

SOUTH AFRICA / JUDGMENT

Matjeding v Tent Technics (GCC 13/2022)

[2023] ZACONAF 1 (16 March 2023)

[2023] ZACONAF 1

COURT

Consumer Affairs Court

BEFORE

M A du Plessis, M Phukubje, P Samuels, P
Opperman

CASE / FILE NUMBER

GCC 13/2022

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IN THE CONSUMER

AFFAIRS COURT FOR THE PROVINCE OF GAUTENG

HELD AT JOHANNESBURG

CASE NO: GCC 13/2022

In the matter between:

MAKHUTLE
DANIEL MATJEDING
Plaintiff
and
TENT
TECHNICS
Defendant

JUDGMENT

Introduction

1. This matter was heard on a virtual platform on 21 February 2023.
2. The plaintiff was present and duly represented by the Consumer Protector during the proceedings.
3. The defendant was represented by Mr Sibusiso Ndlovu.

4. The plaintiff's claim against the defendant, in the particulars of claim attached to the summons, is for a refund payment in the amount of R98 700,00 plus interest thereon at the prescribed rate of interest, from the date of judgment. During the trial a further claim for the plaintiff's transport expenses was submitted by the Consumer Protector.

The common cause facts

5. The common cause facts not in dispute are:

5.1 The plaintiff and defendant entered into a partly oral and partly written agreement on 17 October 2018, in terms of which the defendant sold to the plaintiff, two mobile freezers for the amount of R48 350,00 each, as well as two black and white prints for the amount of R1 000,00 each. The total amounts to R98 700,00.

5.2 The two mobile mobile freezers, at the time when the agreement was entered into, still had to be assembled by the defendant.

5.3 The plaintiff paid the defendant the amount of R98 700,00.

The evidence

6. The plaintiff testified that he saw an advertisement by the defendant for mobile freezers in the Daily Sun newspaper. Upon enquiry, the plaintiff was informed that the defendant manufactures and assembles the mobile freezers. As the plaintiff was approaching his pensionable age, he decided to order two mobile freezers from the defendant to use for multiple purposes, such as, for selling ice and cold drinks and to rent them out for events, in order to supplement his pension income.
7. Upon visiting the defendant during October 2019, the plaintiff was informed that all the parts were not available, but that the defendant would assemble the freezers upon receiving the required parts.
8. During early November 2018, the defendant informed the plaintiff that the mobile freezers were assembled, whereafter the plaintiff collected the mobile freezers from the defendant's premises in Pretoria and transported them to his home in Limpopo.\
9. During December 2018, the plaintiff switched the mobile freezers on for the first time and noticed that they did not get cold. The plaintiff notified the defendant, who advised him that their technicians are unavailable and that they would contact the plaintiff in January 2019.
10. During early January 2019 the plaintiff again called the defendant regarding one of the mobile freezers that is not working and on 7 January 2019 he sent the defendant an email, requesting the defendant to repair the mobile freezer. During January 2019, the plaintiff, upon request by the defendant, took the mobile freezer from Limpopo, at his own expense, to the defendant's premises in Pretoria for repairs. The plaintiff collected the mobile freezer after the repairs and transported it back to Limpopo.

11. On 25 March 2019, the plaintiff notified the defendant by way of email that the mobile freezer that was repaired, stopped working. Again, the plaintiff, upon request by the defendant, and at the expense of the plaintiff, took the mobile freezer from Limpopo to the defendant's premises in Pretoria for repairs. The plaintiff collected the mobile freezer after the repairs and transported it back to Limpopo.
12. On 3 April 2019, the plaintiff again notified the defendant by way of email that the mobile freezer that was repaired, stopped working again. Once again, the plaintiff, upon request by the defendant, and at the expense of the plaintiff, took the mobile freezer from Limpopo to the defendant's premises in Pretoria for repairs. The plaintiff collected the mobile freezer after the repairs and transported it back to Limpopo.
13. On 10 June 2019, the plaintiff again notified the defendant by way of email that the mobile freezer that was repaired, stopped working again. On the same day, the plaintiff took the mobile freezer back to the defendant, left it there, told the defendant that he does not want the mobile freezer repaired again, and requested that the defendant refund him the amount that he paid for the mobile freezer.
14. The defendant was in agreement with the evidence and timeline as set out in paragraphs 6 to 13 herein, and indicated that the faults with the mobile freezer were due to gas leaks. The defendant argued that the gas leaks could have been as a result of the way in which the plaintiff pulled the mobile freezer or that the plaintiff may have driven fast on a gravel road when transporting the mobile freezer. The defendant also indicated that the mobile freezer was repaired free of charge when the mobile freezer was returned for repairs during January, March and April 2019.
15. The defendant confirmed that the plaintiff returned the mobile freezer in June 2019, refused further repairs to the mobile freezer, requested a refund and left the mobile freezer in the possession of the defendant.
16. The defendant indicated that, after the return of the mobile freezer in June 2019, their technician found damage to the blower in the mobile freezer, whereafter they phoned the plaintiff, telling him that they will replace the blower, but since it is the damage of the plaintiff, he will have to pay for the repairs. The plaintiff however refused further repairs, and again requested a refund from the defendant.
17. The plaintiff testified that the second mobile freezer also stopped working during May 2019 and that he telephonically reported to the defendant that he is experiencing the same issues with the second mobile freezer. The plaintiff was advised to bring the second mobile freezer back to the workshop. The plaintiff indicated that he did not take the second mobile freezer back to the defendant's workshop, as it would have costed too much to take the second mobile freezer from Limpopo to Pretoria as well. He testified that he sent the defendant an email with his home address in Limpopo to either inspect, or to take the second mobile freezer back.

18. The Consumer Protector requested the plaintiff to indicate the financial costs to him in transporting the mobile freezer between Limpopo and Pretoria on multiple occasions. The plaintiff indicated that he used his bakkie and a trailer to transport the mobile freezer between Limpopo and Pretoria. The plaintiff indicated his estimation as R2 000,00.
19. In response to a question posed to the defendant, as to why the plaintiff was required to take the mobile freezer to Pretoria, as there is a branch of their business in Polokwane, the respondent indicated that the mobile freezers are manufactured in Pretoria, where the technicians are situated.
20. The defendant's invoice dated 17 October 2018, presented to the plaintiff, indicates as follows: "3 month walk in guarantee on motor only".

Relevant provisions of the Consumer Protection Act, No 68 of 2008

21. Section 55 Consumer's rights to safe, good quality goods

"(2) 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.
- (3) In addition to the right set out in subsection (2)(a), if a consumer has specifically informed the supplier of the particular purpose for which the consumer wishes to acquire any goods, or the use to which the consumer intends to apply those goods, and the supplier—
- (a) ordinarily offers to supply such goods; or
 - (b) acts in a manner consistent with being knowledgeable about the use of those goods, the consumer has a right to expect that the goods are reasonably suitable for the specific purpose that the consumer has indicated.
- (4) In determining whether any particular goods satisfied the requirements of subsection (2) or (3), all of the circumstances of the supply of those goods must be considered, including but not limited to—
- (a) the manner in which, and the purposes for which, the goods were marketed, packaged and displayed, the use of any trade description or mark, any instructions for, or warnings with respect to the use of the goods;

- (b) the range of things that might reasonably be anticipated to be done with or in relation to the goods; and
- (c) the time when the goods were produced and supplied.
- (5) For greater certainty in applying subsection (4)—
 - (a) it is irrelevant whether a product failure or defect was latent or patent, or whether it could have been detected by a consumer before taking delivery of the goods; and
 - (b) a product failure or defect may not be inferred in respect of particular goods solely on the grounds that better goods have subsequently become available from the same or any other producer or supplier.
- (6) Subsection (2)(a) and (b) do not apply to a transaction if the consumer—
 - (a) has been expressly informed that particular goods were offered in a specific condition; and
 - (b) has expressly agreed to accept the goods in that condition, or knowingly acted in a manner consistent with accepting the goods in that condition.”

22. Section 56 Implied warranty of quality

“(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 the 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.
- (3) If a supplier repairs any particular goods or any component of any such goods, and within three months after that repair, the failure, defect or unsafe feature has not been remedied, or a further failure, defect or unsafe feature is discovered, the supplier must— (a) replace the goods; or (b) refund to the consumer the price paid by the consumer for the goods.
- (4) The implied warranty imposed by subsection (1), and the right to return goods set out in subsection (2), are each in addition to—
 - (a) any other implied warranty or condition imposed by the common law, this Act or any other public regulation; and

- (b) any express warranty or condition stipulated by the producer or importer, distributor or retailer, as the case may be.”

23. Section 57 Warranty on repaired goods

“(1) A service provider warrants every new or reconditioned part installed during any repair or maintenance work, and the labour required to install it, for a period of three months after the date of installation or such longer period as the supplier may specify in writing.

(2) A warranty in terms of this section—

- (a) is concurrent with any other deemed, implied or express warranty;
- (b) is void if the consumer has subjected the part, or the goods or property in which it was installed, to misuse or abuse; and
- (c) does not apply to ordinary wear and tear, having regard to the circumstances in which the goods are intended to ordinarily be used.”

Discussion

The discussion will comprise the three claims by the plaintiff, namely the first mobile freezer, the second mobile freezer and the claim for the plaintiff’s transport expenses.

24. The first mobile freezer

24.1 The timeline pertaining to the first mobile freezer shows that the plaintiff took delivery of the mobile freezer in November 2018. During December 2018, the plaintiff notified the respondent that the mobile freezer is faulty, but was told by the defendant to wait until January 2019.

In 2019, the plaintiff took the mobile freezer from Limpopo to Pretoria for repairs in January, March and April.

On 10 June 2019, the plaintiff notified the defendant that the mobile freezer that was repaired on three previous occasions, stopped working again. On the same day, the plaintiff took the mobile freezer back to the defendant and requested a refund of the amount that he paid for the mobile freezer.

24.2 Before addressing the timeline set out in 24.1, it is necessary to indicate what the plaintiff was entitled to expect from the defendant when he purchased the mobile freezer. I refer to section 55 of the Consumer Protection Act, as fully set out in paragraph 21 above.

From the evidence presented, it is clear that the mobile freezer was not useable and durable for a reasonable period of time. The plaintiff specifically informed the defendant of the particular purpose for which he wished to acquire the mobile freezer and what the intended use was. It was shown that the defendant ordinarily manufactures and supplies mobile freezers. The plaintiff therefore had a right to expect that the mobile freezer was reasonably suitable for the specific purpose that he indicated to the defendant. It is further irrelevant whether the failure or defect in

the mobile freezer was latent or patent.

24.3 In addressing the timeline set out in 24.1, section 56, as set out in paragraph 22 above, become relevant. In terms of section 56 the plaintiff is afforded an implied warranty of quality that the mobile freezer he bought complied with the requirements and standards contemplated in section 55. In terms of section 56(2) the plaintiff had the right to return the faulty mobile freezer to the defendant, without penalty and at the defendant's risk and expense for repairs, within six months after the plaintiff took the delivery of the mobile freezer. The plaintiff took delivery of the mobile freezer during November 2018 and returned the mobile freezer for repairs in January, March and April 2019. The plaintiff therefore acted within the timelines set in section 56(2).

On 10 June 2019, the plaintiff took the mobile freezer that was repaired on three prior occasions, and was faulty again, back to the defendant and requested a refund of the amount that he paid for the mobile freezer.

In terms of section 56(3) the plaintiff had the right claim a refund of the price he paid for the mobile freezer where the defendant previously repaired the mobile freezer and where the defect has either not been remedied, or a further defect is discovered. In this case, the further defect seems to have been a faulty blower in the mobile freezer, although no evidence, other than the defendant's averment to that effect was provided.

The plaintiff had to request the refund within three months after the previous repair to the mobile freezer. The period from April to June 2019 falls within the timeline set in section 56(3).

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24.4 The defendant, in his testimony, made reference to warranties in general, including the "3 month walk in guarantee on motor only" on the 17 October 2018 invoice. Section 57, as set out in paragraph 23 above, indicates a three-month warranty on repaired goods that is concurrent with any other warranty.

24.5 The defendant intimated that the plaintiff may have caused damage to the mobile freezer. The defendant's suggestions are mere speculation and no evidence to that effect was submitted.

24.6 The defendant also indicated that the mobile freezer was repaired free of charge when returned for repairs during January, March and April

2019. Section 56(2) clearly states that "... the consumer may return the goods to the supplier, without penalty and at the supplier's risk and expense ..."

25. The second mobile freezer

25.1 The plaintiff testified that he telephonically advised the defendant of the faulty mobile freezer during May 2019, but did not return the mobile freezer to the defendant due to the transport cost implications.

25.2 The plaintiff further testified that he sent the respondent an email with his address regarding the second mobile freezer. The email that was presented to the members of this Consumer Affairs Court is dated 25 March 2019 and corresponds with the plaintiff's complaint relating to the first mobile freezer.

25.3 The Consumer Protector, in leading the evidence of the plaintiff, asked the plaintiff whether he is prepared to take the second mobile freezer to the defendant's premises in Pretoria to be repaired, to which the plaintiff answered in the affirmative. In her closing argument, the Consumer Protector launched a plea to this Consumer Affairs Court to award the plaintiff a full refund on the basis of the plaintiff's preparedness to take the second mobile freezer back to the defendant's premises at his cost. The members of this Consumer Affairs Court find this plea peculiar in view of the judgment in *Vousvoukis v Queen Ace CC t/a Ace Motors* 2016 3 SA 188 (ECG) where the court specifically rejected an argument that it should use its power to make an innovative order to grant a remedy when the goods could be expected to endure for longer than six months.[1] The court concluded that

'The Legislature, for whatever reason, has expressly decreed a limitation period of six months for the return of any goods in section 56(2). There is no question of section 56(2) being ambiguous in any way. In my view, it is not open to a court, under the guise of making an "innovative order", to extend this period. Any innovative order made under section 56(2) must be made within the constraints of the legislation and cannot afford consumers more rights than those specifically provided for in the Act.'

25.4 There is therefore no evidence to warrant recourse for the plaintiff for the second mobile freezer in terms of section 56.

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26. The plaintiff's transport expenses

26.1 During the trial the Consumer Protector submitted a further claim for the plaintiff's transport expenses.

Although the plaintiff proffered his estimation as R2 000,00, it is unclear whether this amount was for each trip, or whether his estimation represented the total expenses. Nevertheless, no evidence as to specific costs or expenses to the plaintiff in transporting the mobile freezer between Limpopo and Pretoria on the various occasions were provided.

26.2 No order will be made pertaining to these costs or expenses.

FINDING

As to the defendant's conduct pertaining to the first mobile freezer, the members of the Consumer Affairs Court find that:

- a) The defendant engaged in prohibited conduct as defined in section 1 of the Consumer Protection Act, No 68 of 2008.

- b) The Defendant furthermore engaged in an unfair business practice as defined in section 1 of the Consumer Protection (Unfair Business Protection) Act, No 7 of 1996.

ORDER

In the circumstances, the following is ordered:

The defendant is ordered to pay the plaintiff an amount of R49 350,00 (forty-nine thousand three hundred and fifty Rands); and interest on the above amount at the prescribed rate of interest from the date of this judgment until date of payment.

ORDERED as such at JOHANNESBURG on 16 March 2023.

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Prof. M A du Plessis

CHAIRPERSON

MEMBERS: M Phukubje, P Samuels and P Opperman concurred.

- [1] T Naude and E de Stadler „Innovative Orders" under the South African Consumer Protection Act 68 of 2008" (Vol 22) [2019] Potchefstroom Electronic Law Journal 21.

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