

SOUTH AFRICA / JUDGMENT

Kwazulu Natal Consumer Protector and Another v Bosch Customer Service Centre Empangeni (KZNCT0G/2022) [2022] ZACONAF 2 (15 August 2022)

[2022] ZACONAF 2

COURT

Consumer Affairs Court

BEFORE

B. Dumisa, N. Cawe, P. Ndlovu

CASE / FILE NUMBER

KZNCT0G/2022

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IN

THE KWAZULU NATAL CONSUMER TRIBUNAL

HELD

IN RICHARDS BAY

Case

Number:

KZNCT0G/2022

In

the matter between: KWAZULU
NATAL CONSUMER PROTECTOR FIRST
PLAINTIFF
STHEMBISO
MABIKA
(Name
of
the
Consumer) SECOND
PLAINTIFF
and
BOSCH
CUSTOMER
SERVICE
CENTRE
EMPANGENI RESPONDENT

Coram: Prof
B. Dumisa: Chairperson &
Presiding Member
Ms
N. Cawe: Member
Ms
P Ndlovu: Member
Date
of Hearing: 29 June
2022
Date
of Judgment: 15 August 2022

JUDGEMENT

AND REASONS

PLAINTIFFS FIRST PLAINTIFF

1. The First Plaintiff in this matter is the OFFICE OF THE KWAZULU NATAL CONSUMER PROTECTOR, established in terms of Section 5 of the KwaZulu Natal Consumer Protector Act 04 of 2013 (the "Act") (hereinafter referred to as "the First Plaintiff"), with Head Offices at 270 Jabu Ndlovu Street, Pietermaritzburg, in the Province of KwaZulu-Natal.
2. The Office of the KwaZulu-Natal Consumer Protector falls under the Department of Economic Development, Tourism and Environmental Affairs (EDTEA) in the Province of KwaZulu-Natal.
3. At the hearing, the First Plaintiff was represented by Mr R Moodley, the Deputy Director in the Office of the Consumer Protector KwaZulu-Natal, in the employ of the First Plaintiff.

4. The First Plaintiffs Investigation Report was deposited to by Ms Nombulelo Zondi, an Assistant Director in the complaints handling unit within EDTEA at King Cetshwayo (Richards Bay) District Office, where she is also appointed as an Investigator by the First Plaintiff.

SECOND PLAINTIFF

5. The Consumer, who is the Second Plaintiff in this matter is STHEMBISO MABIKA, a major male, who resides in Ngwelezane, Empangeni, in the Province of KwaZulu-Natal (hereinafter referred to as "the Second Plaintiff" or "the Consumer").
6. The Second Plaintiff lodged his complaint against the Respondent on the 28th of February 2022.
7. At the hearing, the Second Plaintiff represented himself.

RESPONDENT

8. The Respondent is BOSCH CUSTOMER SERVICE CENTRE, Empangeni, with its principal place of business situated at 104 Dunford Road, Duffs Road, Empangeni, which address it has chosen as its domiciliumcitandi

et executandi (hereinafter referred to as "the Respondent").

9. The Respondent was represented by Messrs Chris Naicker and Yakoo, and Mr Robin Naidoo on behalf of the Retail motor Industries, RMI.

APPLICATION TYPE AND ORDER SOUGHT

10. This KZN Consumer Tribunal (hereinafter referred to as "the Tribunal") derives the jurisdiction for hearing this matter under Section 21 of the KwaZulu-Natal Consumer Protection Act, 4 of 2013 (the KZNCPA). This matter is in terms of Section 4(5)(a), Section 15, Section 54(1) and Section 65(2)(b) and (c), of the Consumer Protection Act No 68 of 2008 (the CPA).
11. The Second Plaintiff sought an order against the Respondent in the following manner:
 - 11.1 Declaring that the Respondent's conduct is prohibited conduct, in contravention of Section 4(5)(a), Section 15, Section 54(1), and Section 65(2)(b) and (c) of the Consumer Protection Act 68 of 2008 (the "CPA");
 - 11.2 Directing the Respondent to refund the Second Plaintiff the total costs paid by the Second Plaintiff for the initial repairs in the sum of R18000.00 {Eighteen thousand Rand};
 - 11.3 Directing the Respondent to pay the total costs charged by Mayfair Gearbox Zululand at the time of making of the order for the repairs of the vehicle;

11.4 Directing the Respondent to pay an administrative penalty of R250 000.00 (TWO HUNDRED AND FIFTY THOUSAND RAND) and/or making any other appropriate order contemplated under Section 4(2)(b)(ii) of the CPA;

and

11.5 Any further and/or alternate relief.

MATTERS TO BE DECIDED

12. The Tribunal has to decide whether:

12.1 The Respondent breached the provisions of the Act as alleged; and

12.2 The appropriate sanction.

BACKGROUND

13. The Second Plaintiff gave the following details when he lodged his complaint against the Respondent with the First Plaintiff.

13.1 The Second Plaintiff took his BMW 328i, with registration number [...]

, to the Respondent on the 31st of August 2021, as his vehicle was consuming excessive water;

13.2 The Second Plaintiff said he reported to the Respondent that his vehicle was under warranty; and he alleges that the Respondent advised that the total costs related to all the necessary repairs would be claimed from the warranty. He claimed that this gave him the peace of mind that his vehicle was in safe hands and furthermore that it would be repaired at no cost to him as all claims would be made against the warranty;

13.3 The Second Plaintiff alleged that when he checked on progress with his vehicle at all times, he alleged that the Respondent always stated that there's nothing to be concerned about.

13.4 The Second Plaintiff was later advised that the oil cooler was problematic and needed to be replaced. He was further informed, in a conversation, that the Respondent only replaces the top oil cooler and are not able to replace the bottom oil cooler as that must be done by a gearbox specialist.

13.5 The Second Plaintiff was however surprised when the Respondent later changed their stance, and WITHOUT SEEKING FURTHER NEW CONSUMER APPROVAL, decided to work on the bottom oil cooler themselves. This

prompted the Second Plaintiff to write as follows

"Later this changed as they did the work themselves which makes me to believe that they attempted work they were not qualified or experienced to do, it could be said my car was a trial work for them".

13.6 The Second Plaintiff collected his vehicle from the Respondent on the

9th of September 2021, where he was told the car had been test driven and everything found to be well after the repairs. He was advised to bring back the car after 1000kms for a follow-up.

13.7 The very following day after collecting the car, on the 10th of September 2021, he informed the Respondent that the car had mechanical problems and could not move, because no gears could be selected. The Respondent towed the car to Mayfair Gearbox Repairs workshop, where it remains to date.

13.8 The Second Plaintiff complains that the Respondent was paid a total amount of R26 000.00 (TWENTY- SIX THOUSAND RAND), that is, R8 000.00 (EIGHT THOUSAND RAND) by the Warranty cover and R18 000.00 (EIGHTEEN THOUSAND RAND) directly by the Second Plaintiff, yet they did not do a proper job.

13.9 Mayfair Gearbox Zululand quoted, on the 21st of October 2021, R96 823.23 (NINETY-SIX THOUSAND EIGHT HUNDRED AND TWENTY-THREE RAND AND TWENTY-THREE CENTS) in total for the repairs. The warranty will not

pay for these costs as the Respondent was paid by the warranty for the initial repairs done on the 9th of September 2021.

13.10 Mayfair Gearbox would not commence with the gearbox repairs, after stripping it, as the Warranty would not cover the costs of repairs, and the Second Plaintiff was also not prepared to pay for such.

13.11 On the 15th of December 2021 the Second Plaintiff lodged a complaint with the Motor Industry Ombudsman of South Africa (MIOSA) against the Respondent. The MIOSA investigation was conducted from the 15th of December 2021 to the 16th of February 2022. After doing their own investigations MIOSA arrived at the following conclusions:

13.11.1 The Respondent had not followed good engineering practice principles by removing the gearbox of the Second Plaintiff's car.

13.11.2 In terms of Section 57 of the CPA, the Respondent is deemed to have warrantied their work for at least three months after the date of such repairs;

13.11.3 In terms of Section 54(2) of the CPA, the Second Plaintiff is entitled to either require the Respondent to remedy any defect in the quality of the services performed or products supplied, or refund of the consumer a reasonable portion of the price paid for the services performed and goods supplied, having regard to the extent of the failure.

13.11.4 The Respondent simply ignored the recommendations of MIOSA.

13.12 On the 28th of February 2022, the Second Plaintiff finally decided to officially lodge this complaint with the First Plaintiff.

THE FIRST PLAINTIFF'S EFFORTS TO RESOLVE THIS COMPLAINT

14. The First Plaintiff sent an email, dated the 10th May 2022, to the Respondent informing the latter about the complaint lodged against him by the Second Plaintiff.

14.1 The Respondent failed to cooperate with the First Plaintiff, in the same way as they failed to adhere to the MIOSA recommendations.

14.2 Based on the Respondent's failure to co-operate with the First Plaintiff, the latter decided to refer this matter to the KZN Consumer Tribunal for adjudication.

THE HEARING

15. The hearing was held on 29 June 2022

15.1 The Hearing was held at the King Cetshwayo (Richards Bay) District Offices of the KwaZulu-Natal Department of Economic Development Tourism and Environmental Affairs (EDTEA).

15.2 The Respondent had not formally indicated their intention to defend the matter, but two people came to defend them:

15.2.1 Chris Naicker

15.2.2 Yakoo

15.2.3 Robin Naidoo from the Retail Motor Industries, RMI

15.3 At the Hearing, the First Plaintiff and the Second Plaintiff confirmed the details of the complaint as contained under Background above. The First Plaintiff also brought Ms Yumna Hassim, who was a Sales Director at Mayfair Gearbox Zululand for six years. The two major submissions of Ms Hassim were that:

15.3.1 She was not sure if the Respondent was competent to do the transmission (gearbox) repairs;

15.3.2 She could not even comment on the expertise of Bosch on the changing of the oil coolers;and

15.3.3 The Second Plaintiff did authorize Mayfair Gearbox Zululand to strip the gearbox.

APPLICABLE SECTIONS OF THE CONSUMER PROTECTION ACT 68 of 2008

16. Section 4 Realisation of consumer rights

"(1)

(2)

(3)

(4)

(5) In any dealings with a consumer in the ordinary course of business, a person must not -

- (a) engage on any conduct contract to, or calculated to frustrate or defeat the purposes and policy of this Act.
17. Section 15 Pre-authorisation of repair or maintenance services
- (1) ...
 - (2) A service provider to whom this section applies, must not charge a consumer for the supply of any goods or service contemplated in subsection (1), unless -
 - (a) the supplier or service provider has given the consumer an estimate that satisfies the prescribed requirements, and the consumer has subsequently authorised the work; or
 - (b) the consumer, in writing, or by another recorded manner or form, has -
 - (i) declined the offer of an estimate, and authorised the work; or
 - (ii) pre-authorised any charges up to a specified maximum, and the amount charged does not exceed that maximum.
 - (3) A service provider to whom this section applies must not charge a consumer for preparing an estimate required in terms of subsection (2), including
 - (a) Any cost of performing any diagnostic work, disassembly or reassembly required in order to prepare an estimate; or
 - (b) Any damage to or loss of material or parts in the course of preparing an estimate, unless, before preparing the estimate the service provider has disclosed the price for preparing that estimate, and the consumer has approved it.
18. Section 54 Consumer's rights to demand quality service
- (1) When a supplier undertakes to perform any services for or on behalf of a consumer, the consumer has a right to -
 - (a) the timely performance and completion of those services, and timely notice of any unavoidable delay in the performance of the services;
 - (b) the performance of the services in a manner and quality that persons are generally entitled to expect;
 - (c) the use, delivery or installation of goods that are free of defects and of a quality that persons are generally entitled to expect, if any such goods are required for performance of the services; and

- (d) the return of any property or control over any property of the consumer in at least as good a condition as it was when the consumer made it available to the supplier for the purpose of performing such services, having regard to the circumstances of the supply, and any specific criteria or conditions agreed between the supplier and the consumer before or during the performance of the services.
- (2) If a supplier fails to perform a service to the standards contemplated in subsection (1), the consumer may require the supplier to either -
 - (a) remedy any defect in the quality of the services performed or goods supplied; or
 - (b) refund to the consumer a reasonable portion of the price paid for the services performed and goods supplied, having regard to the extent of the failure.
- 19. Section 57 Warranty on repaired goods
 - (1) A service provider warrants every new or reconditioned part installed during any repair or maintenance work, and the labour required to install it, for a period of three months after the date of installation or such longer period as the supplier may specify in writing.
 - (2) A warranty in terms of this section -
 - (a) Is concurrent with any other deemed, implied or express warranty;
 - (b) Is void if the consumer has subjected the part, or the goods or property in which it was installed, to misuse or abuse; and abuse; and
 - (c) does not apply to ordinary wear and tear, having regard to the circumstances in which the goods are intended to ordinarily be used.
- 20. Section 65(2)(b) and (c) Supplier to hold and account for consumer's property
 - (1)
 - (2) When a supplier has possession of any prepayment, deposit, membership fee, or other money, or any other property belonging to or ordinarily under the control of a consumer, the supplier -
 - (a)
 - (b) in the handling, safeguarding and utilisation of that property, must exercise the degree of care, diligence and skill that can reasonably be expected of a person responsible for managing any property belonging to another person; and
 - (c) is liable to the owner of the property for any loss resulting from a failure to comply with paragraph
 - (a) or (b).
- 21. Section 67(1) Return of parts and materials

- (1) When a supplier is authorised to perform any service to any goods or property belonging to or ordinarily under the control of the consumer, the supplier must -
 - (a) Retain any parts or components removed from any goods or property in the course of any repair or maintenance work;
 - (b) Keep those parts or components separate from parts removed from other goods or property; and
 - (c) Return those parts or components to the consumer in a reasonably clean container, Unless the consumer declined the return of any such parts or materials.

CONSIDERATION OF THE EVIDENCE BEFORE THE TRIBUNAL

22. It is not in dispute that the Second Plaintiff's car had a leaking radiator bottle problem. For example, sometime in late August 2021, in Durban, the Second Plaintiff noticed there was no water in the radiator bottle. He filled the water and drove to Empangeni without any problems.

22.1 The following day he noticed there was no water again in the radiator;

22.2 He contacted his insurance about it, who advised him to take it to the nearest RMI approved repair workshop.

22.3 It was on these grounds he took the car to the Respondent's repair workshop.

23. The main dispute is around what transpired between the Second Plaintiff and one Zamo, a service advisor at the Respondent's repair workshop. According to the Second Plaintiff, this service advisor made the following comments about the water leaks

23.1 If it is the top bottle which has a leak, no problem, they will sort it out "You must pray that this is the case;

23.2 But, if it the bottom one, on the gearbox, they will take it to Mayfair Gearbox Zululand;

24. Contrary to what was said by the Respondent's service advisor, the Respondent chose to also work on the bottom bottle, on the gearbox, for which they had no expertise.

24.1 It is on this point that MIOSA opined that the Respondent had not followed good engineering practice principles by removing the gearbox of the said vehicle, and stripping the components, and cleaning them from any contaminated oil; and

24.2 Global Motor Administrators, appointed by the Warranty Cover service providers, blamed the problems with the car on "poor workmanship" or "a faulty water cooler".

25. The Second Plaintiff had the legitimate expectation that his car, that he collected from the Respondent on the 9th of September 2022 after repairs done by the latter, had an implied warranty to drive well for at least three months in terms of Section 57 of the CPA. The recommendations of MIOSA, that the Respondent simply ignored, will therefore need to be seriously taken into consideration when arriving at a just decision on this matter.

CONSIDERATION OF THE ORDERS APPLIED FOR

26. There was a prayer for the Respondent's conduct to be declared prohibited conduct in contravention of various provisions of the CPA.

26.1 When the Respondent refused to cooperate with the First Plaintiff, and also refused to implement the Recommendations of MIOSA, their behaviour was deliberately calculated to frustrate or defeat the purposes and policy of the CPA, namely, the realization of consumer rights. This was in contravention of Section 4(5)(a) of the CPA;

26.2 The Second Plaintiff did not give any pre-authorisation for the Respondent to interfere with the gearbox of the Second Plaintiffs car; hence, when the Respondent did so, this had catastrophic

consequences as described by the Global Motor Administrative. This was in contravention of Section 15 of the CPA;

26.3 Having been assured that the Second Plaintiffs car was going to be sent to Mayfair Gearbox Zululand for gearbox repairs; the Respondent therefore betrayed the Second Plaintiffs trust when they decided to interfere with the latter's gearbox, contrary to the performance that the Second Plaintiff generally expected from the Respondent. This was in contravention of Section 54(1); and

26.4 The Respondent's handling of the repairs to the Second Plaintiffs car has been blamed for the Second Plaintiff's car problems subsequent to the 9th of September 2021. This was in contravention of Section 65(2)(b) and (c).

27. The First Plaintiff made a prayer for the Respondent to refund the Second Plaintiff the total costs paid the latter for the initial repairs in the sum of R18 000.00 (EIGHTEEN THOUSAND RAND). This is a reasonable prayer, as the Respondent's quality of repairs did not meet the expected standards. This was in contravention of Section 54(2).

28. Directing the Respondent to pay the total costs charged by Mayfair Gearbox Zululand at the time of making of the order for the repairs to the vehicle.

28.1. There were two serious contraventions of Section 15(3) that form the basis for this prayer:

28.1.1 The Respondent took the Second Plaintiff's car to Mayfair Gearbox Zululand and left it there without first clearing with the latter the terms and conditions of leaving the car there. The findings by the Global Motor Administrators were that the primary cause of the gearbox failure were the contaminated oil which was caused by a suspected faulty oil cooler installed by the Respondent or poor workmanship. It precisely on these grounds that the Respondent, instead of the Second Plaintiff, is responsible for settling the Mayfair Gearbox Zululand.

28.1.2 Whilst it is accepted that the Second Plaintiff did expressly authorize Mayfair Gearbox Zululand to strip the gearbox, there was however no evidence to prove that the latter did specifically disclose to the Second Plaintiff the price for preparing the quotation through such a gearbox stripping. This was in contravention of Section 15(3) of the CPA.

28.1.3 In a recent decided case at the National Consumer Tribunal, NCT213193/2021/75(1)(b) Chane Van Eyssen v Race-Tee Motorsport (Pty) Ltd, the Respondent refused to release the

Applicant's car on grounds that the latter refused to pay for the storage fees incurred whilst the Applicant's car had been stripped

without the Respondent's prior disclosure of the quotation price before stripping this car. The Applicant approached the NCT for

redress. The NCT ruled in favour of the Applicant in terms of Section 15(3) of the CPA, and ordered the Respondent to return the

Applicant's vehicle to the Applicant fully assembled and in the condition the Applicant left it with the Respondent, and at no cost to the Applicant.

28.1.4 In the present case of, Sthembiso Mabika v Bosch Customer Service Centre Empangeni, the Second Plaintiff has exercised his right to lodge the complaint against the Respondent, because of the latter's culpability. It is on these grounds that whatever reasonable expenses Mayfair Gearbox Zululand may be entitled to must be paid by the Respondent.

28.1.5 It is worth highlighting though that this judgment cannot pronounce on the R96 823.39 (NINETY- SIX THOUSAND EIGHTY HUNDRED AND TWENTY-THREE RAND AND THIRTY NINE-CENTS) total quotation by Mayfair Gearbox Zululand, that was rejected by the Generic Insurance Company, firstly because the First Plaintiff and the Second Plaintiff did not expect the KZN Consumer Tribunal to pronounce on this; and secondly because the full repairs of the gearbox are not in contention here.

28.2 Subsequent to the Respondent settling the total costs charged by Mayfair Gearbox Zululand;

28.3 The Second Plaintiff must, with seven calendar days, collect the car from the Mayfair Gearbox Repairs IN THE CONDITION IT WAS AT THE TIME THE RESPONDENT TOWED IT THERE,

that is, with the gearbox reassembled to the condition where it was, as in line with both Sections 15 and Section 67 of the CPA.

29. Directing the Respondent to pay an administrative penalty of R250 000.00 (TWO HUNDRED AND FIFTY THOUSAND RAND) and / or making any other appropriate order contemplated under section 4(2)(b)(ii) of the CPA. Whilst the imposition of an administrative penalty is appropriate under the circumstances; it may not necessarily be appropriate imposing such a higher administrative fine given that there is no proof that the Respondent profited significantly from their contraventions of the CPA.

ORDER

Accordingly, the Tribunal makes the following order:

30. The Respondent is declared to have engaged in prohibited conduct in contravening Section 4(5)(a), Section 15, Section 54(1), Section 57, Section 65(2)(b) and (c), and Section 67 of the Consumer Protection Act No 68 of 2008;
31. The Respondent is ordered to refund the Second Plaintiff the amount of R18 000.00 (EIGHTEEN THOUSAND RAND) paid by the Second Plaintiff for the initial repairs;
32. In line with Paragraph 28 of this judgment, the Respondent is ordered to pay the total costs charged by Mayfair Gearbox Repairs at the time of making of the order for the Repairs to the vehicle; and for Mayfair Gearbox Zululand to return the car to the Second Plaintiff subsequent to such payment by the Respondent.
33. The Respondent is ordered to pay an administrative penalty of R50 000.00 (Fifty Thousand Rand) to the bank account of the KwaZulu-Natal Provincial Revenue Fund: Banking Details are as follows:

BANK NAME ABSA

ACCOUNT NAME KZN PROV GOV- TREASURY

ACCOUNT TYPE CHEQUE ACCOUNT

ACCOUNT NUMBER : [...]

BRANCH NAME ABSA

BUSINESS CENTRE - KZN

BRANCH CODE 630495

Reference: KZNCT06/2022 and Name of Person or Business making payment

34. The total amounts payable within 60 (SIXTY) days of the date of this

judgment.

35. There is no order as to costs.

DATED ON THIS 15th DAY OF AUGUST 2022

Prof B. Dumisa Chairperson

Ms. N. Cawe (Member) and Ms. P. Ndlovu (Member) concurred

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