

SOUTH AFRICA / JUDGMENT

Govender v Bryanston Executive Cars (GCC 08/2020) [2020]

ZACONAF 6 (14 December 2020)

[2020] ZACONAF 6

COURT

Consumer Affairs Court

BEFORE

M A du Plessis, M Phukubje, P Samuels

CASE / FILE NUMBER

GCC 08/2020

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**IN THE CONSUMER AFFAIRS
COURT FOR THE PROVINCE OF GAUTENG
HELD AT JOHANNESBURG
CASE NO: GCC 08/2020
In the matter**

between: MELVIN GOVENDER
Plaintiff
And
BRYANSTON EXECUTIVE
CARS
Defendant

JUDGMENT

1 This is an action in terms of which the Plaintiff seeks the right to return a motor vehicle that he bought from the Defendant on or about December 2018. The plaintiff based his claim on ss 55, 56 and 57 of the Consumer Protection Act, No 68 of 2008 (the CPA). The Plaintiff furthermore claims reimbursement for expenses incurred.

2. The matter was previously referred to the Motor industry Ombudsman of South Africa who on or about 21 June 2019 found in favour of the Plaintiff under reference number 356115.
3. On 3 December 2019 the National Consumer Commission, in terms of s 72(1)(b) of the CPA, referred the matter to the Gauteng Consumer Affairs office for investigation.

4. On 30 November 2020, summons was issued in terms of the Consumer Affairs (Unfair Business Practices) Act, No 7 of 1996.
5. At the hearing of this matter on 14 December 2020, the Plaintiff was represented by the Consumer Protector, Ms Sanele Mthuli. The Defendant was represented by attorney, Ms A Le Roux.
6. The common cause facts not in dispute are:
 - 6.1 The Plaintiff and Defendant entered into a written agreement on or about 21 December 2018 whereby the Plaintiff purchased from the Defendant, a used 2010 BMW Model 1 Series E81/86/F20/F21135i Coupe sport A/T, (the vehicle) for an amount of R197 367,20.
 - 6.2 The Plaintiff took delivery of the vehicle and paid the purchase amount to the Defendant.
7. During the testimony of the Plaintiff it became apparent that this matter was previously adjudicated by the Motor Industry Ombudsman of South Africa who, on or about 21 June 2019, found in favour of the Plaintiff under reference number 356115.
8. Despite evidence presented by both the Plaintiff and the Defendant, the Members of the Gauteng Consumer Affairs Court find as follows:
 - 8.1 Section 69 of the CPA reads:

Enforcement of rights by consumer

69. 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

 - (a) referring the matter directly to the Tribunal, if such a direct referral is permitted by this Act in the case of the particular dispute;
 - (b) referring the matter to the applicable ombud with jurisdiction, if the supplier is subject to the jurisdiction of any such ombud;
 - (c) if the matter does not concern a supplier contemplated in paragraph (b)—
 - (i) referring the matter to the applicable industry ombud, accredited in terms of section 82(6), if the supplier is subject to any such ombud; or
 - (ii) applying to the consumer court of the province with jurisdiction over the matter, if there is such a consumer court, subject to the law establishing or governing that consumer court;
 - (iii) referring the matter to another alternative dispute resolution agent contemplated in section 70; or
 - (iv) filing a complaint with the Commission in accordance with section 71; or

- (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.

8.2 The Plaintiff, in line with s 69, referred the matter to the Motor Industry Ombudsman of South Africa, an accredited industry ombud in terms of s 82 of the CPA, as published in Government Gazette No. 38107 of 17 October 2014.

8.3 Section 69 (c) (i), (ii) and (iv) are parted by the word "or indicating that the consumer may approach an industry ombud, or a consumer court, or the National Consumer Commission. In this matter the Plaintiff elected the industry ombud.

8.4 In Imperial Group (Pty) Ltd t/a Auto Niche Bloemfontein v MEC: Economic Development, Environmental Affairs and Tourism Free State Government and Others

[2016] 3 Ali SA 794 (FB) the court indicated that it is not clear from the wording of s 69 'whether an express hierarchy of alternative dispute resolution agents has been set out. Bearing in mind the use of the word "may/" instead of "must", and the provisions of the Act in general, its context and the relevant background,- it may be argued that s 69 in particular has not set down an implied hierarchy either'. The inference to be drawn is therefore that the alternative dispute resolution agents are viewed to be on a par and approaching one after the other is not possible. The Gauteng Consumer Affairs Court is therefore unable to re-adjudicate this matter.

8.5 in Joroy 4440 CC v Potgieter and Another NNO 2016 (3) SA 465 (FB) the court held that if the remedies outlined in s69(a) to s69(c) of the CPA have been exhausted, a court will exercise its discretion to hear a matter in which relief in terms of the CPA is sought. in formulating its decision the court referred to the principle expressed by the Constitutional Court in Chirwa v Transnet Limited & Others [2007] ZACC 23; 2008

- (4) SA 367 (CC) where it determined that when a specialised framework has been created by the legislature for the resolution of disputes; parties must as a general principle pursue their claims through such frameworks. As the Plaintiff in this instance exhausted his remedies, he may approach a court in terms of s 69(d).

8.6 The Plaintiffs case is dismissed.

ORDERED as such at JOHANNESBURG on 14 December 2020.

Prof. M A du Plessis

CHAIRPERSON

MEMBERS M Phukubje and P Samuels concurred

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