

SOUTH AFRICA / JUDGMENT

Marianne v South Cape Auto (Pty) Ltd t/a Hyundai (NCT/94740/2017/75(1)(b)) [2018] ZANCT 139 (16 December 2018) [2018] ZANCT 139

COURT

National Consumer Tribunal

BEFORE

A Potwana, H Devraj, J Simpson

CASE / FILE NUMBER

NCT/94740/2017/75(1)(b)

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN GEORGE

Case number: NCT/94740/2017/75(1)(b)

In the matter between:

CARINE MARIANNE

APPLICANT

and

SOUTH CAPE AUTO (PTY) LTD t/a HYUNDAI

RESPONDENT

Coram:

Mr A Potwana

- Presiding Tribunal Member

Ms H Devraj

- Tribunal Member

Adv J Simpson - Tribunal Member

Date of Hearing - 14 December 2018

Date of Judgment - 16 December 2018

JUDGMENT AND REASONS

APPLICANT

1. The Applicant is Carine Marianne Henning; an adult female person who resides in George, Western Cape (“The Applicant” or “Ms Henning”). At the hearing; Ms Henning represented herself.

RESPONDENT

2. The Respondent is South Cape Auto (Pty) Ltd; a private company that is duly incorporated and registered in accordance with the company laws of the Republic of South Africa; with its registered address at 17 York Street, George, Western Cape (“the Respondent”). The Respondent operates as a motor vehicle dealership. At the hearing; the Respondent was represented by Mr Pieter Jacobs who is employed by the Respondent as a legal representative.

TYPE OF APPLICATION

3. In this application; the Applicant seeks that the Respondent be ordered to reimburse her monies she paid to a third party for repairs

conducted on a motor vehicle that she claims she bought from the Respondent.

4. The Applicant was granted leave to refer the matter to the Tribunal.

BACKGROUND

5. On 8 January 2016; the Applicant took possession of a 2009 BMW X6 XDrive 50i with extras (“the car”) purchased from the Respondent. The car’s mileage was 113 400km and it cost R388 303.79. The purchase of the car was financed and the monthly instalment was R8 134.03.
6. Approximately; one week after taking possession of the car; the Applicant noticed that the radio console as well as the mileage console reverted to a blank screen every time the ignition was switched off. This had to be re-set manually when starting the car. As the Respondent is a multi-franchise dealer and not a registered BMW specialists; the Applicant visited an authorised BMW dealer; Lynn Schroeder BMW, George (“BMW”) to enquire about the problem. The diagnosis revealed that the vehicle had an “on board battery power saving system” that reset the indicators automatically when the vehicle was not driven regularly. She was also told that the wiper blades, a set of brake pads and passenger window switch had to be replaced at a cost of R7 964.43. This was done and completed on 29 April 2016.
7. Shortly after the above-mentioned incidents; the “low oil” warning light appeared when the Applicant was driving to Cape Town. She topped up the oil with an approved brand. A week later; on her way back from Cape Town; the “low oil” warning light appeared again. Once again; she topped up the oil with an approved brand. Thereafter; the “fuel combustion”

warning light appeared. She immediately informed the Respondent and returned the car to BMW where this warning light was reset. However; the same warning light appeared again. This time; BMW diagnosed a “missing O ring” in the engine. The oil was topped up again by BMW.

8. After running a further diagnostic check on the vehicle; it was found that the timing on the vehicle was not correct. A specific timing tool is required to reset this. As neither the Respondent nor BMW had this tool; the latter ordered it from Germany.
9. Further investigation resulted in the diagnosis that the engine had been tampered with prior to the purchase date. This resulted in certain parts having to be replaced at a cost of R77 997.23 in order to restore the vehicle into a running condition. This was weeks after the original O ring diagnosis. The Applicant contacted the Respondent and informed it of the diagnosis. This was followed by a visit to the Respondent to explain the dilemma to Mr Daniel Marais (“Mr Marais”) and Mr Etienne van Blerk (“Mr van Blerk”). The discussions proved unfruitful as the Respondent was not prepared to contact the dealer from whom they purchased their stock. Also; the Respondent rejected the Applicant’s offer to pay 50% of the expenses on condition that it paid the balance.
10. The Applicant stated that she purchased the vehicle in good faith and with the assurance that it was accident free; and was in perfect

running order. Also; the car had an Extended Warranty on which an amount of R20 000.00 could be claimed for damages.

11. The Applicant submitted that she has been making monthly payments for an item she did not have in her possession since 4 August 2016 until 27 June 2017. She seeks full financial reimbursement from the Respondent for the full repair/ replacement of the defects and restoration of the car to a driveable and roadworthy state or a reimbursement of the incurred expenses.
12. The deponent in the Respondent’s answering affidavit is Etienne van Blerk. The Respondent argued that:

12.1. It is evident from the documentation that the purchaser and owner of the car is Vision Direct 195 CC;

12.2. The Applicant did not purchase the goods and has no locus standi; and

12.3. The application is fatally defective and should be dismissed.

13. Further; the Respondent argued that:

13.1. the Applicant did not present any proof of payment of expenses;

13.2. there is no evidence in support of the allegation that the purchaser of goods suffered any loss;

13.3. there is no proof of quantum;

13.4. in the event that the Applicant paid the cost of repairs, she has a rightful claim against the owner of the goods, Vision Direct 195 CC; and

13.5. there is no contractual relationship between the Respondent and the Applicant.

14. The Respondent submitted that the correct citation of the Respondent is Multi Franchise George, a division of Motus Corporation (Pty) Ltd but stated that this does not have an impact on the application.

15. In addition to the points in limine, the Respondent argued that:

15.1. the car is a 2009 model and the mileage was approximately 109 700 km on date of delivery to the purchaser;

15.2. the car passed a Roadworthiness Test conducted by DEKRA on 9 November 2015 and DEKRA issued a Certificate of Roadworthiness;

15.3. the defects occurred outside the 6 month Consumer Protection Act[1]("CPA") warranty period;

15.4. the Applicant had the vehicle repaired by a third party;

15.5. there is no evidence that the defects occurred within 6 months of purchase;

15.6. there is no proof of damages; and

15.7. there is no proof that the defects were brought to the Respondent's attention within 6 months of purchase.

FACTS

16. At the hearing; the Applicant submitted that she wanted to be reimbursed for the R167 302.08 that she paid for the faulty and defective engine and for the parts. Also; she wanted the Respondent to pay for the cost of correcting the car's registration from diesel to petrol.

17. The Applicant argued that the car started showing warning signs a week after the date of purchase. She took the car to BMW as BMW had the necessary expertise to repair the car. However; she contacted the Respondent telephonically on numerous occasions (8 to 10 times) within 6 months of taking delivery of the car to inform it of the faults. In May the car stopped running. Between May and June 2016; she phoned the Respondent and asked for a meeting. The meeting took place during the first week of July 2016. The Respondent refused to carry the cost of repairs and referred her to the Motor Industry Ombudsman of South Africa ("MIOSA"). Repairs to the engine only started on 4 August 2018.

18. The Applicant tried to introduce two invoices as evidence that could prove that; there were extensive repairs done to the car before she purchased it. The Respondent objected and the invoices were not allowed.

19. At the hearing; the Respondent argued that:
- 19.1. the Applicant did not have locus standi as she was not the owner of the car;
- 19.2. the owner of the car is Vision Direct CC;
- 19.3. to qualify as consumer under the CPA; Vision Direct CC should prove that its annual turnover is below R2 Million;
- 19.4. there was no proof of damages;
- 19.5. the damages occurred outside the six months period; and
- 19.6. by taking the car to BMW; the Applicant broke the supply chain.
20. The Respondent called two witnesses; Mr van Blerk and Mr Marais. Mr van Blerk testified that he was the Respondent's Dealer Principal. The Respondent purchased the car in Pretoria. The car was driven from Pretoria to George. He drove the car for about a month covering a distance of 2000 km. He never experienced any problems with the car. The car was subjected to two roadworthy tests and it passed both. He saw the Applicant around September 2016 and told her to use the warranty to repair the faults or contact the MIOSA. Under cross examination; Mr van Blerk testified that he met the Applicant towards the end of August 2016.
21. Mr Marais testified that he was a used vehicle Sales Manager. He drove the car to Oudtshoorn twice. He spoke to the Applicant three months after the purchase of the car. The Applicant wanted a refund for monies she had paid for replacing wear and tear items such as brake pads and windscreen wipers. He told her that he would speak to the Dealer Principal. Subsequently; he told the Applicant that the Respondent would not pay her.
22. The Respondent's legal representative made an undertaking that the Respondent would pay for the actual fees for correcting the registration of the car from diesel to petrol.

ISSUES

TO BE DECIDED

23. The Tribunal is required to decide whether; in terms of the CPA; the Applicant is entitled to be reimbursed the sum of R167 302.08 that she paid to a third party for the faulty and defective engine.

THE LAW

24. Section 4(1) of the CPA states-

"Any of the following persons may, in the manner provided for in this Act, approach a court, the Tribunal or the Commission alleging that a consumer's rights in terms of this Act have been infringed, impaired or threatened, or that prohibited conduct has occurred or is occurring:

- (a) A person acting on his or her own behalf;
- (b) An authorised person acting on behalf of another person who cannot act in his or her own name;
- (c) ...
- (d) ...
- (e) ...”

25. In Section 53(1)(a) of the CPA; a “defect” is defined as-

“(i) any material imperfection in the manufacture of the goods or components, or in performance of the services, that renders the goods or results of the services less acceptable than persons generally would be reasonably entitled to expect in the circumstances; or

(ii) any characteristic of the goods or components renders the goods or components less useful, practicable or safe than persons generally would be reasonably entitled to expect in the circumstances.”

26. Section 55(2) of the CPA states-

“Except to the extent contemplated in subsection (6), every consumer has a right to receive goods that-

- (a) are reasonably suitable for the purposes for which they are generally intended;
- (b) are of good quality, in good working order and free of any defects;
- (c) will be useable 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 their supply; and
- (d) comply with any applicable standards set under the Standards Act, 1993 (Act No. 29 of 1993), or any other public regulation.”

27. Section 56 of the CPA states-

“(1) In any transaction or agreement pertaining to the supply of goods to a consumer there is an implied provision that the producer or importer, the distributor and retailer each warrant that the goods comply with the requirements and standards contemplated in section 55, except to the extent that those goods have been altered contrary to the instructions, or after leaving the control of the producer or importer, a distributor or the retailer, as the case may be.

- (2) Within six months after the delivery of any goods to a consumer, the consumer may 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, and the supplier must, at the direction of the consumer, either-
 - (a) Repair or replace the failed, unsafe or defective goods; or

- (b) Refund to the consumer the price paid by the consumer, for the goods.”

ANALYSIS

OF THE EVIDENCE

Point in limine

28. The Applicant admitted that she is not the owner or purchaser of the car. She did not dispute the Respondent’s contention that the purchaser and owner of the car is Vision Direct CC. She is a co-owner of Vision Direct CC. She admitted that she was supposed to institute the proceedings under the name of owner: Vision Direct CC. In view of Section 4(1)(a) of the CPA; and the Applicant’s admission that she is not the owner of the car; it is clear that the right to institute legal proceedings in respect of the car vests in Vision Direct CC; as the owner of the car; and not the Applicant. In *Dadoo Ltd v Krugersdorp Municipal Council*, 1920 AD 530, Innes CJ stated-

“A registered company is a legal persona distinct from the members who compose it...nor is the position affected by the circumstance that a controlling interest in the concern may be distinct from its shareholders is no merely artificial and technical thing. It is a matter of substance; property vested [55] in the company is not, and cannot be, regarded as vested in all or any of its members.”[2]

29. Although the Applicant did subsequently provide a resolution from Vision Direct CC authorising her to institute the proceedings on behalf of the Applicant; this does not cure the legal standing of the Applicant. Section 4(1)(b) makes it clear that; only where a person cannot act on own name can an authorised person act on behalf of that person. In this case; there is no evidence that suggests that Vision Direct CC could not act in its own name.
30. The Tribunal can note that there is a factual dispute between the parties as to when the meeting took place regarding the defects to the vehicle. Besides the verbal testimony, there is no evidence to prove when this meeting took place and whether it was within the 6 month period required by section 56 of the CPA.
31. The Tribunal can further note that the Applicant repaired the defects to the car herself. Whether this aspect renders the nature of her claim as general damages or a claim under section 56 of the CPA is subject to debate.

CONCLUSION

32. As the Applicant does not have locus standi; it follows that the Applicant’s claim stands to be dismissed.
33. The Tribunal notes and records the Respondent’s undertaking to pay for the actual registration costs of correcting the description of the fuel type of the car.

ORDER

34. The Tribunal makes the following order:-

34.1. the application to order the Respondent to reimburse the Applicant the monies paid by the Applicant to a third party for repairing the car is refused; and

34.2. there is no order made as to costs.

Thus; done and signed at Centurion on 16 December 2018.

Mr A Potwana

Presiding Tribunal Member

Ms H Devraj (Tribunal Member) and Adv J Simpson (Tribunal Member) concurring.

[1] 68 of 2008.

[2] At 550.

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