

SOUTH AFRICA / JUDGMENT

Koloi v Ben Morgenrood Auto CC (NCT/119915/2018/75(1)(b)) [2019] ZANCT 127 (31 July 2019) [2019] ZANCT 127

COURT

National Consumer Tribunal

BEFORE

N Maseti

CASE / FILE NUMBER

NCT/119915/2018/75(1)(b)

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IN

THE NATIONAL CONSUMER TRIBUNAL

HELD

IN CENTURION

Case

Number: NCT/119915/2018/75(1)(b)

In

the matter between:

TSEKO
EDWIN KOLOI
APPLICANT
and
BEN
MORGENROOD AUTO CC
RESPONDENT

Coram:

NOMFUNDO
MASETI – Presiding Member
Date
of Hearing: 01 July 2019

JUDGEMENT**AND REASONS****THE PARTIES**

1. The Applicant is Tseko Edwin Koloï, an adult male consumer, residing in Ficksburg, hereinafter referred to as “the Applicant”. The Applicant represented himself at the hearing; with the assistance of the interpreter, Mr Sole Sekete.
2. The Respondent is Ben Morgenrood Auto CC, a car dealership which conducts its business at the corner of Annan street and Kaolin Street in Carletonville. The Respondent is involved in the sale of Ford branded cars; and provides maintenance and servicing of vehicles under Ford brand.
3. At the hearing, the Respondent was represented by Ms Chinette de Beer, from Hinrichsen Attorneys, instructed by the Respondent.

THE APPLICATION

4. This is an Application by the Applicant for leave to refer his complaint, which was non-referred by the National Consumer Commission (“the Commission”), directly to the National Consumer Tribunal (“the Tribunal”) in terms of section 75(1)(b) of the Consumer Protection Act, 2008 (“the Act”).
5. The Application for leave to refer the matter was filed with the Tribunal on 13 November 2018.
6. Section 75(1)(b) states that:
“(1) 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) ...;or
 - (b) the Tribunal, with leave of the Tribunal.*(2)...*
 - (3) A referral to the Tribunal, whether by the Commission or by a complainant in terms of subsection (1), must be in the prescribed form.
 - (4) The Tribunal—
 - (a) must conduct a hearing into any matter referred to it under this Chapter, in accordance with the requirements of this Act, and the applicable provisions of the National Credit Act pertaining to the proceedings of the Tribunal; and

- (b) may make any applicable order contemplated in this Act or in section 150 or 151 of the National Credit Act, read with the changes required by the context.
- 7. The Commission issued a Notice of Non-referral of the complaint on 27 August 2018, on the basis that the defects in dispute did not warrant a replacement of the vehicle.
- 8. The Tribunal must therefore, in accordance with section 75(1)(b), determine whether or not, to grant leave to the Applicant to refer his complaint.

BACKGROUND

- 9. Although this judgement will not be addressing any merits of the matter, I deem it necessary to set out a brief background and the context of the issues that the Applicant alleges in his application.
- 10. On 11 October 2017, the Applicant purchased a new Ford Ranger 2.2D XLT 4x2 motor vehicle, from the Respondent. On or around 28 October 2017, while driving to Free State province, the Applicant noticed defects in the vehicle after two (2) weeks from date of purchase, and informed the Respondent who agreed to attend to the concerns.
- 11. The defects entailed:
 - 11.1 Loose and swinging loading bin, and may cause safety hazard;
 - 11.2 Rear bumper on the left side of the vehicle was not well aligned;
 - 11.3 Cover underneath the steering wheel showed scratches like a burned plastic material that shrunk and crammed – more of a factory fault; and
 - 11.4 A rattle in the left front door panel.
- 12. The Applicant took the vehicle to the Respondent to be assessed and fixed, and he received the vehicle back after three days, on 2 or 3 November 2017. It is the Applicant's contention that some defects were not addressed, namely: swinging loading bin was still not properly aligned. As a result, Ford SA (Pty) Ltd, the manufacturer of Ford vehicles advised the Applicant to take the vehicle to Ford dealership in Ficksburg for assessment, which the Applicant did.
- 13. Ford Dealer in Ficksburg issued an assessment report, stating that it attempted to adjust the bin and the step without success. The only way to align the loading bin correctly, would be to do modifications to the rear step holes to line up correctly with the load bin.
- 14. The Applicant was unhappy about suggested modifications, and reconditioned vehicle as he purchased a new car. He also asserts that the noise on the left front door was not fixed and that loose parts and rubbles were found on the door.

15. The Applicant demanded a refund of his money paid including the trade-in money of his used vehicle put down as a deposit for the new vehicle. He contended that he cannot pay his first instalment on a repaired vehicle; thus, he asked that the Respondent replace the defective vehicle with a new vehicle.
16. The Respondent refuses to reimburse the Applicant or replace the vehicle as it contends that the faults are insignificant to warrant such relief.
17. The Applicant reported the matter to Ford SA (Pty Ltd ("Ford")), the manufacturer of Ford vehicles who advised the Applicant to refer his dispute with the Respondent to the Motor Industry Ombudsman of South Africa ("MIOSA"). He proceeded to do as advised and lodged a complaint with MIOSA on 15 November 2017.
18. On 18 April 2018, based on lack of response from, and cooperation by the Respondent, MIOSA found the Respondent to have contravened both the South African Automotive Industry Code of Conduct and section 82(8) of the Act.
19. The Applicant subsequently filed a complaint with the National Consumer Commission ("the NCC") following non-compliance of the Respondent with the findings of MIOSA. The NCC has, on 27 August 2018, issued a notice of Non-referral on the basis that "the defects in dispute do not warrant a replacement vehicle or cancellation of the sales agreement".[1]
20. The Applicant thus invoked his right under the Act to apply for leave to refer the matter directly to the Tribunal, the outcome of which is the essence of this judgement.

CONSIDERATION OF THE MERITS OF THE APPLICATION OF LEAVE TO REFER

21. In the matter of *Coertze and Burger v Young*[2], the Tribunal set out factors that must be evaluated in order to ascertain whether to grant leave, namely:
 - a) The Applicant's prospects of success with the referral; and
 - b) Whether the matter is of substantial importance to the Applicant or the Respondent.
22. Firstly, it is undoubtedly clear that the matter is of substantial importance to the Applicant, who as an ordinary consumer without the means to access legal counsel, has gone to great lengths with attempts to resolve the matter with the Respondent at the Carletonville Branch; proceeded to the main dealer in Randfontein; to Ford the manufacturer; to lodge a complaint with MIOSA and the NCC; and to pursue it further with the Tribunal.
23. It is important to keep in mind that one of the crucial aims of consumer protection legislation is access to justice. The clear intention of the Act is to ensure the protection of consumer rights; this is covered intently in numerous sections of the Act.

24. The Act's preamble explains that the promotion and protection of the interests of consumers are the very reasons why the Act was introduced. Furthermore, section 4(2)(b)(2) provides that in any matter brought before the Tribunal or a court in terms of this Act, the Tribunal or court, as the case may be, must—
- (i) promote the spirit and purposes of this Act; and
 - (ii) make appropriate orders to give practical effect to the consumer's right of access to redress, including, but not limited to—
 - (aa) any order provided for in this Act; and
 - (bb) any innovative order that better advances, protects, promotes and assures the realisation by consumers of their rights in terms of this Act.
25. In *Imperial Group (Pty) Ltd t/a Cargo Motors Klerksdorp v Dipico and Another*[3], the court pointed out that “the purposes of the Act are to promote and advance the social and economic welfare of consumers in South Africa by, amongst others, providing a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions; and an accessible, consistent, harmonised, effective and efficient system of redress for consumers.[4]
26. The Applicant in this matter, is precisely the kind of consumer for whom this legislation was enacted and the evidence before the Tribunal indicates just how difficult it has been for him to resolve the problems he has experienced with his motor vehicle.

SUBMISSIONS

AT THE HEARING

27. The hearing for the application for leave took place on 01 July 2019.
28. The Respondent contended in its Answering Affidavit and in various emails exchanged between itself and the Applicant that the defects are insignificant, and do not warrant the relief sought by the Applicant. The Respondent argued that the definition of “defect” in section 53 of the Act is only concerned with:
- “any material imperfection of 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”.*
29. In this definition, the Respondent emphasised “materiality” of the defect, and asserts that the vehicle was in a functioning mode, and was driven by the Applicant. According to the Respondent, most of the defects were resolved, namely: cover under the steering wheel was replaced; noise of left front door and rear bumper was aligned. These defects were fixed within 3 weeks of purchase of this vehicle.

30. The Respondent also argued that the Applicant's relief is impossible because the vehicle in question was repossessed by ABSA Vehicle and Asset Finance, a division of ABSA Group Limited ("ABSA"), and may have been sold. Therefore, if the leave

to refer application succeeds, the Respondent contends that ABSA be joined.

31. The Applicant contends that he is entitled to a refund of a portion of money paid in cash, and from the trade-in of his used vehicle for deposit of the new vehicle. He insists that he was sold a defective vehicle as "new vehicle", that even the Respondent proposed to take it to its main workshop for panel beating.

"Please note as I mentioned to you yesterday, we will do the repairs/work on your vehicle in house. However, if it is needed to take the vehicle to an Approved Panel beater because we have not succeeded to adjust / align the load bin in our Workshop, this might take up to two working days".[5]

32. The Applicant submitted in the hearing that the load bin was never properly aligned, and this is confirmed by Ficksburg Ford dealer who confirmed in writing that for the load bin to be properly adjusted, certain modifications are necessary.[6] According to the Applicant, the swinging load bin presented hazard and an extreme risk of personal injury or property damage to the consumer or to other persons. He contended that the misaligned and swinging loan bin rendered this "new" vehicle less useful and less safe than expected from a new vehicle. Yet he was made to pay a full price while not enjoying benefits of a new vehicle; no refund for the defect in the load bin. It remained with the defect until it was repossessed by ABSA, when the Applicant lost his job in 2018.

33. Notwithstanding the above, the Applicant did not object to the suggestion that ABSA be joined in this application.

34. In view of the above, it is rather apparent, without concluding on the merits, that the cause of action of this matter, involves both the Respondent and ABSA a great degree. ABSA financed the vehicle as "new", and took possession of it. ABSA might be prejudiced if the Tribunal rules in favour of the Applicant on replacement.

35. In *Kransfontein Beleggings (Pty) Ltd v Corlink Twenty Five (Pty) Ltd and Others*[7], the court stated that "the test whether there has been a non-joinder is whether a party has a direct and substantial interest

in the subject matter of the litigation, which may prejudice the party that has not been joined".

36. In my view, due to the critical importance of this matter to both the Applicant and the Respondent, the Applicant should be afforded the opportunity to join ABSA to the proceedings in terms of Section 143 of the National Credit Act of 2005, read with Rule 16 of the Rules of Tribunal.

ORDER

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

37.1 The application for leave is granted;

37.2 The Applicant is hereby instructed to file a joinder application for ABSA, and serve upon them all papers no later than 30 (thirty) days before the date set down for hearing the merits of this matter before the Tribunal; and

37.3 No order is made as to costs.

DATED 31 JULY 2019 AT CENTURION.

[signed]

Ms N Maseti

Presiding Tribunal Member

[1] Refer to Commissioner's letter attached to the Notice of Referral, pg 27 of the file.

[2] NCT/7142/2012/75(1)(b)&(2).

[3] Northern Cape Division Kimberley Case No 1260/2015 handed down on 1 April 2016.

[4] See para 25 of the judgment where the court quoted s3 (1) (g)-(h) of the Act.

[5] Email dated 1 November 2017 from Benita Schutte, a Service Manager of the Respondent

[6] Ficksburg Ford was recommended by Ford Company SA (Pty) Ltd to the Applicant

[7]

[2017] ZASCA 131

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