

SOUTH AFRICA / JUDGMENT

Makhetha v Lenny Karam Motors CC (NCT/301206/2023/75(1)(b)) [2024] ZANCT 18 (11 July 2024) [2024] ZANCT 18

COURT

National Consumer Tribunal

BEFORE

P Manzi-Ntshingila, S Hockey, S Mbhele

CASE / FILE NUMBER

NCT/301206/2023/75(1)(b)

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case No: NCT/301206/2023/75(1)(b)

In the matter between: WILLIAM MOTSOKO MAKHETHA APPLICANT and LENNY KARAM
MOTORS CC RESPONDENT

Coram:

Ms P Manzi-Ntshingila

- Presiding Tribunal member

Mr S Hockey

- Tribunal member

Mr S Mbhele

- Tribunal member

Date of the hearing:

- 08 July 2024

Date of judgment: - 11 July 2024

JUDGMENT AND REASONS

THE PARTIES

1. The applicant is William Motsoko Makhetha (the applicant), a consumer as defined in section 1 of the Consumer Protection Act, 2008 (the CPA)[1]. At the hearing of this matter, the applicant represented himself.
2. The respondent is Lenny Karam Motors CC (the respondent), a close corporation incorporated as such under the company laws of South Africa and a supplier as defined in section 1 of the CPA. At the hearing, the respondent was represented by Mr NG Stevens, an attorney from GSR Attorneys.

APPLICATION TYPE AND JURISDICTION

3. The applicant first referred his complaint to the National Consumer Commission (the NCC), who, after an assessment thereof, concluded on 16 November 2023 that the redress sought by the applicant could not be provided in terms of the CPA. The NCC noted that the faults complained about were related to wear and tear items, which, according to them, were not covered by the CPA.
4. Thereafter, the applicant referred this matter to the National Consumer Tribunal (the Tribunal) in terms of section 75(1)(b). This section provides that if the NCC issued a notice of non-referral as it did in the present matter, the complainant may refer the matter directly to the Tribunal, with leave of the Tribunal. The Tribunal granted such leave on 19 April 2024.
5. Accordingly, the Tribunal has jurisdiction in terms of section 73(2)(b) and section 27(a)(ii)[2] of the National Credit Act 34 of 2005 (the NCA) to consider this application.

BACKGROUND

6. On 8 August 2022, the applicant purchased a BMW X5 3.0 D M-Sport (the vehicle) from the respondent for R403 850.00. The sale was subject to a one-month or 1 000 km warranty on the vehicle.
7. According to the applicant, he experienced mechanical failures with the vehicle around October 2022. He took the vehicle to BMW[3] for diagnosis on 22 November 2022, after which he informed the respondent of the diagnosis report “as an opportunity for them to address or confirm that they would fix the issues diagnosed”.
8. The applicant states that the respondent initially said they could fix the issues at a fraction of what BMW quoted, but afterward, they did not provide any assistance. Hence, the applicant referred a complaint to the Motor Industry

Ombudsman of South Africa (MIOSA).

9. It is evident from MIOSA’s letter to the respondent dated 8 February 2023[4] (the MIOSA letter) that it received submissions from both the applicant and the respondent. The letter is in the form of a detailed report.

10. It was noted in the MIOSA letter that the respondent submitted invoices from a service provider indicating that, before the sale of the vehicle, work on the lower control arm and wheel alignment was carried out, and on 6 July 2022, the left front upper control arm was repaired. There was also communication from a different service provider stating that the fitment of the different size tyres would have no effect on the drivetrain or transfer box of the vehicle.
11. MIOSA referred to the implied six-month warranty provision of section 56(2), which it stated was applicable;

“irrespective of the mileage covered of the purchase as this implied warranty is subject to a consumer’s right to safe, good quality goods as per Section 55 Subsection 2 of the [CPA], which states that every consumer has a right to receive goods that are reasonably suitable for the purpose for which they are generally intended; are of good quality, in good working order and free of any defects; will be usable and durable for a reasonable period of time, having regard to the use to which they would normally be put and to all the surrounding circumstances of the supply; and comply with any applicable standards set out under the Standards Act, 1993 (Act No. 29 of 1993), or any other public regulation.”
12. MIOSA made the following finding:

“It is therefore the finding of the MIOSA that as the concern noted came to light within the aforementioned implied warranty parameters, the subject vehicle should be returned to the respondent, at the risk and expense for assessment and if it can be conclusively determined that the damages noted were pre-existing and not caused by the complainant during the period of ownership and usage, the respondent will be liable for the applicable warrantable repairs to be carried out within fifteen (15) business days from the receipt of this correspondence, as per the provisions of the Consumer Protection Act 68 of 2008.”
13. Following the MIOSA letter, the vehicle was returned by courier to the respondent as recommended and has been with the respondent ever since. It is worth noting that the applicant is based in Cape Town, and the respondent is in Johannesburg. The respondent has not effected any repairs on the vehicle since its return to it.
14. As a result of the above, the applicant referred his complaint to the NCC, who, after an assessment, issued a notice of non-referral as already discussed.

FURTHER SUBMISSIONS BY THE APPLICANT

15. During his testimony at the hearing, the applicant confirmed the issues with the vehicle as identified by SMG Cape Town. He also argued that the incorrect tyres on the vehicle affect its power and cause a drag when driving. As stated in the SMG Cape Town report, other items that needed replacement or repairs included various rubber mounts for transmission mounting, bottom control arms, and shock absorbers.

16. The applicant argues that the respondent contravened section 51(1) by selling the vehicle with a one-month or 1 000 km warranty, whichever comes first, thereby purportedly waiving his rights under section 56(2).
17. The applicant further relies on section 56(2) read with the provisions of section 55.

THE RESPONDENT'S EVIDENCE AND SUBMISSIONS

18. The respondent called Fred David James Wheeler (Mr Wheeler) from Pro Automobile (Pty) Ltd as an expert to testify at the hearing. Mr Wheeler stated that he has over 35 years of experience in the automobile industry and repairs vehicles for the respondent. In relation to this matter, he inspected the vehicle and prepared a report[5] on it. Mr Wheeler's status as an expert was not contested.
19. Mr Wheeler found that the various vehicle parts were defective and needed replacement. These items are listed on his "report" as the left outer CV boot (leaking grease), the front control arm rubber mounting, the front right wishbone with rubber mounting (ball joint worn), the right-side steering rack end (worn and knocking), transfer case mounting, transfer box oil, gearbox oil, rear shocks (not standard has EDC). The "report" also listed the need for wheel alignment and labour costs for the work required. The total repair costs are quoted as R39 945.35, including VAT.
20. Mr Wheeler testified that the items that needed to be replaced were all wear- and-tear items that did not last forever. These are the same items that SMG Cape Town identified as needing replacement, save that the latter also reported that the tyres needed to be replaced.
21. Mr Wheeler testified that if a vehicle's shock absorbers fail, the vehicle will hang on one side and be unstable on the road.
22. As for the tyres, Mr Wheeler testified that the vehicle has four of the same size tyres with the same rolling circumference. In his opinion, the tyres on the vehicle did not present a problem, even though they may not be precisely the same size as what BMW recommends for this type of vehicle.
23. Mr Wheeler considered the most serious issue he identified on the vehicle to be the control arm bushes because they affect the suspension and steering of the vehicle. If they fail, it would affect the vehicle's driving and pose a danger.
24. Mr Stevens argued that all the issues identified with the vehicle are wear-and-tear items that cannot be subject to any warranty. He also pointed out that when SMG Cape Town prepared their report on the vehicle, the respondent had already driven 6 000 km with it since its purchase. When the vehicle was delivered to the respondent, it had been driven for a further 9 000 km.

THE RELEVANT LEGAL PROVISIONS

25. The applicant seeks relief in terms of section 56(2) read with the provisions of section 55. He also alleges that the respondent acted in contravention of the provisions of section 51.

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26. Section 56(2)(a) provides that a consumer may, within six months after delivery of any goods to it, 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. The supplier must then, at the direction of the consumer, either repair or replace the failed, unsafe or defective goods in terms of subsection (2)(a) or refund the purchase price paid by the consumer for the goods in terms of subsection (2)(b).
27. Section 55(2)(b) and (c) provides that, except to the extent contemplated in subsection (6), the consumer has a right to receive goods that are of good quality, in good working order, and free of any defects and will be usable and durable for a reasonable period of time, having regard to the use to which they would normally be put and all the surrounding circumstances of the supply. Subsection (6) provides that subsections (2)(a) and (b) do not apply to a transaction if the consumer has (a) been expressly informed that particular goods were offered in a specific condition and (b) expressly agreed to accept the goods in that condition or knowingly acted in a manner consistent with
- accepting the goods in that condition.
28. Section 51(1)(i) and (ii) prohibits a supplier from making a transaction or agreement subject to terms that directly or indirectly purport to (i) waive or deprive a consumer's right in terms of the CPA or (ii) avoid the supplier's obligation or duty in terms of the CPA.

ANALYSIS

29. The one-month or 1 000 km warranty that the respondent offered the applicant on the vehicle did not expressly exclude that statutory warranty as contained in section 56(2), nor did it expressly defeat the purpose of the CPA. The Tribunal is of the view that the above warranty was not in contravention of the provisions of section 51, and no further attention in respect hereof is necessary.
30. The Tribunal disagrees that wear-and-tear items are excluded from the operation of the CPA by their very nature. An important provision in section 55 is that a consumer has a right to receive goods that are of good quality, in good working order, and free of any defects. Importantly, the goods must also be usable and durable for a reasonable period, having regard to the use to which they would normally be put and in all the surrounding circumstances of the supply.
31. It is important to note that the vehicle's purchase price was relatively expensive, namely R403 850.00. The issue the applicant encountered with the vehicle arose well within the six months contemplated in section 56(2).

32. The respondent's argument that the vehicle passed a roadworthy test, serving as proof that the issues with the vehicle were not present at its sale, is of little significance. Section 55(4) provides that, amongst others, all the circumstances of the supply of goods must be considered to determine whether the goods satisfy the requirements of subsection (2), but importantly, section 55(5)(a) provides that it is irrelevant whether a product failure or defect was latent or patent, or whether a consumer could have detected it before taking delivery of the goods.
33. The Tribunal finds no fault with the evidence of Mr Wheeler, who inspected the vehicle and concluded that various parts needed replacement. He testified of the danger that failed stock absorbers may cause. The worn shock absorbers are, without doubt, a defect, as defined in section 53. The shock absorbers did not last for the period contemplated in section 56(2), and both SMG Cape Town and Mr Wheeler found that they needed replacement. Mr Wheeler testified that he found the biggest issue with the vehicle being the control arm bushes, which posed a danger. These must also be a defect or hazard, as defined in section 53.
34. The other issues identified by Mr Wheeler relate to the suspension and include rubber casings, which leaked grease. It does not need much to conclude that grease leaking from a casing that covers and protects a part needing such grease to operate constitutes a defect. So are the mountings of the transfer box. Mr Wheeler found that all the transfer box mountings, twelve in total, needed to be replaced.
35. The Tribunal finds that all the issues identified by Mr Wheeler are defects or hazards as defined in section 53.
36. The relief sought by the applicant is expressed in his referral form, which can be said to serve as a notice of motion, as one of two options, namely that the respondent fix the vehicle and return it to him, and secondly that the sale agreement be cancelled and that the respondent reimburses him what he had to pay to the bank who financed the vehicle. In the latter instance, he also wants the respondent to pay the damages he suffered due to having been without a vehicle for so long, including his commuting costs. The Tribunal, of course, is not authorised to make any order for damages as claimed and only has powers to order a refund of the purchase price of the vehicle on return thereof in terms of section 56(2)(b).
37. In the circumstances of this matter, the Tribunal considers it appropriate to order the respondent to make the repairs to the vehicle as identified by its own expert.
38. The Tribunal agrees with Mr Wheeler that the vehicle's tyres, despite not being recommended by BMW, pose no risk and do not constitute a defect.

THE ORDER

39. In the result, the following order is made:

39.1. The respondent shall effect all the repairs identified by Mr Wheeler as set out in the document he authored after he inspected the vehicle, as found on page 113 of the record. Such repairs shall be effected within 20 business days from the date of the issuance of this order, whereafter the respondent shall return the vehicle to the applicant at the respondent's costs.

39.2. There is no order as to costs.

S Hockey (Tribunal member)

Tribunal members P Manzi-Ntshingila (Presiding) and Mr S Mbhele concur.

[1] Any reference to a section in this

judgment

will be a reference to a section of the CPA.

[2] This section provides that the Tribunal or a member of the Tribunal acting alone in accordance with the NCA or the CPA may adjudicate in relation to any allegations of prohibited conduct.

[3] The vehicle was taken to SMG Cape Town, a BMW dealer, as can be ascertained from the tax invoice for the diagnostic services on page 53 of the record.

[4] See page 22 of the record.

[5] The "report" is on page 113 of the record and consists of a repair estimate for parts that need repair or replacement.

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