

SOUTH AFRICA / JUDGMENT

Mbadla v Meyers Motors (Pty) Ltd (NCT-291844-2023-75(1)(b)) [2024] ZANCT 62 (20 October 2024) [2024] ZANCT 62

COURT

National Consumer Tribunal

BEFORE

M Peenze, N Maseti, P Manzi-Ntshingila

CASE / FILE NUMBER

NCT-291844-2023-75(1)(b)

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case number: NCT-291844-2023-75(1)(b)

In the matter between:

PHUMEZO MBADLA

APPLICANT

And

MEYERS MOTORS (PTY) LTD

RESPONDENT

Coram:

Dr M Peenze

- Presiding Tribunal Member

Ms N Maseti

- Tribunal Member

Ms P Manzi-Ntshingila - Tribunal Member

Date of Hearing

- 18 October 2024

Date of Judgment

- 20 October 2024

JUDGMENT AND REASONS

1. The applicant is Phumezo Mbadla (the applicant), a consumer as defined in section 1 of the Consumer Protection Act, 68 of 2008 (the CPA). The applicant represented himself at the hearing.
2. The respondent is Meyers Motors (Pty) Ltd (the respondent), a supplier as defined in section 1 of the CPA. At the hearing, Ms Abulele Sifumba, an attorney from Stirk Yazbek Attorneys, represented the respondent.

TERMINOLOGY

3. A reference to a section in this judgment refers to a section of the CPA.
4. A reference to a rule refers to the “Regulations for matters relating to the functions of the Tribunal and Rules for the conduct of matters before the National Consumer Tribunal”.^[1]

TYPE OF APPLICATION

5. The applicant referred this matter to the National Consumer Tribunal (the Tribunal) in terms of section 75(1)(b). The applicant first referred his complaint to the National Consumer Commission (the NCC), who, after an assessment, concluded on 26 September 2023 that the redress sought by the applicant could not be provided in terms of the CPA.
6. Regarding sections 75(1)(b), 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 6 March 2024.

FACTUAL BACKGROUND

7. The essence of the complaint is that the respondent allegedly sold the applicant a defective Ford Super Cab vehicle (the vehicle) on 29 September 2021. The vehicle reflected approximately 174,000 km on the odometer and was sold for R199 991.00. According to the applicant, the engine was defective, which led to the vehicle breaking down just two months from the date of purchase. The vehicle had only been driven approximately 3500km when the engine failed. The dealer in Port Alfred informed the applicant that the engine needed to be replaced at a cost of R85 000.00, but that M-Sure Warranty (the insurance) approved only R45 000.00. There was a shortfall of R40 000.00, which the respondent was required to pay. The parties did not find each other on the cause of the engine failure, as the respondent denied that the vehicle was defective.

8. The applicant demanded a cancellation of the sale agreement concluded with the respondent and demanded a refund. The Motor Industry Ombudsman of South Africa (MIOSA) made a finding favourable to the applicant, as it found that the vehicle failed to meet the standard contemplated in section 55 and ruled that the respondent must refund the applicant the excess not covered by the insurance.
9. The vehicle was not repaired or replaced. In July 2023, the applicant voluntarily surrendered the vehicle to the Motor Finance Corporation (MFC) by terminating the instalment agreement they had concluded.
10. On 3 May 2024, the Tribunal issued a postponement ruling to allow the applicant to join the MFC in the proceedings. The applicant failed to do so. According to the respondent, the relief requested is not competent as the MFC was not joined, and the vehicle was already sold to an unknown party.
11. The applicant alleges the contravention of sections 55(2)(a) and (b) read with section 56. The relief sought in terms of section 56 is for an order directing the respondent to refund the applicant the purchase price and all costs involved.

THE RELEVANT LEGAL PROVISIONS

12. In terms of section 55(2)(a) and (b), every consumer has a right to receive goods that are reasonably suitable for the purpose for which they are generally intended, of good quality, in good working order, and free of any defects.
13. Section 56 deals with an implied warranty of quality. Subsection (2) states that within six months after 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. The supplier must then, at the election of the consumer, either repair or replace the failed, unsafe, or defective goods or refund the consumer the price paid by the consumer for the goods.
14. If a supplier repairs any goods or any component of any such goods and the failure, defect, or unsafe feature has not been remedied within three months after that repair, section 56(3) outlines that the supplier must replace the goods or refund the consumer the price paid by the consumer for the goods.
15. Section 65 outlines a supplier's responsibility to hold and account for a consumer's property. Per subsection (2), when a supplier has possession of any property belonging to or ordinarily under the control of a consumer, the supplier –
 - a. must not treat that property as being the property of the supplier;
 - b. in the handling, safeguarding and utilisation of that property, must exercise the degree of care, diligence and skill that can reasonably be expected of a person responsible for managing any property belonging to another person; and

- c. is liable to the property owner for any loss resulting from a failure to comply with paragraph (a) or (b).

IN LIMINE POINTS

16. The respondent submitted that the matter is *res judicata*, as the MIOSA and NCC had already ruled on the complaint. This point in limine should fail, as matters before the Tribunal are considered *de novo*^[2] and do not constitute an appeal to a finding by the MIOSA or the NCC. Further, neither the NCC nor any Ombud's finding is binding on the Tribunal.
17. The respondent submitted that the relief requested could not be considered, as the MFC was not joined in the proceedings despite having a direct and substantial interest in the relief sought. The Tribunal finds it competent to consider the request for a finding of prohibited conduct, as the MFC does not have a direct interest in such a claim. However, the Tribunal finds it is not competent to consider a refund, as the MFC has a direct interest in such relief and is not a party to the proceedings. This finding will be detailed later in this judgment.

CONSIDERATION OF PROHIBITED CONDUCT

Selling of defective goods

18. The Tribunal has considered whether the respondent's conduct constitutes prohibited conduct^[3] in terms of the CPA. In doing so, the Tribunal is mindful of its wide-ranging powers to make appropriate orders concerning prohibited conduct.^[4]
19. In the present matter, the applicant argued that the respondent contravened sections 55(2) (a) and (b), read with section 56.
20. According to the evidence before the Tribunal, the applicant did not receive a just vehicle of good quality and free of defects. The applicant put up a convincing case that the vehicle's engine did not perform as expected, as it seized just over 3000 km after purchase, well before the engine was due for service. The vehicle became stationary along the road and had to be towed. This occurred within two months of purchase. The Tribunal accepts the consumer's testimony that he made the required water and oil refills. As a professional driver, he would have noticed any warning light, but no warning light was illuminated before the vehicle started to smoke. The respondent's hearsay evidence that the consumer continued driving despite a warning light is rejected.
21. The defective engine, a mechanical defect of grave concern to the applicant, renders the vehicle unsuitable for the purpose for which vehicles are generally intended. The assessment reports before the Tribunal confirmed that the engine was worn out and had to be replaced.^[5] Although the reports indicate that the melted cylinder head's sender units are commensurate with a scorching engine, the quotation

includes various other faults on the engine, necessitating a replacement of the whole engine. These assessment reports were never provided to the applicant before the hearing.

22. The Tribunal is persuaded that the engine malfunctioned because it was worn out and not because of a driving error. No warning light was illuminated. The engine was also under mechanical warranty when the defect occurred. Although the mechanical warranty is not of concern in the allegation of prohibited conduct, the Tribunal noted that the insurance approved the repairs but that the respondent, notwithstanding, failed to repair the vehicle and pay the access in the warranty claim.
23. Further, the respondent should have informed the applicant of any problems, performance challenges or other deteriorating vehicle conditions before purchase. It did not. The applicant was not furnished with documentation showing that the vehicle was properly serviced. Further, no inspection report was furnished to the applicant as proof that the vehicle passed a roadworthy test. The respondent's argument that the vehicle passed a roadworthy test and that the applicant signed the disclosure and delivery documents accepting the vehicle does not affect the determination of whether the vehicle has latent defects. The respondent was obliged to disclose all material facts and latent defects^[6] at the time of sale. Moreover, defects that manifest after the sale are still covered by the implied warranty in section 56, regardless of the roadworthy test outcome. In any event, the alleged defects were not disclosed when the applicant signed the said documents.
24. A supplier cannot contract out of their liability under the CPA, except that sections 55(2)(a) and (b) do not apply to a transaction if the supplier expressly informed the consumer that the goods were offered in a specific condition and the consumer expressly agreed to accept the goods in that condition. The applicant's acceptance of the vehicle thus does not negate the respondent's responsibility for any undisclosed or latent defects under the CPA.^[7]
25. Further, section 56(2) does not give suppliers the right to choose the remedy for defective goods. It is a contravention of the CPA for a supplier to insist on processing an insurance claim when the applicant requests repairs as per the CPA. The supplier must comply with the consumer's chosen remedy, and a repair warranty does not override the consumer's rights under the CPA.

Duty of care

26. Certain rules exist in terms of our common law when dealing with the liability of a person who has received goods belonging to another (depositum). These rules provide that the depositary must exercise due care and diligence in taking care of such goods and will be liable to the depositor if it fails to do so. A supplier will, therefore, be liable for damages resulting from the loss of damage to goods through negligence while in its custody. It has become customary for depositaries to exclude or severely restrict the

rights of depositors in their standard terms and conditions. Such clauses will now fall foul of the provisions of the CPA dealing with the validity of standard terms, especially section 51(1)(b), which prohibits terms that directly or indirectly waive consumers of a right in terms of the CPA or avoids the supplier's obligations in terms of the CPA. In *Kwamashu Bakery Ltd v Standard Bank*[8] it was made clear that a business that undertakes a business venture voluntarily cannot complain and say it should not be held to a duty of care because it would cost too much or be disruptive to its practice.

27. Under Section 65, a supplier must recognise the consumer's ownership

or controlling rights when dealing with movable property delivered to the supplier. The supplier must also take reasonable care of such property according to how a reasonable person in the same position would handle it.

28. The respondent took possession of the vehicle by instructing it to be towed to a third party. The respondent was obliged to ensure the vehicle was kept safe and secure to prevent it from getting damaged at a third party's premises. The Tribunal is persuaded that the respondent did not take proper care of the vehicle while it was in its direct possession or a third party's possession. According to the evidence before the Tribunal, the vehicle was kept in an open space, with the bonnet open, and various items were eventually removed from the vehicle. The vehicle also collected rust, and its condition deteriorated.

29. As a result, the vehicle, as surrendered to the MFC, was sold on auction for R76 000, far less than the purchase price.

Conclusion

30. A consumer has the right to a usable and durable vehicle for a reasonable period. In this case, the applicant purchased a roadworthy vehicle, expecting it to be in good working order and defects-free, which it was not. The Tribunal is persuaded that the vehicle was sold with a defective engine.

31. The Tribunal finds that a defective engine is not a small fault. This defect rendered the motor vehicle less acceptable than people generally would be reasonably entitled to expect from a second-hand

vehicle. It further rendered the motor vehicle less useful, practicable, or safe for the purpose for which the consumer purchased

it.

32. As the vehicle is found unsuitable for its intended purpose, it did

not satisfy the requirements of section 55(2). It was neither of good quality nor in good working order and free of defects. It was 'plainly' not safe and usable for a reasonable time. Therefore, the consumer was entitled to request repair or replacement of the failed goods in terms of section 56(2)(a). The Tribunal finds that the respondent showed no sympathy or understanding for the applicant when he brought the vehicle's mechanical defects to its attention and requested repairs.

33. Despite the applicant's request for repair, the respondent

failed to action such repairs and delayed the process by insisting that an insurance claim be processed. As a result, the defect was not remedied, and the vehicle was sold on auction for an amount that left the consumer with such debt that he had to be placed under debt review.

34. The CPA protects consumers from exploitation and abuse in the marketplace. It promotes an economic environment that supports and strengthens a culture of consumer rights and responsibilities. By failing to respect the consumer's right to repair, the respondent has not only engaged in prohibited conduct as defined in the CPA but also

infringed on the consumer's right to fair consumer practices and to receive safe and good-quality goods.

RELIEF REQUESTED

35. The MFC, the consumer's credit provider, paid the purchase

price. It is common cause that the amount was paid to the respondent based on the consumer's instruction through its credit provider.

36. The Tribunal has jurisdiction to order a refund of the purchase price. However, the Tribunal has no jurisdiction to order the repayment of the purchase price where the financing bank is not a party to the proceedings and where the vehicle has already been surrendered to the financing bank. Such an order would amount to an order for general damages. What would be appropriate in the circumstances is for the applicant to institute a civil claim before an appropriate forum if he believes that such a claim can be proven.[9]

37. In terms of section 115(2)(a), a person who has suffered loss or

damage as a result of prohibited conduct 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 is prohibited or required conduct in terms of [the CPA];

(ii) stating the date of the Tribunal's finding, if any; and

(iii) setting out the section of [the CPA] in terms of which the Tribunal made its finding, if any."

38. The certificate referred to in section 115(2)(b) is sufficient proof of its contents.[10]

ORDER

39. In the result, the Tribunal makes the following order:

39.1. It is declared that the respondent contravened:

39.1.1. Section 55(2)(a) and (b), read with section 56(1);

39.1.2. Section 56(2)(a); and

39.1.3. Section 65(2)(b) and (c).

39.2. The contraventions listed above are declared prohibited conduct.

39.3. The applicant may request a certificate from the Chairperson of the Tribunal to claim his damages in a civil court.

39.4. There is no cost order.

DR. MC PEENZE

PRESIDING MEMBER

Tribunal members Ms N Maseti and Ms P Manzi-Ntshingila concur.

[1] Published in GN 789 in GG 34405 of 29 June 2007.

[2] *Lewis Stores (Pty) Ltd v Summit Financial Partners (Pty) Ltd and Others*, Case no 314/2020 [2021] ZASCA 91 (25 June 2021).

[3] Prohibited conduct is defined in section 1 as meaning an act or omission in contravention of the CPA.

[4] *See National Credit Regulator v Dacqup Finances CC trading as ABC Financial Services – Pinetown and Another* (382/2021)

[2022] ZACSA 104 (24 June 2022).

[5] See pages 239-242 of the record.

[6] *Le Roux v Zietsman and Another* (330/202) [2023] ZASCA 102 (15 June 2023) para 20.

[7] Also see *Vonk v Willow Crest Motors CC* (NCT/115078/2018/75(1) (b)) [2019] ZANCT 63 (6 April 2019).

[8] *Commercial Law Report* (1994) 156 (D & CLD) at 178.

[9] *See Steyn NO v Ronald Bobroff & Partners* [2012] ZASCA 184; 2013 (2) SA 311 (SCA).

[10] Section 115(3).

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