

SOUTH AFRICA / JUDGMENT

James v Noordhoek Motors (Pty) Ltd t/a Hyundai Pinetown (NCT/103531/2018/75(1)(b)) [2018] ZANCT 96 (11 October 2018) [2018] ZANCT 96

COURT
National Consumer Tribunal

BEFORE
Tanya Woker

CASE / FILE NUMBER
NCT/103531/2018/75(1)(b)

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CAPE TOWN

Case Number: NCT/103531/2018/75(1)(b)

In the matter between

Eugene James

APPLICANT

and

Noordhoek Motors (Pty) Ltd t/a Hyundai Pinetown

RESPONDENT

Coram:

Prof Tanya Woker – Presiding member

Date of hearing – 9 October 2018

APPLICATION FOR LEAVE TO REFER

JUDGMENT AND REASONS

1. The Applicant is Eugene James (hereinafter referred to as “the Applicant”), a consumer who lodged a complaint with the Motor Industry Ombudsman of South Africa (MIOSA) and the National Consumer Commission (the NCC), in terms of Section 72(1) (a) of the Consumer Protection Act, 2008 (the CPA). At the hearing the Applicant represented himself.

2. The Respondent is Noordhoek Motors (Pty) Ltd t/a Hyundai Pinetown whose physical address is 147 Old Main Road; Pinetown; 3600, and whose postal address is PO Box 414; Pinetown; 3600 (hereinafter referred to as “the Respondent”). There was no appearance at the hearing by the Respondent or its representative.

APPLICATION

3. The application brought before the Tribunal is in terms of section 75(1)(b) of the CPA. The Applicant lodged a complaint with the NCC and received a notice of non-referral in response. The Applicant is now applying for leave from the Tribunal for the complaint to be referred directly to the Tribunal.
4. In accordance with section 75(5)(b), only the application for leave is being considered at this stage by a single member of the Tribunal.
5. This judgment is based on the documents before the Tribunal as well as information provided by the Applicant at the hearing held in Durban on 9 October 2018.

BACKGROUND

6. On 14 July 2015 the Applicant entered into an agreement with the Respondent to purchase a Hyundai Getz 1.4 HS. The Applicant specifically wanted an HS model as this is a high spec model as opposed to a standard model.
7. A high spec model has certain additional features including an additional airbag for the front seat passenger. At the time the Applicant was purchasing the vehicle he was negotiating with two different dealers. The Respondent’s sales representative Santalia Singh (Singh) informed him that she had a HS model for him at a good price. Based on Singh’s assurances the Applicant decided to purchase the vehicle from the Respondent and not the other dealer.
8. The Applicant saw the vehicle before delivery but relied on the assurance from Singh that this was an HS model and not a standard model.
9. However, when the vehicle was delivered to the Applicant late in the day on 14 July 2015, he realised that it was a standard model and not an HS model. In particular, he realised that it did not have the extra airbag for the passenger.
10. The following day, on 15 July 2015, the Applicant contacted Singh and informed her about the problem and she undertook to get back to him and provide feedback. After numerous phone calls to the dealership, which did not yield any results, the Applicant went into the dealership and spoke to Singh and Ryan Rispin (Rispin), the service manager. Rispin informed him that they were still investigating the matter and that he needed to be patient.

11. On 25 September 2015, Singh contacted the Applicant and informed him that he had in fact been sold a Hyundai Getz 1.4 HS model. She informed the Applicant that on 24 September 2015 the Respondent had applied to Transunion for a vehicle verification report. This report confirmed that the vehicle was an HS model.
12. The Applicant did not accept Singh's explanation as the vehicle did not have the extra features of an HS model. He took the vehicle to another dealership who confirmed that the vehicle was not an HS model.
13. The Applicant contacted the Respondent's dealer principal, Mike Torrance (Torrance) who appeared to accept that the Applicant had not been sold an HS model. Torrance stated that he was prepared to take the motor vehicle back and would repay the purchase price less the mileage used.
14. The Applicant did not accept this because he had purchased the vehicle in accordance with a finance agreement with Standard Bank. The Applicant instead wanted the Respondent to replace the vehicle with the vehicle he had actually purchased, namely an HS model and not a standard model.
15. Torrance did not respond to Applicant's numerous attempts to communicate with him.
16. Eventually on 26 October 2016 the Applicant submitted a request for assistance to MIOSA.
17. On 31 October 2016, MIOSA sent an email to Torrance requesting him to respond to the complaint laid by the Applicant within 10 days. Torrance did not respond to the request.
18. On 3 Feb 2017, MIOSA sent another request for a response to Torrance, requesting that he respond within 2 days. Again, there was no response.
19. On 16 August 2017, MIOSA informed the Applicant that it had not received a response from the Respondent and that it had no option but to close its file although it regarded the Respondent's non-response as a contravention of section 82(8) of the CPA. The Applicant then referred the complaint to the NCC.
20. On 29 September 2017, the NCC sent an email to Torrance and the Respondent attaching a copy of the Applicant's complaint.
21. The Respondent replied to this email on 6 October 2017, stating that he was prepared to accept the vehicle back and that he would repay what he paid for the vehicle less mileage used as determined by MIOSA. This response was also sent to the Applicant.
22. The Applicant however was not prepared to accept this solution because he had purchased an HS model and he expected the Respondent to supply him with an HS model.[1] Thereafter there were a number of communications between the Applicant, the NCC and MIOSA but the matter appeared to stagnate.[2]

23. On 8 March 2018, the NCC issued a notice of non-referral stating that the complaint does not allege any facts which, if true, would constitute grounds for a remedy under the CPA.

THE HEARING

24. The Respondent did not appear at the hearing and was also not represented, therefore the matter was heard on a default basis in

accordance with rule 24 of the Tribunal Rules.[3] This rule states that –

“24 (1) If a party to a matter fails to attend or be represented at any hearing or any proceedings, and that party –

- (a) is the applicant, the presiding member may dismiss the matter by issuing a written ruling; or
 - (b) is not the applicant, the presiding member may –
 - a. continue with the proceedings in the absence of that party; or
 - b. adjourn the hearing to a later date
 - (2) The Presiding member must be satisfied that the party had been properly notified of the date, time and venue of the proceedings, before making any decision in terms of subrule (1).”
25. The Tribunal was satisfied that the Respondent was properly notified of the matter and of the hearing.[4]

APPLICANT’S CASE

26. At the hearing the Applicant set out the facts which led to this hearing. These facts have been set out under background above and so it is not necessary to repeat them again.
27. The Applicant also informed the Tribunal that he had consulted the CPA and had attempted, although without any legal representation, to identify those sections of the Act that he believed were relevant to his complaint.
28. These included the following:
- (1) Section 41 (1) (a) which deals with false, misleading and deceptive representations;
 - (2) Section 41 (1) (c) which deals with a failure on the part of the Respondent to correct an apparent misapprehension on the part of the consumer;
 - (3) Section 54 (1) (a) which deals with the right of a consumer to demand quality service; and

- (4) Finally the Applicant referred to section 56 (2) which provides that within six months after the delivery of any goods to the 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 replaced the failed, unsafe or defective goods; or
 - (b) refund to the consumer the price paid by the consumer for the goods.
29. Applicant informed the Tribunal that he had contacted Lydia Bekker (Bekker), the Respondent's customer service manager on two occasions requesting assistance. (Once when he referred the matter to MIOSA and once after he had received the notice of non-referral from the NCC). His intention was to try and resolve this matter because he is stuck with a vehicle which is not the one that he had purchased. Bekker informed that because he had referred the matter to MIOSA and the NCC the Respondent could not assist him any further and that they must just wait for the outcome of this process.

THE LAW APPLICABLE TO THE APPLICATION

29.

30. The question now before the Tribunal is whether or not leave should be granted for the matter to be heard by the Tribunal. The Tribunal can only assess the reasonable prospects of success by

considering whether the CPA finds application in the dispute and may therefore be adjudicated on by the Tribunal.

31. In this regard it must further be borne in mind that the Tribunal is merely considering the application for leave at this stage and is not engaging in a determination of the merits of the main dispute between the parties. At this stage the Tribunal is merely assessing whether the Applicant has made out a case which should be considered by the Tribunal.

32. In determining whether the Applicant should be granted leave to refer

the matter to the Tribunal, the Tribunal must consider the requirements for the granting of "leave". A similar application can be found in the High Court practice, where an Applicant applies for leave to appeal a judgment. It was held in the *Westinghouse Brake and Equipment (Pty) Ltd* – matter, as cited above, that -

"in applications for leave to appeal properly brought before the appropriate court in terms of the old sec 20, read with sec 21 as it then was, the only relevant criteria were whether the applicant had reasonable prospects of success on appeal and whether or not the case was of substantial importance to the applicant or to both him and the respondent."

33. The Tribunal, when considering whether to grant the Applicant leave to refer or not, uses the same test as applied in the High Court for applications for “leave” ..[5]
34. The Tribunal will therefore consider the following factors:
 - (1) whether the matter is of substantial importance to the Applicant; and
 - (2) the Applicant’s reasonable prospects of success with the referral.
35. Based on the lengths the Applicant has gone to in order to attempt to resolve the complaint with the Respondent, and then to lodge the complaint with the MIOSA and the NCC, and ultimately the Tribunal, it is clear that the matter is of substantial importance to the Applicant.
36. The Applicant upon receiving the vehicle noted that same day that the model was incorrect and he contacted the Respondent’s sale representative, Singh, the following day. Over the last three years he has made numerous attempts to resolve this matter. When he referred the matter to MIOSA and the NCC he consistently followed up the complaint in an attempt to receive feedback.
37. When he did not receive the required assistance from these entities
he went back to the Respondent’s customer service division in an attempt to resolve the matter.
38. The Tribunal therefore finds that the requirement that the matter is of substantial importance to the Applicant has been met.
39. The second question, as to the reasonable prospects of success must
be answered by considering whether the substance of the Applicant’s complaint falls within the ambit of the CPA without deciding on the merits of the matter.
40. During the hearing the Applicant addressed the Tribunal on which
sections of the CPA he believed were applicable to the matter and may have been contravened by the Respondent.
41. Although the Applicant has not formulated his case against the Respondent clearly on the papers within the ambit of the CPA, the Tribunal notes that he is unrepresented and has made a concerted effort to apply his mind to the issues.
42. It is a common occurrence in the Tribunal that parties are not represented by legal counsel. It is indeed within the very nature of the Tribunal, that the Tribunal offers a forum where unrepresented parties are able to state their case, without the need for carefully drafted legal argument, and to receive redress where appropriate.[6]
43. The Applicant in this matter is unrepresented. Allegations have been

made against the Respondent regarding whether the correct model of vehicle as contemplated in the agreement was delivered and the manner in which it dealt with the Applicant's complaint. It is clear to the Tribunal that the Applicant has made a concerted effort to apply his mind to possible contraventions of the CPA and that a case can be argued in this regard.

44. In addition, MIOSA sent two communications to the Respondent requesting that it respond to the allegations made by the Applicant. MIOSA is the accredited industry ombud appointed in terms of section 82 (6) of the CPA that is responsible for the resolution of consumer disputes in the motor vehicle industry. Its code of conduct applies to all those in the industry including the Respondent.[7] The Respondent has failed to respond to requests made by the MIOSA, leaving the Applicant with no alternative but to refer the matter to the NCC.

45. The Applicant, based on the allegations made and on the Respondent's

failure to respond to MIOSA's requests for a response to the complaint deserves an opportunity to argue the matter on the merits before a full Tribunal. The Respondent in turn will be granted a full opportunity to submit contrary argument.

CONCLUSION

46. The Tribunal finds that the Applicant has satisfied the requirements for the granting of leave in terms of Section 75(1)(b) of the CPA.

ORDER

47. Accordingly, the Tribunal makes the following order:

- (1) The application for leave from the Tribunal is granted; and
- (2) No order is made as to costs.

48. Since leave to refer the main application to the Tribunal has been granted, the normal rules and time frames for filing an answering affidavit to the main application now apply.

DATED 11 October 2018

Prof T Woker

Presiding Member

[1] See email dated 16 October 2017, page 69 of the documents before the Tribunal.

[2] See pages 72-74 of the documents before the Tribunal.

[3] Rules for the Conduct of Matters Before the National Consumer Tribunal.

[4] See pages 85, 86 and 107 of the documents before the Tribunal for proof of service.

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- [5] This issue has also been considered by the Tribunal in a number of other decisions , see for example, *MV Chauke v Standard Bank et al* NCT/4658/2012/141(1)(P), and *Coertze and Burger v Young* NCTT/7142/2012/73(3)&75(1)(b) CPA and *Esther Rhulani Tshwale (obo True Harvest College) v Faitzan Properties* NCT/12505/2014/75(1)(b) & (2) CPA.
- [6] See *Esther Rhulani Tshwale (obo True Harvest College) v Faitzan Properties* NCT/12505/2014/75(1)(b) & (2) CPA.
- [7] See Government Gazette No 38107 17 October 2014. In accordance with this notice, MIOSA became the accredited industry ombud three months after publication which would have been on 15 January 2015,
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Prepared on 12 October 2026 · Esheria