa v Transnet Ltd and Others* [2007] ZACC 23 [2007] ZACC 23; ; 2008

(4) SA 367 (CC)"

37 The Applicant in *Joroy* thus had to exhaust its remedies through the "specialised framework that has been created for the resolutions of Disputes" [13] before approaching other forums. The "specialised framework" includes the Appellant in this matter having to approach the Tribunal for a determination of prohibited conduct against the Respondent, in spite of the Tribunal not having the authority to order damages. As alluded to in paragraph 33 above; a finding of prohibited conduct can enable a victorious complainant to seek damages in the relevant high court.

38 For the Chairperson of the Tribunal to issue the notice in terms of section 115 of the CPA, it must be clear that the conduct which constitutes the basis for the action has been found to be prohibited conduct.

39 Having read all the documents filed of record including the Applicant's application for condonation, the Respondent's opposing affidavit, the condonation judgement; and the appeal documents; and having listened to the parties' arguments; the Appeal Panel accordingly finds that the single Member erred in not basing the reasons for refusing the application for condonation on-

39.1 whether the Appellant just assumed that the Respondent "was just going to repeat the same diagnosis of the water cooler as done before which had not worked hence the car broke down within a kilometre after collecting it[14]";

39.2 whether it could not be reasonably assumed that when the Appellant released her car to the Respondent, she was giving the Respondent consent to strip or dismantle the engine of the Appellant's car;

39.3 concluding that the Appellant had "not made a good case whether the second diagnosis done by the Respondent could have yielded different results had it been done by another assessor"[15];

39.4 the age and mileage of the car[16]; and

39.5 the decision of the MIOSA and the NCC.

40 The reasons for the Appeal Panel's findings are that –

40.1 The above issues had nothing to do with the alleged poor quality of workmanship; based on the breaking down of the car within a kilometre after being collected from the Respondent's premises; that formed the basis of the Appellant's complaint;

40.2 There is no indication that the single Member applied his mind to whether the Respondent gave the Appellant an estimate for performing the diagnostic work and the Appellant approved it as required in terms of section 15(3) of the CPA;

40.3 There is also no indication that the single Member applied his mind to the possibility that the Respondent may have contravened section 57 (1) of the CPA, which provides for a statutory three-month warranty; and

40.4 Further, there is no indication that the single Member considered the possibility that the Respondent could be found guilty of committing prohibited conduct which could then open the doors for the Appellant to seek damages in the high court.

41 Thus; the Appeal Panel finds that the single Member's order dismissing the application for condonation on the basis that "... there are no prospects of success for this matter should it be referred to the Tribunal for a full hearing on merit" is erroneous and deserves to be overturned.

CONCLUSION

42. The Appellant enjoys reasonable prospects of success of proving that the Respondent contravened several provisions of the CPA, by rendering poor quality workmanship when repairing the Appellant's vehicle, and for not honouring the statutory warranty as required in terms of section 57 of the CPA. Thus; the Appellant showed good cause for condonation to be granted.

43 The Appellant should therefore be given an opportunity to argue her application for leave to refer her complaint before the Tribunal in terms of section 75(5)(b) of the CPA. The Respondent will have an opportunity to defend the application should it wish to do so.

44 Accordingly, the Appeal Panel is of the view that the single Member erred in refusing the Appellant's application for condonation.

ORDER

45 Therefore, the Appeal Panel, having considered all the factors relevant to the determination of this application, makes the following order:

45.1 The appeal is upheld;

45.2 The Applicant's condonation application is granted;

45.3 The Registrar of the Tribunal must set the matter down for hearing of the application for leave to refer; and

45.4 There is no order made as for costs.

DONE IN CENTURION ON THIS 24TH DAY OF MAY 2019

[duly signed]

MS. M NKOMO

PRESIDING TRIBUNAL MEMBER

With Mr A Potwana (Tribunal Member) and Ms P Beck (Tribunal Member) concurring

[1] Para 21 of the single Member's Condonation Judgment dated 15 January 2019

[2] Para 20 of the Condonation

Judgment

[3] Page 8 of the record bundles

[4] *ibid*

[5] *ibid*

[6] 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

[7] 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 and Malela v Capitec Bank Limited (NCT93576/2017/148)[2018] ZANCT 12 (6 February 2018)

[8] OFS 1958 (4) SA (O).

[9] 1962 (4) SA 531 (A) at 532C-F

[10] Para 25 o of the Respondent's opposing affidavit

[11]"A person who has suffered loss or damage as a result of prohibited conduct, or dereliction of required conduct- (a) may not institute a claim in a civil court for the assessment of the amount or awarding of damages if that person has consented to an award of damages in a consent order; or (b) if entitled to commence an action referred to In paragraph (a), when instituting proceedings , must file with the registrar or clerk of the court a notice from the Chairperson of the Tribunal in the prescribed form- (i)certifying whether the conduct constituting the basis for the action has been found to be a prohibited or required conduct in terms of this Act; (ii) stating the date of the Tribunal's finding, if any; and (iii) setting out the section of this Act in terms of which the Tribunal made its finding, if any. "

[12] 2016 (3) SA 465 (FB)

[13] Chirwa v Transnet Ltd and Others [2007] ZACC 23[2007] ZACC 23; ; 2008 (4} SA 367 (CC)"

[14] Condonation Judgment dated 15 January 2019 para 21.1.1

[15] Ibid para 22.1

[16] Ibid para 22.2

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