

SOUTH AFRICA / JUDGMENT

Mafadza v Bidvest McCarthy Volkswagen Arcadia (Pty) Ltd (NCT/122593/2018/75(1)(B)) [2019] ZANCT 45 (10 March 2019) [2019] ZANCT 45

COURT

National Consumer Tribunal

BEFORE

Bonke Dumisa

CASE / FILE NUMBER

NCT/122593/2018/75(1)(B)

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case Number: NCT/122593/2018/75(1) (b)

In the matter between

MARIA MAFADZA

APPLICANT

and

BIDVEST McCARTHY VOLKSWAGEN ARCADIA (PTY) LTD RESPONDENT

Coram:

Prof Bonke Dumisa – Presiding member

Date of hearing – 8 March 2019

APPLICATION FOR LEAVE TO REFER

JUDGMENT AND REASONS

THE PARTIES

1. The Applicant is MARIA MAFADZA (hereinafter referred to as “the Applicant”), a consumer who resides at 1578 ... extension 12, in Pretoria, in the Gauteng Province. She lodged a complaint with the Motor Industry Ombudsman of South Africa (“the 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 herself.
2. The Respondent is BIDVEST McCARTHY VOLKSWAGEN ARCADIA (PTY) LTD (hereinafter referred to as “the Respondent”), a company with registration number 1991/003245/06, operating the business of buying and selling motor vehicles, from 470 Stanza Bopape Street (formerly Church Street), Arcadia, in Pretoria, in the Gauteng Province. At the hearing the Respondent was represented by Mr Ian Jan Van Niekerk.

THE APPLICATION

3. The application was brought before the Tribunal is in terms of section 75(1)(b) of the CPA. The Applicant lodged a complaint with the National Consumer Commission (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 parties at the hearing held in Centurion on the 8th of March 2019.

BACKGROUND

6. The Applicant purchased a 2017 Volkswagen Tiguan 1.4 TSI Comfort Line new motor vehicle (the vehicle) from the Respondent at a total purchase price of R498 751.54 in terms of a purchase agreement dated 02 December 2017 which was signed by the Applicant as purchaser.
7. The Applicant alleges that the process of purchasing this vehicle commenced in November 2017 when she, directly on her own or through her friend Ms Maduwa, approached various outlets for quotations for a Tiguan. She supplied the dealers with the full specifications of what she expected from the car, one of those specifications being a factory installed sound system (as she was already driving a VW Polo with a good sound system).
8. The Applicant was told that the Arcadia showroom did not have a car with her specification; and that a car with her specifications would be ordered for delivery from Witbank.
9. The Applicant took delivery of the vehicle, from Arcadia, on 04 December 2017; and alleged that because of the late delivery of the car, she did not get adequate time for the full inspection of the car.

10. The Applicant says the person responsible for the release of the car rushed through most of the things; and specifically did not play the Compact Disc player before the handover of the car, purportedly on grounds that he did not have a CD to use.
11. The Applicant says she did not drive her car around prior to leaving
for Limpopo Province weeks later. She alleged that she parked this car in her garage, without moving it, for weeks until her trip to Limpopo around Christmas time.
12. The Applicant says she only discovered weeks later when she was driving to Limpopo Province that the CD player was not working.
13. The Applicant could only report the problem with the CD player upon
her return to the Gauteng Province. The Applicant said she reported this on the 4th of January 2018; but the Respondent said the Applicant only approached them about this on the 23rd of January 2018.
14. The car was booked for a CD player fault inspection on the 5th of February 2018.
15. The Respondents later told her that the VW SA had said they would not cover this CD player fault problem purportedly on grounds that she had tampered with the CD player installations. The Applicant was never given the official report that alleged that she had tampered with the CD player.
16. The Applicant's efforts to resolve this matter directly at the VW SA Head Office level, through the Office of the Managing Director, proved fruitless. One person called Marco, at that office, promised to investigate the matter, but did not provide the Applicant with a written report on their own investigations.

THE APPLICANT'S REFERRAL OF THIS MATTER TO THE MOTOR INDUSTRY OMBUDSMAN

17. The Applicant then submitted a request for assistance to the Motor
Industry Ombudsman of South Africa (MIOSA). The Respondents allegedly completely refused to cooperate with MIOSA, not
even bothering to respond to the very first letter sent to them (the Respondents), by the MIOSA case manager Mr Robin Wright, about this matter on the 22nd of March 2018.
18. On the 26th of July 2018, the MIOSA's Mr Wright wrote the following letter, with a tone of desperation: "With reference to the above mentioned complaint lodged with the Motor Industry Ombudsman of South Africa (MIOSA) and our recent telephonic discussion in the same regard: Kindly provide your response to the above mentioned complaint via email to cma3@miosa.co.za. All relevant documentation is attached. Please respond by close of business, Monday, 30 July 2018, failing which we will have no other option but to close our file and advise the consumer to register a complaint with the National Consumer Commission for further action".

19. The MIOSA finally gave up trying to help the Applicant because of the intransigence of the Respondent. The MIOSA sent a letter, dated 14 August 2018, to the Applicant stating:

“We kindly refer to a complaint lodged with the office of the Motor Industry Ombudsman of South Africa (MIOSA), regards the above. This matter was forwarded to the selling dealer / service provider / manufacturer in order to afford them the opportunity to impart their side of the matter... We unfortunately did not receive the courtesy of a response. We view this as a contravention of the South African Automotive Industry Code of South Africa and also it is also in contravention of Section 82(8) of the Consumer Protection Act 68 of 2008 (CPA)... With the above in mind, we are left with no option but to close our file and recommend that you register your complaint with the National Consumer Commission... in order that they may act in terms of Section 72

of the CPA”.

APPLICANT’S REFERRAL OF THIS MATTER TO THE NATIONAL CONSUMER COMMISSION

20. The Applicant then referred the complaint to the NCC. The exact

date of the referral is unknown; but it does not appear as if the NCC did thoroughly deal with this matter, as they wrote: “The Commission has assessed your complaint and determined that there is a dispute of facts, related to who tempered with the compact disc player. Issues of dispute of facts can be appropriately addressed through an arbitration process. We note that the damage does not render the vehicle inoperable and it that it could be repaired, which does not warrant cancellation of the sales agreement. As a result of the above, we cannot pursue your matter... The Commission is issuing a notice of non-referral and advise that we are closing the file”.

21. On 29 November 2018, the NCC issued a notice of non-referral stating

that the complaint does not allege any fact which, if true, would constitute grounds for a remedy under the Consumer Protection Act.

22. At the hearing the Applicant confirmed many of 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.

23. The Applicant said she felt abused as “Prey” at the hands

of the Respondent who was just totally dismissive of her complaints about a compact disc which was purportedly defective from the very beginning.

THE RESPONDENT’S CASE

24. The Respondent’s representative initially took a position that

issues related to warranties had nothing to do with the dealers, and that these matters should be directly between the consumer and VW South Africa.

25. The Respondent’s representative questioned why the Applicant

did not raise her complaint about the compact disc earlier; they argued that the Applicant collected the car on the 4th of December 2017, and yet only came to complain as late as the 23rd of January 2018 (as opposed to date of the 4th of January 2018 given by the Applicant during her submissions).

26. The Respondent's representative conceded that the Applicant was not given access to the technician's report that alleged that the Applicant had tampered with the CD player installations.
27. The Respondent's representative said it was company policy not to give consumers and other external stakeholders access to such technical reports.
28. The Respondent's representative even confirmed that he would not give the Presiding Member, at the Tribunal, access to that technical report that the Respondent was reading from during his submissions.

THE LAW APPLICABLE TO THE APPLICATION

29. The question now before the Tribunal is whether 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.
30. 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.
31. 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."

32. 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" ..[1]
33. The Tribunal will therefore consider the following factors:
 - 32.1 whether the matter is of substantial importance to the Applicant;
 - 32.2 the Applicant's reasonable prospects of success with the referral.

33 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, the NCC, and ultimately the Tribunal, it is clear that the matter is of substantial importance to the Applicant. The Tribunal therefore finds that the requirement that the matter is of substantial importance to the Applicant has been met.

34 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.

35 The Applicant, at the time of taking delivery of the vehicle, was not given the opportunity to know if the CD player was working properly, as the sales executive purportedly said he did not have a CD to use in testing the CD player. The Applicant reported this problem to the Respondent within two months of purchasing the car, which was well inside the warranty periods; and also fully explained why her trip to Limpopo delayed her reporting this matter to the Respondent.

36 The Applicant gave compelling reasons why her matter deserved being escalated to a Tribunal hearing on merits.

37 Section 4(2) of the CPA also provides guidance as to the Tribunal's approach when considering cases in terms of the CPA –

Realisation of consumer rights

(2) In any matter brought before the Tribunal or a court in terms of this Act—

(a) the court must develop the common law as necessary to improve the

realisation and enjoyment of consumer rights generally, and in particular by persons contemplated

in section 3(1)(b); and

(b) 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.

(3) If any provision of this Act, read in its context, can reasonably be construed to have more than one

meaning, the Tribunal or court must prefer the meaning that best promotes the spirit and purposes of

this Act, and will best improve the realisation and enjoyment of consumer rights generally, and in

particular by persons contemplated in section 3(1)(b).

38 The Applicant was unrepresented at the Tribunal hearing, and she did all her written submissions on her own as well. It is indeed within the very nature of the Tribunal, as set out in Sections 4(2) of the CPA, that the Tribunal offer 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.[2]

39 In addition, the MIOSA, the accredited industry ombudsman appointed in terms of section 82 (6) of the CPA that is responsible for the resolution of consumer disputes in the motor vehicle industry, did not get the cooperation of the Respondent when the MIOSA tried to resolve this matter on behalf of the Applicant. Its code of conduct applies to all those in the industry including the Respondent.[3]

40 The reasons given by the National Consumer Commission (NCC) for their certificate of non-referral were not entirely satisfactory:

40.1 The NCC wrote that the issue of who was responsible for the compact disc not working was a dispute of facts, related to who tampered with the compact disc player. This NCC position presupposes that there was absolutely no possibility that this could be a factory fault. This position may be problematic, given that the Applicant alleged that the sales executive who dealt with her never tested the compact disc player prior to the car being released to her;

40.2 The position of the Respondent that they could not give the Applicant access to the technician's report, that alleged that the Applicant purportedly tampered with the compact disc player, leaves much to be desired. This is one of the many reasons why this matter needs to be referred to the Tribunal, on merit, for the Tribunal to also determine whether such refusal to grant the consumer access to such a crucial document does not run counter to the spirit of Section 4(5)(a) of the CPA which states that businesses must not engage in any conduct contrary to, or calculated to frustrate or defeat the purposes and policy of the CPA; and

40.3 The NCC's position that the faulty compact disc player did not render the vehicle inoperable seems misplaced, as the people who buy cars at that R490 000 price band may be assumed to be people who take it as a given that cars at that price bracket come with a high quality sound system. The position of the NCC on this point was not necessarily in the spirit of Section 4 of the CPA, in its entirety.

41 The Applicant, based on the allegations made and the facts before the Tribunal, many of which are common cause, deserves an opportunity to argue the matter on the merits before a full Tribunal. Where there are disputes of fact, these disputes can be resolved through the

presentation of evidence by both the Applicant and the Respondent. Both parties will have a full opportunity to argue their cases and to cross-examine the witnesses called by the other party. Furthermore, the Tribunal may even have the opportunity to summon the technician, who alleged the Applicant tampered with the CD player, to come and give evidence, under oath, and be cross-examined by the Tribunal in order for their reasons for not covering the Applicant's warranty to be fully tested for reasonableness.

CONCLUSION

42 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

43 Accordingly, the Tribunal makes the following order:

43.1 The application for leave from the Tribunal is granted; and

43.2 No order is made as to costs.

DATED 10 March 2019

signed]

Prof Bonke Dumisa

Presiding Member

[1] 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.

[2] See *Esther Rhulani Tshwale (obo True Harvest College) v Faitzan Properties* NCT/12505/2014/75(1)(b) & (2) CPA.

[3] 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 11 October 2026 · Esheria