

SOUTH AFRICA / JUDGMENT

Krumm v Park An Ad CC trading as Autohaus Angel (NCT/115345/2018II5(1)(b)) [2019] ZANCT 165 (6 July 2019)

[2019] ZANCT 165

COURT

National Consumer Tribunal

BEFORE

J Simpson

CASE / FILE NUMBER

NCT/115345/2018II5(1)(b)

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IN

THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case

number: NCT/115345/2018II5(1)(b)

In

the matter between:

CHARL
PIETER KRUMM
APPLICANT
And
PARK
AN AD CC
Trading
as AUTOHAUS ANGEL
RESPONDENT
Coram
Adv.
J Simpson - Presiding Tribunal member Date
of Hearing - 7 June 2019

RULING**AND REASONS ON LEAVE TO REFER****THE PARTIES**

1. The Applicant in this matter is Chari Pieter Krumm, an adult male, residing in Durbanville in the Western Cape (the "Applicant"

or "Mr Krumm"). At the hearing Mr Krumm was represented by Adv J Engelbrecht of the Cape Bar; instructed by Krumm Attorneys.

From the papers it appears that Mr Krumm is an attorney himself.

2. The Respondent is Park an Ad CC which is trading as Autohaus Angel (the "Respondent" or "Autohaus"). Mr Krumm did not provide any further detail or documentation regarding the Respondent. The Respondent appears to be a dealer in pre-owned vehicles. The physical address of Autohaus is Willie Van Schoor Avenue, Oakdale, Belville, in the Western Cape. At the hearing the Respondent was represented by Mr R Titus of Thomson Wilks Inc. Attorneys.

APPLICATION TYPE

3. This is an application in terms of Section 75(1)(b) of the Consumer Protection Act, Act 68 of 2008, (hereinafter referred to as "the CPA").
4. 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."

JURISDICTION

5. Section 75(5) of the CPA states that:

"The Chairperson of the Tribunal may assign any of the following matters arising in terms of this Act to be heard by a single member of the Tribunal, in accordance with section 31(1)(a) of the National Credit Act:

(a)...

(b) an application for leave as contemplated in subsection (1)(b)"

6. Accordingly, the Tribunal has jurisdiction to hear this application for leave to refer a complaint to the Tribunal as contemplated under section 75(1)(b).
7. A single member of the Tribunal may hear the application in accordance with section 75(5)(b) of the CPA.

BACKGROUND

8. On 7 July 2017 Mr Krumm purchased a pre-owned 2010 Range Rover 3.6 Tdi VB from Autohaus. He was informed by the salesman that the vehicle had a full service history. The proof of this would be provided to him at a later stage. Mr Krumm then purchased the vehicle on this understanding. Within three days after taking delivery the vehicle's transmission appeared to be faulty. After numerous unsuccessful attempts by Mr Krumm to have Autohaus repair the fault, it eventually agreed. The vehicle was then repaired by a transmission specialist company. Upon return of the vehicle, Mr Krumm noticed an oil leak on the vehicle. The transmission specialist company denied responsibility for the leak. The vehicle's gearbox linkage then broke and had to be repaired. The vehicle's alternator broke and also had to be repaired. Thereafter the vehicle's coolant warning light came on and remained on. All these faults occurred within 6 months of purchasing vehicle. The gearbox linkage, alternator and coolant problems occurred within three months after the vehicle's

transmission problem was repaired.

9. Mr Krumm was presented with the service history of the vehicle some three months after purchase. The service history indicated that the vehicle did not have a full service history as represented and had not been serviced for 75 000 kilometres.
10. On 13 October 2017 Mr Krumm requested Autohaus to take the vehicle back and refund the purchase price to him. Autohaus refused the request.
11. On 1 February 2018 Mr Krumm lodged a complaint with the Motor Industry Ombudsman of South Africa (MIOSA). MIOSA issued a recommendation

dated 2 May 2018. The recommendation was that Mr Krumm did not have the vehicle serviced within the 12 000 kilometre period required and this contributed to the engine failure. Other problems with the vehicle occurred outside the 6 month period after purchase. It therefore found that Autohaus was not responsible for refunding the purchase price.

12. On 8 May 2018 Mr Krumm lodged a complaint with the National Consumer Commission (NCC). The NCC issued a Notice of non-referral dated 27 August 2018. The letter accompanying the Notice essentially stated that the complaint was subject to a dispute of fact, which the NCC could not resolve.
13. On 17 September 2018 Mr Krumm lodged the application with the Tribunal for leave to refer the dispute to the Tribunal. In his application,

Mr Krumm states that he wants the sale agreement cancelled, repayment of all the instalments he paid to Nedbank and repayment of all expenses incurred.

14. On 13 November 2018 Autohaus filed an answering affidavit and application to condone the late filing thereof. Mr Krumm filed a replying affidavit and affidavit opposing the application for condonation. In a judgment dated 7 January 2019 a Member of the Tribunal granted the condonation for the late filing.
15. Autohaus essentially submits that Mr Krumm is responsible for the damage to the vehicle due to him not servicing it. It submits the vehicle was advertised as having a "service history", not a "full service history". No representation was made that the vehicle had a "full service history". The vehicle was delivered to Mr Krumm without any oil leaks or problems and Mr Krumm is responsible for the maintenance related issues which occurred. Mr Krumm attempted to cancel the purchase of the vehicle a year after taking delivery.

THE HEARING

16. At the hearing both parties made oral submissions. The Applicant submitted written heads of argument.
17. The Applicant submitted a supplementary affidavit at the hearing which had been filed the night before. The supplementary affidavit by Mr Krumm stated that there was a typographical error on his founding affidavit. Paragraph 120) of the affidavit states that he began the process of requesting the Respondent to take the vehicle back on "13 October 2018". The correct date is however "13 October 2017." E-mail correspondence between the parties was attached to support the date in question.
18. The Respondent objected to the submission of the supplementary affidavit and made various submissions in this regard.
19. The Presiding Member held that the Rule 15 of the Rules was applicable. The proposed amendment to the documents was opposed by the

Respondent. The Applicant would therefore have to apply for a postponement of the matter, for a full hearing to be held on the

application for amendment. The Respondent would be entitled to file an answering affidavit opposing the application. The Applicant chose to abandon the submission of the supplementary affidavit. The Applicant will present the appropriate evidence at the main hearing of the matter.

20. The Applicant essentially submitted that the vehicle was defective and the defects occurred within six months of purchase. The Applicant was therefore entitled to a refund of the purchase price. A material misrepresentation was made regarding the service history of the vehicle. This constituted prohibited conduct.

21. The Respondent submitted that the defects in the vehicle, only if proven, were in any event so minor that they were not material. The Applicant was therefore not entitled to a refund. The Applicant was required to physically return the vehicle to the Respondent within the six month period and leave it with the Respondent. He did not do so and was therefore not entitled to the relief sought. Merely demanding that the purchase price be refunded was not sufficient.

APPLICATION FOR LEAVE

22. In terms of section 75(1)(b) of the CPA, the Applicant may only refer the matter directly to the Tribunal with leave of the Tribunal.
23. In determining whether the Applicant should be granted leave to refer the matter directly to the Tribunal, the Tribunal must consider the requirements for the granting of "leave".
24. In *Westinghouse Brake and Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd*[1] it was held 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."

25. The Tribunal will therefore, when considering whether to grant the Applicant leave to refer the matter or not, use the same test as applied in the High Court for applications for "leave" and will consider:

25.1 The Applicant's reasonable prospects of success with the referral; and

25.2 Whether the matter is of substantial importance to the Applicant, the Respondent or both.

26. It is clear that the matter is of substantial importance to the Applicant. The Applicant has gone to great lengths to pursue his

complaint and the value of the goods is significant. Both parties agreed at the hearing that the matter was of substantial importance.

27. In considering the reasonable prospects of success, it must be noted that the Applicant provided a frustrating and disappointing lack of detail in his application. For example, there is no evidence of the sale agreement between the parties, no evidence of the dates on which the defects occurred and how they were repaired, the kilometres travelled with the vehicle at each stage etc. The Tribunal has not been provided with a complete and comprehensive application.

28. However, the evidence submitted does at least provide the most basic elements necessary to support a claim under the CPA. The Applicant submitted that the defects in the vehicle occurred within 6 months of purchase. The defects appear to be of a material nature, which renders the vehicle less acceptable than one would reasonably expect. If a finding is made that the vehicle was defective, then the Applicant would be entitled to a refund, replacement or repair of the vehicle, in accordance with section 56 of the CPA.
29. The Applicant has further made out a reasonable basis for alleging that a material misrepresentation was made regarding the service history of the vehicle. Should this be proven as prohibited conduct under section 41 of the CPA, the Tribunal could impose an administrative fine.
30. The Respondent's submissions and answering affidavit do not provide any basis for a finding that the claim does not potentially fall within the ambit of the CPA and should not be heard.

CONCLUSION

31. The Tribunal finds that the matter is of substantial importance to the parties and there is a reasonable prospect of the Applicant succeeding in his claim against the Respondent.

ORDER

32. Accordingly, the Tribunal makes the following order -
- 32.1 The Applicant's application for leave to refer is granted; and
- 32.2 There is no order as to costs.

THUS DONE IN CENTURION ON THIS 7TH DAY OF JUNE 2019

[signed]

Adv. J. Simpson

Presiding Tribunal Member

[1] 1986 (2) SA 555 (A). Also see *Coertze and Burger v Young* NCT/7142/2012/75(l)(b)&(2)

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