

SOUTH AFRICA / JUDGMENT

Maphutha v Early Worx 634 (Pty) Ltd Trading As Q Cars (NCT/290789/2023/75(1)(b)) [2024] ZANCT 6 (25 March 2024)

[2024] ZANCT 6

COURT

National Consumer Tribunal

BEFORE

A Potwana, M Peenze, N Maseti

CASE / FILE NUMBER

NCT/290789/2023/75(1)(b)

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IN THE NATIONAL CONSUMER TRIBUNAL

SITUATED IN CENTURION

Case Number: NCT/290789/2023/75(1)(b)

In the matter between: SETSOPO TSIBISO MAPHUTHA APPLICANT and EARLY WORX 634 (PTY) LTD TRADING AS Q CARS RESPONDENT

Coram:

Dr A Potwana - Presiding Tribunal member

Dr M Peenze - Tribunal member

Ms N Maseti - Tribunal member

Date of hearing: 19 March 2024

JUDGMENT AND REASONS

THE PARTIES

1. The applicant is Setsopo Tsibiso Maphutha, an adult male person (Mr Maphutha). The applicant is a consumer as defined in section 1 of the Consumer Protection Act 68 of 2008 (CPA). During the hearing, the applicant represented himself.
2. The respondent is Early Works 634 (Pty) Ltd, a private company trading as Q Cars. The respondent is a supplier, as defined in section 1 of the CPA. The respondent did not file an answering affidavit and was not represented during the hearing.

TYPE OF APPLICATION AND JURISDICTION

3. The applicant was granted leave to refer his complaint to the Tribunal as envisaged in section 75(1)(b) of the CPA. In terms of section 27(a) of the National Credit Act 34 of 2005 (NCA), the Tribunal has jurisdiction to consider this matter.

INTRODUCTION AND

BACKGROUND

4. On 9 October 2023, the applicant applied for leave to refer a complaint directly to the Tribunal with the Tribunal's Registrar (Registrar). The application documents were served on the respondent by courier on 5 October 2023 and on the National Consumer Commission (Commission) by email on 9 October 2023. In "Part D: Order sought from the Tribunal" of the prescribed form for applying for leave to refer complaints to the Tribunal, Form TI.73(3) & 75(1)(b) & (2) CPA, the applicant stated that if leave is granted, he will seek that the respondent refund him the full purchase price (transaction value) of R224 399.00 and take back its car as if he had never bought it. In the alternative, the applicant wants the purchase price for the car to be discounted by 40%, which amounts to R89 759.60. As stated above, the Tribunal granted leave.
5. The applicant's case is stated in his affidavit. He stated that on 14 December 2021, he purchased a Volkswagen Jetta GP 1.4 TSI Comfortline (the motor vehicle) from the respondent for R224 399.00. A copy of the purchase agreement is annexed to his affidavit. On 12 November 2022, whilst speaking on the phone with one of the consultants of VW McCarthy in Wonderboom, Pretoria (VW McCarthy), he discovered that the motor vehicle's mileage was 92 126 km on 9 May 2019. This mileage was 23 268 km more than when he purchased the motor vehicle on 14 December 2021. In this regard, the applicant asserted that as he was able to verify the vehicle's odometer readings, the respondent purposefully falsified and hid the actual odometer readings in breach of section 41(1)(a) of the CPA and then employed the provisions of section 49(1) and (2) of the CPA to "legalise the breach." The applicant's assertion in this regard is based on the fact that in the Vehicle Appraisal Form (VAF), it is written:

"Q-Cars is unable to confirm mileage with the manufacturer as they will not divulge the information or there is no service information available. Q-Cars alerted me to the fact that they were suspicious but unable to confirm the authenticity. I therefore accept the mileage may have been tampered with and cannot hold Q-Cars liable should that be the case." (sic in toto)

6. The applicant argued that based on the provisions of section 48(2)(c) to (d) of the CPA, the sale agreement between himself and the respondent should be considered grossly unfair, unreasonable, and unjust.
7. On the same day, 12 November 2022, the applicant submitted a formal request to VW South Africa (VWSA) for the motor vehicle's service history, which VWSA provided to him. He alleges that the motor vehicle's service history proves what he discovered through VW McCarthy that the odometer had been tampered with and reversed to give the motor vehicle

a higher market value. On the same day, he filed a complaint with the respondent. On 14 November 2022, the respondent advised him of the proper procedure to file a complaint. After this, he never received an answer from the respondent and filed a complaint with the Motor Industry Ombudsman of South Africa (Ombudsman). On 24 April 2023, the Ombudsman issued a finding unfavourable to the applicant on the basis that the applicant filed a complaint after 11 months of ownership, which fell outside the statutory warranty prescribed under section 56(2) of the CPA. On 26 April 2023, the applicant referred his complaint to the Commission. The Commission issued a Notice of Non-Referral on the basis that the applicant's complaint did not allege any facts, if true, would constitute grounds for a remedy under the CPA.

8. Notwithstanding the findings by the Ombudsman and the Commission, in paragraph 30 of his founding affidavit, the applicant averred that his complaint does not pertain to the warranty or the quality of the motor vehicle. Instead, he was complaining about the description thereof and the interpretation of the notice as regulated under sections 22(1)(a), 24(1)(c), and 24(3)(a)(i) of the CPA as well as his right to fair and honest dealings as per section 41(1)(a) to (c) of the CPA.
9. The applicant further alleged that the respondent misrepresented the motor vehicle as a VW Jetta GP 1.4 TSI Comfortline. However, the manufacturer has confirmed that it is, in fact, a VW Jetta GP 1.2 TSI Trendline, which is a lower trim level and has a smaller engine capacity compared to the one he agreed to purchase. The respondent acknowledged the discrepancy, attributed it to a finger fault, and claimed that there was no significant difference in the purchase prices, engine capacities and trim models of the two motor vehicles.
10. The applicant submitted that his complaint is based on sections 22(1)(a), 24(1)(c), 24(3)(a)(i), 41(1)(a) to (c), and 48(1)(a) to (c) of the CPA. He further submitted that when he decided to buy the motor vehicle, he also considered that he would be reimbursed for official kilometres travelled, which would aid in repaying the motor vehicle loan. The reimbursement rate is contingent on the engine capacity of the motor vehicle used. The variance in reimbursement rate between 1.2 and 1.4 engine sedan vehicles averages

around 83 cents per kilometre. Since he travels an average of 2000 kilometres per month, he loses approximately R16 660.00 per month. Over a period of seventy-two months, he estimates that he could lose R119 520.00 due to the respondent's false misrepresentation.

11. As a result of the uncertainty surrounding the true condition of the motor vehicle, he was compelled to acquire another vehicle and pay for two cars.
12. On 14 February 2024, the Acting Registrar issued a Notice of Set Down for the application to be heard on 19 March 2024 and served it on the parties by email and to the respondent by registered mail as well.

HEARING THE MATTER ON A DEFAULT BASIS

13. Rule 13(1) of the Tribunal Rules[1] provides that any respondent to an application or referral to the Tribunal may oppose the application or referral by serving an answering affidavit on the applicant and every other person the application was served.
14. Rule 13(2) provides that an answering affidavit to an application or a referral other than an application for interim relief must be served on the parties and filed with the registrar within 15 business days of receipt by such party of the application.
15. Rule 13(5) provides that any fact or allegation in the application or referral not specifically denied or admitted in an answering affidavit will be deemed to have been admitted.
16. Rule 24(1) and (2) states –
- “(1) If a party to a matter fails to attend or be represented at any hearing or any proceedings, and that party-*
- (a) is the applicant, the presiding member may dismiss the matter by issuing a written ruling; or
 - (b) is not the applicant, the presiding member may-
 - (i) continue with the proceedings in the absence of that party; or
 - (ii) adjourn the hearing to a later date
- (2) The Presiding member must be satisfied that the party had been properly notified of the date, time and venue of the proceedings, before making any decision in terms of subrule (1).”
17. Rule 30(1) provides that a document may be served on a party by sending it by registered mail to the party’s last known address.
18. We are satisfied that the application documents were served on the respondent by courier and that the Notice of Set Down was served on it by email and registered mail. In *Sebola and Another v Standard Bank of South Africa Ltd and Another*[2] (Sebola), the Constitutional Court held that “proof of registered dispatch to the address of the consumer, together with proof that the notice reached the appropriate post office for delivery to the consumer, will in the absence of contrary indication constitute sufficient proof of delivery”.

19. In *Kubyana v Standard Bank of South Africa Ltd*[3] (*Kubyana*), the Constitutional Court revisited *Sebola* and clarified that when delivery occurs through the postal service, credit providers' obligation to prove that they brought section 129 notices to the attention of consumers entails proof that:

"(a) the section 129 notice was sent via registered mail and was sent to the correct branch of the Post Office, in accordance with the postal address nominated by the consumer. This may be deduced from a track and trace report and the terms of the relevant credit agreement;

- (b) the Post Office issued a notification to the consumer that a registered item was available for her collection;
- (c) the Post Office's notification reached the consumer. This may be inferred from the fact that the Post Office sent the notification to the consumer's correct postal address, which inference may be rebutted by an indication to the contrary . . .; and
- (d) a reasonable consumer would have collected the section 129 notice and engaged with its contents. This may be inferred if the credit provider has proven (a) – (c), which inference may, again, be rebutted by a contrary indication: an example of why, in the circumstances, the notice would not have come to the attention of a reasonable consumer."
20. In this matter, the Post Office tracking report proves that the Notice of Set Down was sent to the respondent by registered mail to the correct branch of the Post Office, it issued a notification to the respondent that a registered item was available for collection, and the notification reached the respondent on 11 March 2024. However, despite this, the respondent failed to file an answering affidavit within the prescribed 15 business days and failed or neglected to apply for condonation to file the same at any time thereafter.
21. Accordingly, this application stands unopposed. In terms of Rule 13(5), any fact or allegation in the application or referral not specifically denied or admitted in an answering affidavit will be deemed to have been admitted.

THE LAW

22. Section 22(1)(a) of the CPA states:

"The producer of a notice, document or visual representation that is required, in terms of this Act or any other law, to be produced,

provided or displayed to a consumer must produce, provide or display that notice, document or visual representation in the form prescribed in terms of this Act or any other legislation, if any, for that notice, document or visual representation."

23. Section 24(1)(c) states:

“For the purposes of this section, a trade description is applied to goods if it is contained in any sign, advertisement, catalogue, brochure, circular, wine list, invoice, business letter, business paper or other commercial communication on the basis of which a consumer may request or order the goods.”

24. Section 24(3)(a)(i) states:

“A retailer of goods must not offer to supply, display or supply any particular goods if the retailer knows, reasonably could determine or has reason to suspect that a trade description applied to those goods is likely to mislead the consumer as to any matter implied or expressed in that trade description.”

25. Section 41(1)(a) to (c) states:

“In relation to the marketing of any goods or services, the supplier must not, by words or conduct –

- (a) directly or indirectly express or imply a false, misleading or deceptive representation concerning a material fact to a consumer;
- (b) use exaggeration, innuendo, or ambiguity as to a material fact, or fail to disclose a material fact if that failure amounts to a deception; or
- (c) fail to correct an apparent misapprehension on the part of a consumer, amounting to a false, misleading, or deceptive representation, or permit or require any other person to do so on behalf of the supplier.”

26. Section 48(1)(a) to (c) states:

“A supplier must not –

- (a) offer to supply, supply, or enter into an agreement to supply, any goods or services-
 - (i) at a price that is unfair, unreasonable, or unjust; or
 - (ii) on terms that are unfair, unreasonable or unjust;
- (b) market any goods or services, or negotiate, enter into or administer a transaction or an agreement for the supply of any goods or services, in a manner that is unfair, unreasonable or unjust; or
- (c) require a consumer, or other person to whom any goods or services are supplied at the direction of the consumer –
 - (i) to waive any rights;
 - (ii) assume any obligation; or
 - (iii) waive any liability of the supplier, on terms that are unfair, unreasonable, or unjust, or impose any such terms as a condition of entering into a transaction.”

27. Rule 13(5) of the Tribunal Rules states that “Any fact or allegation in the application or referral not specifically denied or admitted in an answering affidavit, will be deemed to have been admitted.”

CONSIDERATION OF THE MERITS

28. The respondent has not filed an answering affidavit opposing the main application. Given the provisions of rule 13(5) of the Tribunal Rules, the allegations made by the applicant are deemed to be admitted.
29. The applicant has not presented evidence of a notice that does not meet the requirements of section 22(1)(a) of the CPA and that the respondent contravened section 24(1)(c) of the CPA.
30. Concerning the alleged contraventions of sections 24(3)(a)(i), 41(1)(a) to (c), and 48(1)(a) to (c) of the CPA, we are satisfied that the applicant presented evidence proving that:

30.1. The stipulations made in the VAF contravene the provisions of section 24(3)(a)(i) as alleged by the applicant. The respondent had a duty to ascertain the mileage and not require the applicant to accept that the mileage may have been tampered with. By acquiring the information from VWSA, the applicant has proved that the respondent could have also acquired the information.

30.2. The model of the motor vehicle delivered to the applicant is not the same as the one that appears from the purchase agreement the applicant signed. False, misleading, or deceptive representations are prohibited under section 41(1)(a) to

(c) of the CPA.

30.3. The respondent marketed, offered to supply, and supplied the motor vehicle at a price and terms that were unfair, unreasonable, or unjust and required the applicant to waive any rights he had concerning the mileage of the motor vehicle in contravention of section 48(1)(a) to (c)(i) of the CPA.

31. In view of the above, we are satisfied that the applicant has proved, on a balance of probabilities, that the respondent contravened sections 24(3)(a)(i), 41(1)(a) to (c), and 48(1)(a) to (c)(i) of the CPA. An act or omission in contravention of a provision of the CPA constitutes prohibited conduct.

32. We now turn to consider the relief sought. Unlike the provisions of section 56(2)(b) of the CPA which empower this Tribunal to order,

among other things, a refund of the purchase price for defective goods, there is no CPA provision empowering the Tribunal to order a refund of the full purchase price for the three contraventions of sections 24(3)(a)(i), 41(1)(a) to (c), and 48(1)(a) to (c) of the CPA.[4] Also, we are mindful that the applicant has had possession of and used the motor vehicle for over two years. Consequently, we are unable to order a full refund of the purchase price and that the respondent take back the motor vehicle “as if it has never been bought” as prayed for by the applicant. Furthermore, we

cannot order a reduction of the purchase price by 40%, which amounts to R89 759.60 as prayed for in the alternative by the applicant. In our view, the applicant has not presented convincing evidence that he is entitled to a 40% purchase price reduction. Moreover, this prayer amounts to a damages claim that should be brought before a civil court in terms of section 52(1) of the CPA, which states –

“(1) If, in any proceedings before a court concerning a transaction or agreement between a supplier and consumer, a person alleges that –

- (a) the supplier contravened section 40, 41 or 48; and
 - (b) this Act does not otherwise provide a remedy sufficient to correct the relevant prohibited conduct, unfairness, injustice or unconscionability, the court, after considering the principles, purposes and provisions of this Act, and the matters set out in subsection (2), may make an order contemplated in subsection (3).”
33. We note further that the applicant stated that as a result of the respondent’s misrepresentation, he loses approximately R16 660.00 per month and could lose R119 520.00 over a period of seventy-two months. In view of the Tribunal’s finding that the respondent committed prohibited conduct, the absence of a specific remedy under the CPA for the type of prohibited conduct that the respondent committed, the provisions of section 52(1) of the CPA, the loss or damages that the applicant claims to have suffered,

and the fact that the Tribunal is not statutorily empowered to make the orders that the applicant seeks, he may apply for a certificate

of prohibited conduct from the Chairperson of the Tribunal and institute a claim for the assessment and awarding of damages in a civil court as contemplated in 115(2) of the CPA, which states-

“(2) A person who has suffered loss or damage as a result of prohibited conduct, or dereliction of required conduct –

- (a) may not institute a claim in a civil court for the assessment of the amount or awarding damages if that person has consented to an award of damages in a consent order; or
- (b) if entitled to commence an action referred to in paragraph (a), when instituting proceedings, must file with the registrar or clerk of the court a notice from the Chairperson of the Tribunal in the prescribed form –
 - (i) certifying whether the conduct constituting the basis for the action has been found to be prohibited or required conduct in terms of this Act;
 - (ii) stating the date of the Tribunal’s finding, if any; and
 - (iii) setting out the section of this Act in terms of which the Tribunal made its finding, if any.”

CONCLUSION

34. The applicant has proved, on a balance of probabilities, that the respondent committed prohibited conduct by contravening sections 24(3)(a)(i), 41(1)(a) to (c), and 48(1)(a) to (c)(i) and (iii) of the CPA.

ORDER

35. The Tribunal makes the following order:

35.1. The respondent committed prohibited conduct by contravening sections 24(3)(a)(i), 41(1)(a) to (c), and 48(1)(a) to (c)(i) and (iii) of the CPA; and

35.2. There is no order as to costs.

Thus, done and dated 25 March 2024. [signed]

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Dr A Potwana

Presiding Tribunal Member

Dr M Peenze and Ms N Maseti (Tribunal members) concur.

- [1] Regulations for matters relating to the functions of the Tribunal and Rules for the conduct of matters before the National Consumer Tribunal, published under GN 789 in GG 30225 of 28 August 2007 (As amended).
- [2] 2012
- (5) SA 142 (CC) at para 87.
- [3] 2014
- (3) SA 56 (CC) at para 54.
- [4] Although section 112 of the CPA empowers the Tribunal to impose an administrative in respect of prohibited conduct, this is not the relief the applicant seeks, and he has neither presented evidence nor argued for the imposition of an administrative penalty.

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