

SOUTH AFRICA / JUDGMENT

**Martin v Strauss and Reynders CC t.a
Motortland
East London (NCT/122211/2018/75(1)(b)) [2019]
ZANCT 97 (27 June 2019)
[2019] ZANCT 97**

COURT

National Consumer Tribunal

BEFORE

H Devraj

CASE / FILE NUMBER

NCT/122211/2018/75(1)(b)

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IN

THE NATIONAL CONSUMER TRIBUNAL

HELD

IN CENTURION

Case

number: NCT/122211/2018/75(1)(b)
In

the matter between: PIERRE
JACQUES CLAUDE
MARTIN APPLICANT
And
STRAUSS
AND REYNDERS CC T/A MOTORLAND
EAST
LONDON RESPONDENT
Coram
Ms
H Devraj - Presiding Tribunal member
Date
of Hearing - 7 June 2019
Date
of Judgment - 27 June 2019

RULING**AND REASONS ON LEAVE TO REFER****THE PARTIES**

1. The Applicant in this matter is Pierre Jacques Claude Martin, an adult male, residing in Gonubie in East London (hereinafter referred to as the “Applicant” or “Mr Martin”). At the hearing Mr Martin represented himself.
2. The Respondent is Strauss and Reynders CC trading as Motorland East London (hereinafter referred to as the “Respondent”

or “Motorland”). At the hearing the Respondent was represented by Mr Gary Stirk from Stirk Yazbek Attorneys, Notaries

and Conveyancers.

APPLICATION TYPE

3. This is an application in terms of Section 75(1)(b) of the Consumer Protection Act, Act 68 of 2008, (hereinafter referred to as “the CPA”).
4. Section 75(1) of the CPA states the following –

“If the Commission issues a notice of non-referral in response to a complaint, other than on the grounds contemplated in section 116, the complainant concerned may refer the matter directly to –

- (a) ...
- (b) the Tribunal, with the leave of the Tribunal.”

JURISDICTION

5. Section 75(5) of the CPA states that:

“The Chairperson of the Tribunal may assign any of the following matters arising in terms of this Act to be heard by a single member of the Tribunal, in accordance with section 31(1)(a) of the National Credit Act:

- (a)...
 - (b) an application for leave as contemplated in subsection (1)(b)”
6. Accordingly, the Tribunal has jurisdiction to hear this application for leave to refer a complaint to the Tribunal as contemplated under section 75(1)(b).
 7. A single member of the Tribunal may hear the application in accordance with section 75(5)(b) of the CPA.

BACKGROUND

8. On 23 December 2015, Mr Martin purchased a pre-owned 2013 SsangYong Rexton from Motorland. The mileage of the vehicle at the time of purchase was 40,100km. During the period 1 February 2016 to 25 February 2017, Mr Martin experienced numerous problems with the vehicle. He informed the Respondent of the various issues with the vehicle. The problems experienced with the vehicle related to amongst others; the air-conditioning compressor not working; the fan belt shredding; faulty breaks and gearbox. In total the vehicle was in for repairs on 11 occasions; and was with the Respondent for an accumulated period of 4 months.
9. In July 2016, Mr Martin requested that the Respondent replace the vehicle; as the fan belt had already been replaced 4 times from the time he took ownership of the vehicle.
10. The Applicant further averred that he had tried to resolve the dispute with the Respondent, but that the Respondent had not provided a genuine offer to resolve the matter. The Respondent had offered the Applicant a trade in value of R140 000.00 (one hundred and forty thousand rand) for his vehicle; and he would then have to purchase a Mahindra to the value of R389 995.00 (three hundred and eighty nine thousand, nine hundred and ninety five rand).
11. During April 2017; Mr Martin lodged a complaint with the Motor Industry Ombudsman of South Africa (MIOSA). MIOSA issued a finding dated 6 December 2017. MIOSA found that the vehicle purchased by Mr Martin was not suitable for the purpose for which it was intended and advised the Respondent to refund the Applicant the purchase price of the vehicle; less the cost of usage. Mr Martin engaged with MIOSA on numerous occasions in order to obtain clarity regarding the calculation that should be used to determine the cost of usage. On 6 March 2018; MIOSA responded to Mr Martin and provided him with total cost of usage amount which according to MIOSA was R156,688.56 (one hundred and fifty six thousand, six hundred and eighty eight rand and fifty six cents)
12. On 11 June 2018; Mr Martin lodged a complaint with the National Consumer Commission (NCC). The NCC issued a Notice of non-referral dated 5 September 2018. The letter accompanying the Notice essentially stated that the complaint related to the cost of usage of the vehicle and as such these calculations are not determined by the NCC.
13. On 11 December 2018; Mr Martin lodged the application with the Tribunal for leave to refer the dispute to the Tribunal. On 20 December 2018; the Applicant filed a condonation application for the late referral of the leave application. In a judgment dated; 8 March 2019; a Member of the Tribunal granted the condonation for the late filing of the referral to the Tribunal. In his application, Mr Martin states that the method used to calculate the costs of usage does not promote fairness and that the redress provided to him in terms of the CPA; should not place him at a disadvantage.

14. On 17 April 2019; Motorland filed its Answering Affidavit. Motorland essentially submitted that Mr Martin has failed to return the vehicle to it and therefore it is unable to comply with MIOSA's finding.

THE HEARING

15. At the hearing both parties made oral submissions.
16. The Applicant essentially submitted that the vehicle was defective and the defects occurred less than two months he purchased the vehicle. Mr Martin submitted that after the numerous repairs were done on his vehicle; he approached the Respondent in July 2016; to provide him with a suitable replacement or a refund. However, the Respondent was unable to provide him with a suitable vehicle to resolve the dispute. The Respondent had offered Mr Martin; the option of purchasing a Mahindra to the value of R389 995.00 (three hundred and eighty nine thousand, nine hundred and ninety five rand). The MIOSA finding with regard to the manner in which the cost of usage of determined by using the 2018/2019 financial year as determined by the South African Revenue Services (SARS); placed him at a worse of position and that the 2015 SARS rates should have been applied; as this is the period during which he purchased the vehicle. Mr Martin averred that he relies on Section 56 of the CPA.
17. The Respondent submitted that the only complaint raised by the Applicant was the calculation used by the Motor Industry Ombudsman. The calculation for the cost of usage was based on the 2018/2019 financial year SARS rates; instead of the year in which Mr Martin purchased the vehicle. The Respondent also appeared to be of the view that once the Motor Industry Ombudsman made a finding, the Tribunal was bound by such.

APPLICATION FOR LEAVE

18. In terms of section 75(1)(b) of the CPA, the Applicant may only refer the matter directly to the Tribunal with leave of the Tribunal.
19. In determining whether the Applicant should be granted leave to refer the matter directly to the Tribunal, the Tribunal must consider the requirements for the granting of "leave".
20. In *Westinghouse Brake and Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd*[1] it was held 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."

21. The Tribunal will therefore, when considering whether to grant the Applicant leave to refer the matter or not, use the same test as applied in the High Court for applications for "leave" and will consider:

25.1 The Applicant's reasonable prospects of success with the referral; and

25.2 Whether the matter is of substantial importance to the Applicant, the Respondent or both.

22. It is clear that the matter is of substantial importance to the Applicant. The Applicant has gone to great lengths to pursue his complaint. Both parties agreed at the hearing that the matter was of substantial importance. The Respondent stated that the matter posed a reputational risk to it.
23. In considering the reasonable prospects of success, it must be noted that the Applicant provided an application that was not properly

indexed and made it very difficult to work through the various documents referred to. Further; the Applicant kept making

reference to documents that had not been filed with the Tribunal and the Tribunal had to confine Mr Martin to the actual papers that had been filed. The Tribunal also informed Mr Martin that he could not introduce any new evidence during the hearing and that he would need to file an amendment to his papers in terms of Rule 15 of Rules of the Tribunal,[2] should he wish to amend his papers.

24. However, the evidence submitted does at least provide the most basic elements necessary to support a claim under the CPA. The Applicant submitted that the defects in the vehicle occurred within 6 months of purchase. The defects appear to be of a material nature, which renders the vehicle less acceptable than one would reasonably expect. If a finding is made that the vehicle was defective, then the Applicant would be entitled to a refund, replacement or repair of the vehicle, in accordance with section 56 of the CPA.
25. The Respondent's submissions and answering affidavit do not provide any basis for a finding that the claim does not potentially fall within the ambit of the CPA and should not be heard. The Respondent argued rather that the dispute only related to the cost of usage and not to any issues in relation to the CPA.
26. The Tribunal is a creature of statute and makes rulings and issues judgments on matters pertaining the the National Credit Act[3] (NCA) and CPA. MIOSA is an accredited dispute resolution forum which makes recommendations and findings. The Tribunal is not bound by these findings and recommendations and applies the NCA CPA to come to its own ruling on matters before it. The orders of the Tribunal have the same status as that of the High Court.

CONCLUSION

27. The Tribunal finds that the matter is of substantial importance to the parties and there is a reasonable prospect of the Applicant succeeding in his claim against the Respondent.

ORDER

28. Accordingly, the Tribunal makes the following order –

28.1. The Applicant's application for leave to refer is granted; and

28.2. There is no order as to costs.

THUS DONE IN CENTURION ON THIS 27TH DAY OF JUNE 2019

[signed]

Ms H Devraj

Presiding Tribunal Member

[1] 1986 (2) SA 555 (A). Also see *Coertze and Burger v Young* NCT/7142/2012/75(1)(b)&(2)

[2] GN 789 of 28 August 2007: Regulations for matters relating to the functions of the Tribunal and Rules for the conduct of matters

before the National Consumer Tribunal, 2007 (Government Gazette No. 30225). As amended.

[3] Act 34 of 2005 (hereinafter referred to "the Act").

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Prepared on 9 October 2026 · Esheria