

SOUTH AFRICA / JUDGMENT

Gcakasi v NTT Motors East London (Pty) Ltd (NCT-147567-2019-75(1)(b)) [2022] ZACONAF 4 (6 June 2022)

[2022] ZACONAF 4

COURT

Consumer Affairs Court

BEFORE

N Sephoti, M Peenze, A Potwana

CASE / FILE NUMBER

NCT-147567-2019-75(1)(b)

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IN THE NATIONAL CONSUMER TRIBUNAL HELD IN CENTURION

Case number: NCT-147567-2019-75(1)(b)

In the matter between:

MPUMELELO DERRICK GCAKASI APPLICANT

and

NTT MOTORS EAST LONDON (PTY) LTD RESPONDENT

T/A NTT VOLKSWAGEN KING WILLIAMS TOWN

Coram:

Adv N Sephoti

- Presiding Tribunal member

Dr M Peenze

- Tribunal member

Mr A Potwana

- Tribunal member

Date of hearing: 17 May 2022

JUDGEMENT AND REASONS

THE PARTIES

1. The Applicant is Mpumelelo Gcakasi, an adult male consumer (Mr Gcakasi). During the hearing, Mr Gcakasi represented himself.
2. The Respondent is NTT Motors East London (Pty) Ltd, trading as NTT Volkswagen King Williams Town, a private company that is duly incorporated and registered in terms of the company laws of the Republic of South Africa. On the day of the hearing, the Respondent was represented by Mr Courtenay, an advocate from the Johannesburg Society of Advocates, on the instructions of Kruse Attorneys Incorporated. Mr Courtenay was assisted by Dr Ratz, an attorney from Kruse Attorneys Incorporated.

TYPE OF APPLICATION AND JURISDICTION

3. The Applicant was granted leave to refer a matter directly to the Tribunal after the National Consumer Commission (Commission) issued a Notice of Non-Referral in response to the Applicant's complaint.
4. In terms of section 27(a) of the National Credit Act 34 of 2005 (NCA), the Tribunal has jurisdiction.

INTRODUCTION

5. On or about 6 December 2019, the Applicant delivered an application in terms of section 75(1)(b) of the Consumer Protection Act 68 of 2008 (CPA) using Form TI.73(3) & 75(1)(b) & (2) CPA. In "Part D: Order sought from the Tribunal" of Form TI.73(3) & 75(1)(b) & (2) CPA, the Applicant stated that if leave to refer was granted; he would seek the following relief:

"That NNT VW KWT take back the vehicle and refund the purchase price of R453 763.86 and refund all instalments made to the noise defect as of 22 October 2018. Alternatively, NNT VW KWT, take back the vehicle and refund the purchase price of R453 763.86 and refund all instalments made as of 25 March 2019 due to the Digital Instrument Cluster defect reported on 25 March 2019." (sic in toto).

FACTS

6. The Applicant's supporting affidavit was attached to the filed form Form TI.73(3) & 75(1)(b) & (2) CPA. Briefly, the Applicant averred that he bought a 2018 VW Polo 2.0 GTI DSG (147Kw) (hereafter referred to as "the vehicle") from the Respondent after seeing an advert on the CARFIND website. The purchase was funded by ABSA Bank Limited (ABSA). The vehicle was to be delivered to him in Port Elizabeth on 5 October 2018 but had a defect on the fuel pump, which had to be repaired under warranty. He did not like how he was treated by the Respondent's sales manager, Mr Bevan Prince (Mr Prince). Mr Prince had been rude to him when he asked what needed to happen since the vehicle was broken down before it was delivered. He filed a complaint with the Motor Industry Ombudsman of South Africa (MIOSA). In the complaint, he stated that he wanted the vehicle replaced with a similar one. The Respondent's Sales Manager apologised via email and indicated that the Respondent would repair the vehicle and deliver it to the Applicant in Cape Town. He ignored the

Applicant's request for a replacement vehicle.

7. The Applicant collected the vehicle from the Respondent's sister company, NTT Stellenbosch, on 15 October 2018. He was not happy with the vehicle, and on 17 October 2018, he instructed ABSA not to pay the Respondent until the vehicle was assessed. He suspected that there were other defects in the vehicle which the Respondent had not told him about due to oil and smoke residue in the engine compartment. The Respondent told him to take the vehicle to NTT Stellenbosch for an inspection. The Respondent did not respond to his request for a replacement vehicle or refund even though he had previously requested a replacement vehicle on 5 October 2018.
8. On 18 October 2018, the Respondent's salesperson, Mr Nkosana, sent the Applicant the Vehicle Receipt Form. He submitted the document to the Respondent via email on 22 October 2018 and indicated that "the vehicle was delivered NOT IN GOOD ORDER AS PER AGREEMENT" and added pictures and comments. The Applicant listed the following faults:
"paint damage on the bonnet, both external mirrors and on the driver's side of footwell as per Enclosure 11, Picture of Left Hand Side Mirror, Enclosure 12, Picture of Right Hand Side Mirror, Enclosure 13, Picture of Driver's side Footwell, Enclosure 14, Picture of Bonnet. The vehicle also had a cracked windscreen as per Enclosure 15, Picture of Cracked Windscreen. The vehicle had a scrapping noise when it reversed at slow speed and was emitting excessive exhaust smoke and had a high fuel consumption as per Enclosure 16, Vehicle Delivery Receipt." (sic in toto).
9. In summary, the Applicant submitted that "[T]he vehicle was not in an acceptable state on 22 October 2018, and NTT KWT and the Bank" was made aware of this." Some defects were attended to, but others were not. The Respondent replaced the cracked windscreen after the Applicant sent it numerous emails. On 27 February 2019, the brake pads were replaced, and the handbrake was adjusted. There were several unsuccessful attempts to resolve the noise issue. On 14 May 2019, VW SA indicated that they had attempted all they could to resolve the noise issue, and the Applicant had to accept that the noise was a characteristic of the vehicle. In an email of 28 May 2019, Mr Prince confirmed that nothing could be done about the noise issue. On 30 May 2019, the Applicant demanded a refund from the Respondent since the Respondent could not fix a problem he had reported on 22 October 2018. The Respondent ignored the Applicant's demand.
10. On 13 May 2019, MIOSA issued a final closing letter. On 4 July 2019, the Applicant filed a complaint with the Commission. On 15 November 2019, the Commission issued a Notice of Non-Referral on the basis that the Applicant's complaint did not allege any fact, which, if true, would constitute grounds for a remedy under the CPA. Subsequently, the Applicant approached the Tribunal seeking leave to refer his complaint directly to the Tribunal on the basis that the Respondent contravened sections 19(5), 40(2), 55(2) and 56(2) of the CPA.

11. On 9 December 2019, the Registrar issued a Notice of Filing and served it to the parties. On 8 January 2020, the Respondent's attorneys filed the Respondent's answering affidavit opposing the Applicant's application for leave. On 9 March 2020, the Registrar issued a Notice of Set Down for the Applicant's application for leave to refer a complaint to the Tribunal to be heard on 27 May 2020 and served it on the parties. The hearing did not take place on 27 May 2020. On 12 August 2020, the Registrar issued another Notice of Set Down for the Applicant's application for leave to refer a complaint to the Tribunal to be heard on 18 September 2020 and served it on the parties. This date was later changed to 14 September 2020. On 18 September 2020, the Registrar issued the Tribunal's ruling granting the Applicant leave to refer his complaint to the Tribunal.
12. On 20 October 2020, the Registrar issued a Notice of Set Down for the main matter to be heard on 21 January
2021. On 24 November 2020, the Registrar issued a notice changing the hearing of the main matter on 21 January 2021 to a pre-hearing and served it on the parties. On 2 February 2021, the Registrar issued the pre-hearing minutes.
13. On 24 February 2021, the Respondent's attorneys delivered several documents, including a condonation application and a joinder application. On 11 June 2021, the Registrar issued the Tribunal's ruling granting the condonation application for the late filing of the joinder application. On 19 July 2021, the Registrar issued a Notice of Set- Down for the joinder application to be heard on 6 October 2021. The joinder application was subsequently withdrawn. On 7 October 2021, the Registrar issued a Notice of Set Down for a second pre-hearing to take place on 2 November 2021 and served the same on the parties.
14. On 8 November 2021, the Registrar issued the pre-hearing minutes. The pre-hearing minutes show that the Respondent's legal representative, Mr Ratz, submitted that it was no longer possible for the Tribunal to order the return of the vehicle and the refund as the Applicant was no longer in possession of the vehicle. The relief sought by the Applicant was no longer valid. The Respondent had been expecting an application to amend from the Applicant's attorneys since July 2021, when they indicated that they would be filing the same. The Applicant responded by stating that he would not be seeking an application to amend. The Tribunal should make an appropriate order based on his papers as they were. Mr Ratz submitted that the Respondent did not know what case to answer and wanted to file an interlocutory application. The Tribunal directed the parties to file any interlocutory applications necessary to proceed with their respective cases by no later than 26 November 2021.
15. On 3 December 2021, the Respondent's attorneys filed a condonation application for the late filing of the Respondent's answering affidavit together with the Respondent's answering affidavit. On 8 December 2021, the Registrar issued a Notice of Filing – Rule 34 and served it on the parties. On 20 January 2022, the Applicant filed a condonation application for the

late filing of his affidavit opposing the Respondent's application for the late filing of its answering affidavit. On 24

February 2022, the Registrar issued the Tribunal's Ruling granting the Applicant condonation for the late filing of his affidavit opposing the Respondent's application for condonation for the late filing of its answering affidavit. The Tribunal refused the Respondent's application to file an Answering Affidavit in a subsequent ruling. The Registrar set the matter down for hearing on 17 May 2022.

HEARING

16. On the day of the hearing, the Applicant chose not to testify under oath and did not call an expert witness. He argued that the Respondent's conduct towards him was unconscientious. The vehicle bore several defects and died within six months of purchase. He asked for a refund of the purchase price on or about the 25th day of March 2019, but the Respondent refused to take the vehicle. The vehicle was subsequently involved in an accident and written off. The vehicle's value at the time of loss was approximately R298 000.00. He submitted that, notwithstanding the fact that he cannot return the vehicle to the Respondent, the Tribunal should order the Respondent to pay him the difference between the purchase price of the vehicle, R453 763.86, and the value of the vehicle at the time of the accident, R298 000.00.
17. Mr Courtenay submitted that the Tribunal should disregard any statements that the Applicant did not make under oath. He argued that the relief sought by the Applicant was incompetent. The Applicant was paid by his insurer. The Tribunal does have the power to make the orders sought if the Applicant cannot return the vehicle to the Respondent. The Applicant did not persist with his request for a refund. Some of the alleged damages were not previously mentioned. The defects alleged by the Applicant do not fall within the definition of a "defect" as defined under section 53 of the CPA. The vehicle was never returned to the Respondent. Section 40 of the CPA is not applicable.

THE LAW

18. Section 19(5) of the CPA states-

"When a supplier tenders delivery to a consumer of any goods, the supplier must, on request, allow the consumer a reasonable opportunity to examine those goods for the purpose of ascertaining whether the consumer is satisfied that the goods-

- (a) are of a type and quality reasonably contemplated in the agreement, and meet the tests set out in section 18(3) and (4); and
- (b) in the case of a special-order agreement, reasonably conform to the material specifications of the special order."

19. Section 40(2) of the CPA states-

“In addition to any conduct contemplated in subsection (1), it is unconscionable for a supplier knowingly to take advantage of the fact that a consumer was substantially unable to protect the consumer’s own interests because of physical or mental disability, illiteracy, ignorance, inability to understand the language of an agreement, or any other similar factor.”

20. Section 53(1) of the CPA states-

“In this Part, when used with respect to any goods, component of any goods, or services-

- (a) “defect” means-
- (i) any material imperfection in the manufacture of the goods or components, or in performance of the services, that renders the goods or results of the service less acceptable than persons generally would be reasonably entitled to expect in the circumstances; or
- (ii) any characteristic of the goods or components that renders the goods or components less useful, practicable or safe than persons generally would be reasonably entitled to expect in the circumstances.”

21. Section 55(2) of the CPA states-

“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 No. 29 of 1993), or any other public regulation.”

22. Section 56(2) of the CPA states-

“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.”

CONSIDERATION OF THE MERITS

The allegation that the Respondent violated section 19(5)(a) of the CPA

23. The Applicant did not present any evidence that the Respondent delivered the vehicle to him and that upon request, the Respondent refused to afford him a reasonable opportunity to assess it. According to the Applicant's own version, he collected the vehicle from NTT Stellenbosch. It was not delivered to him. In the circumstances, the Applicant has failed to prove that the Respondent violated the provisions of section 19(5)(a) of the CPA.

The allegation that the Respondent violated section 40(2) of the CPA

24. The Applicant did not present any evidence that he was substantially unable to protect his own interests because of physical or mental disability, illiteracy, ignorance, inability to understand the language of an agreement, or any other similar factor, and the Respondent knowingly took advantage of any of these factors. Accordingly, the Applicant has failed to prove that the Respondent

violated the provisions of section 40(2) of the CPA.

The allegation that the Respondent violated sections 55(2) and 56(2) of the CPA

25. The Applicant failed to prove that the faults he identified soon after collecting the vehicle amounted to a violation of the standards set out in section 55 of the CPA. According to his own version, many of these faults were repaired except for the scraping noise. In the absence of evidence that the scraping noise amounts to a violation of the standards set out in section 55 of the CPA, there is no basis for concluding that the Respondent violated section 56 of the CPA. By his own admission, the Applicant could drive the vehicle until it was involved in an accident and was subsequently written off. Since the Applicant is no longer in possession of the vehicle, he cannot return it to the Respondent as envisaged in section 56 of the CPA. The Tribunal cannot order the Respondent to refund the Applicant the purchase price in these circumstances.
26. Concerning the Applicant's suggestion that the Tribunal should order the Respondent to pay him the difference between the purchase price and the value of the vehicle at the time it was written off, neither the CPA nor the NCA empowers the Tribunal to make such an order. Without evidence that the vehicle failed to satisfy the requirements and standards contemplated in section 55 and that the Applicant returned the vehicle to the Respondent, there is no basis for making the order suggested by the Applicant. Section 150(i) of the NCA empowers the Tribunal to make appropriate orders in relation to prohibited or required conduct. In this matter, we are not satisfied that the Respondent committed prohibited conduct.

CONCLUSION

27. The Applicant has failed to prove, on a balance of probabilities, that the Respondent violated sections 19(5), 40(2), 55(2) and 56(2) of the CPA, as alleged.

ORDER

28. Accordingly, for the reasons set out above; the Tribunal makes the following order: -

28.1. The application is dismissed, and

28.2. no order is made as to costs.

Thus, done and signed on 6 June 2022. [signed]

Mr A Potwana

Presiding Tribunal member

With Adv N Sephoti and Dr Peenze concurring.

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