

SOUTH AFRICA / JUDGMENT

Hennig v South Cape Auto (Pty) Ltd t/a Hyundai (NCT/110709/2018/148(1)) [2018] ZANCT 136 (23 October 2018)

[2018] ZANCT 136

COURT

National Consumer Tribunal

BEFORE

D Terblanche, T Bailey, B Dumisa

CASE / FILE NUMBER

NCT/110709/2018/148(1)

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Source record**IN THE NATIONAL CONSUMER TRIBUNAL
HELD IN GEORGE****Case****number:** NCT/110709/2018/148(1)**In****the matter between:**

CARINE MARIANNE
HENNIG
APPELLANT
and
SOUTH CAPE AUTO (PTY) LTD t/a
HYUNDAI
RESPONDENT
Coram
Ms
D Terblanche
-
Presiding Tribunal Member
Mr.
T Bailey
-
Tribunal Member
Prof B
Dumisa
-
Tribunal Member
Date
of Hearing
-

8
October 2018

JUDGMENT

AND REASONS

THE PARTIES

1. The Appellant is Carine Marianne Hennig, an adult female (hereinafter referred to as "the Appellant".)
2. The Respondent is South Cape Auto (Pty) Ltd t/a Hyundai, 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 17 York Street, George, Western Cape (hereinafter referred to as "the Respondent").

APPLICATION TYPE

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

Tribunal (hereinafter referred to as "the Tribunal") to a three-member panel of the Tribunal.

4. The Appellant is challenging the Member's refusal to grant her leave to refer a matter non-referred by the National Consumer

Commission (hereinafter referred to as "the Commission"), 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").
6. 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".

THE APPEAL HEARING

7. Both parties attended the appeal hearing held in George on 8 October 2018.
8. The Appellant represented herself and Mr. Jacobs, the Respondent's legal advisor, represented the Respondent.

BACKGROUND

TO THE MAIN APPLICATION

9. 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 opposed the main application.

10. 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.

11. The Member had to decide whether the Tribunal should grant the Appellant leave to bring the complaint to the Tribunal directly after the Commission has issued a notice of non-referral in response to the Appellant's complaint.
12. According to the Member at the hearing at first instance, the Tribunal heard the parties on the merits merely and strictly for purposes of determining the Appellant's prospects of success.
13. From the record it appears to be common cause between the parties that the Appellant bought a second-hand motor vehicle, a 2009 BMW X6 (hereinafter referred to as "the vehicle"), from the Respondent, for R 378 853,00 (three hundred and seventy-eight thousand, eight hundred and fifty three Rand) on 8 January 2016.
14. The Appellant submitted, at the hearing of first instance that-
- 14.1. The vehicle was bought and the deal was done in good faith and with the assurance from the dealer that the vehicle was roadworthy, accident free, and in perfect running order with a full service history (hereinafter referred to as "FSH") and an Extended Warranty;
- 14.2. . The vehicle presented problems soon after purchase, including problems with the radio console and battery power saving system;
- 14.3. She experienced a "low oil" warning light alert and later the "fuel combustion" warning light also appeared;
- 14.4. BMW George did various diagnostic tests and effected various tests and repairs on the vehicle, including the identification of a missing "O-ring" in the engine, a valve timing malfunction, a broken timing chain and the use of non-genuine bolts;

14.5. Lynn Schroeder Auto started repairs on the vehicle on 4 August 2016; and

14.6. Her expenses, for the repairs to the vehicle over a period of more than a year, with certain repairs still to be done, were in excess of R 188 00.24.

15. The Respondent submitted that -

15.1. The vehicle was not presented to it with complaints of defects within 6 (six) months of purchase; and

15.2. Since it was not afforded the opportunity to repair the vehicle within 6 (six) months of purchase, and since a different dealer effected repairs to the vehicle, it cannot be held liable to repay the Appellant the monies she spent for the repairs of the vehicle.

16. The Appellant is claiming her past expenses for repairs to the vehicle from the Respondent.

17. The Member found at paragraph 43 of her judgment that-

"...In particular, the payment of damages falls outside the ambit of the orders the Tribunal may issue in terms of these Acts.[1]" and concluded at paragraph 44 that... the relief requested by the Appellant cannot be considered by the Tribunal, resulting in the Appellant not having any chance of success in the main application."

18. The Member found at paragraph 42 of her judgment that-

"... The evidence taken as a whole reveals that the Applicant purchased the vehicle from the Respondent in a seemingly good condition. It is not in dispute that the Respondent failed to approach the Applicant within the warranty period but opted to take the vehicle to another dealer for repairs. As a result the value chain was broken and the particular relief provided for in the Act became irrelevant: ..." (Emphasis added)

19. Based on the above the Member came to the conclusion that there is no reasonable chance of success in the main application, as -

(i) The claim for damages does not fall within the jurisdiction of the Tribunal; and

(ii) The failure to provide the Respondent with an opportunity during the first 6 (six) months of the purchase to rectify any alleged defects in the goods purchased or to consider refunding the goods on return by the Appellant, amounted to the forfeiting of relief in terms of section 56 of the CPA.

20. Appellant challenged the decision on the bases that-

20.1. "The evidence, taken as a whole, by submission, is not supported by taking the individual true facts into consideration;

20.2. The Respondent knowingly and underhandedly sold the vehicle to the Applicant under false pretences;

20.3. The Respondent was fully aware of the diagnosis of the damage repairs to the tampered with engine of the vehicle within the CPA period; and

20.4. The Respondent's lagging demeanour and dragging of heels, in reaching an amicable decision with the Applicant, within the CPA period, is the reason the repairs were commenced on 4 August 2016".

ISSUE TO BE DECIDED

21. The three-member appeal panel of the Tribunal (hereinafter referred to as "the Panel") has to consider whether the decision and reasons of the Member refusing the Appellant leave to refer her complaint directly to the Tribunal can be sustained.

DISCUSSION

22. 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[2] 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 ..."

23. We will now consider the issues we have identified in paragraph 21 above to determine whether this appeal should succeed or not.

THE APPELLANT FAILED TO PROVIDE THE RESPONDENT WITH AN OPPORTUNITY DURING THE FIRST 6 (SIX) MONTHS OF THE PURCHASE TO RECTIFY ANY ALLEGED DEFECT

24. The CPA is explicit with regard to the timeframe within which a consumer has to alert the supplier of defective goods to access rights to redress. It provides in section 56(2) as follows-

" 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."

(Emphasis added)

25. For the Appellant to succeed she should therefore have notified the Respondent of the vehicle's alleged defects within the six months

from delivery of the vehicle for the supplier to, at the direction of the consumer, either repair or replace the vehicle or refund the consumer.

-
26. The Appellant purchased the vehicle on 8 January 2016 and it appears it was delivered to her on the same date. This means that the six months' period expired on 8 July 2016.
27. There is a dispute between the parties whether the Appellant informed the Respondent of the alleged defects within the six months period.
28. The Appellant submitted that -
- 28.1. She complained to the Respondent within six months after taking delivery of the vehicle, but that Respondent delayed in attending to and resolving her complaints.
- 28.2. It was only after the Respondent's dilatory behaviour that she gave Lynn Schroeder the go ahead to repair the vehicle.
29. The Respondent submitted that-
- 29.1. The Appellant did not provide any evidence in support of her allegation that the Respondent was informed and was fully aware of every defect that occurred shortly after purchase of the vehicle; and
- 29.2. It was not aware of any defects in the vehicle.
30. The Appellant allegations seems to be supported on the face of the record -
- 30.1. Where she stated on page 132 of the record in paragraphs 5 and 6 that she"... contacted Hyundai George, telephonically to inform them of the said diagnosis...and subsequent visit in person...proved unfruitful..."; and
- 30.2. From Lynn Schroeder statement on page 133, paragraph 6 of the record where it is said that "... As Ms Hennig wished to approach South Cape Auto for financial assistance prior to giving permission for the repairs...".
31. The above allegations cannot be determined through merely considering the papers filed with the Tribunal, considering they have been filed by an unrepresented layperson.
32. The provisions of section 56(2) do not prescribe any formalities for the consumer to adhere to when returning the goods and accessing the rights above.
33. If the Appellant can therefore prove at a hearing, through giving and leading oral testimony, that she in fact provided an opportunity to the Respondent during the first six months of the purchase to rectify any alleged defect, she would have met the jurisdictional pre-requisites of notification to the Respondent to proceed with her claims against the Respondent.
34. In the light of the Appellant's allegations that she approached the Respondent, the above allegations, in the view of the Panel, have to be tested at a hearing.
35. We are accordingly of the view that the Member erred in -

35.1. Concluding just that"... the evidence, taken as a whole, supports the conclusion arrived at by the member that the Appellant failed to provide the Respondent with an opportunity during the first 6 (six) months of the purchase... - and

35.2. Not considering the allegations the Appellant made that she telephonically communicated to and met with the Respondent during the

six months following the delivery of the vehicle about the defects.

Appellant's claim for damages does not fall within the jurisdiction of the Tribunal

36. The Member sets out the basis for concluding that the Appellant's claim for damages does not fall within the jurisdiction of the Tribunal in paragraph 43, as follows-

"The relief to be granted and the orders to be issued by the Tribunal are outlined in the National Credit Act. Act 34 of 2005 and the CPA. In particular, the payment of damages falls outside the ambit of the orders the Tribunal may issue in terms of these Acts." (Emphasis added)·

37. The Member relies on *Mia v Car King Second-Hand (Pty) Ltd and Another*[3] for authority. The Tribunal's rationale in the above matter though was that the Respondent did not prove prohibited conduct, not that Mia was not entitled to damages under the CPA. This is evidenced in paragraph 35 of the judgment where the Tribunal concludes that-

" It follows that Mia has not discharged the onus borne by her that the respondents' actions amounted to prohibited conduct as envisaged by the CPA. This application must therefore fail." (Emphasis added)

38. Mia's application to the Tribunal therefore failed "...because the complaint does not allege any facts which, if true, would constitute grounds for a remedy under the CPA..." not that the remedy he seeks is not available from the Tribunal under the CPA.

39. Furthermore, 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.

40. 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."

41. Section 115 of the CPA allows a party to approach the civil court for damages on-

...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; ..." [4]

42. The above provision read with section 69(d)[5] of the CPA obliges the Applicant to first exhaust the provisions of the CPA through the structures set up in the CPA, namely the National Consumer Commission and the National Consumer Tribunal.
43. In *Joroy 4440 CC v Potgieter and Another NNO*[6] 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.·"

44. 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.(My emphasis.)"

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; 2008 (4) SA 367 (CC)"

45. The Applicant in *Joroy* thus had to exhaust its remedies through the "specialised framework that has been created for the resolutions of disputes"[7] before approaching other structures. 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.
46. For the Tribunal to make the determination to populate the notice in terms of section 115 of the CPA, it must be clear which provisions of the CPA have been contravened.

47. The Tribunal accordingly finds that the Member erred in dismissing the Appellant's application to refer her complaint directly to the Tribunal, based on the Tribunal's lack of jurisdiction to award damages.

ORDER

48. The Tribunal accordingly makes the following order-

48.1. The Appeal is upheld; and

48.2. No order is made for costs.

Dated at Johannesburg this 23rd day of October 2018.

D Terblanche

Presiding Tribunal Member

Mr. T Bailey and Prof B Dumisa concurring

[1]

- [2] 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)

- [3] (NCT29083/2015/73(3)&75(1))(2017) ZANCT 128 (1 November 2017)(Mia vs Car King)

[4]"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. "

- [5] "A person contemplated in section 4 (1) may seek to enforce any right in terms of 15 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."

- [6] 2016 (3) SA 465 (FB)

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

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