

SOUTH AFRICA / JUDGMENT

Mdluli v Jermaine Investments & Projects (Pty) Ltd (NCT/109750/2018/75(1)(b)) [2018] ZANCT 143 (9 October 2018) [2018] ZANCT 143

COURT
National Consumer Tribunal

BEFORE
P A Beck

CASE / FILE NUMBER
NCT/109750/2018/75(1)(b)

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IN

THE NATIONAL CONSUMER TRIBUNAL

HELD

IN CENTURION

Case

number: NCT/109750/2018/75(1)(b)
In

the matter between: PATRICK
MDLULI APPLICANT
AND
JERMAINE
INVESTMENTS & PROJECTS (PTY)
LTD RESPONDENT
Coram
P
A BECK - Presiding Member
Date
of Hearing – 9 October 2018

JUDGMENT

AND REASONS

THE PARTIES

1. The Applicant in this matter is Patrick Mdluli, an adult male, residing at [...] N Street, Menlo Park, Pretoria, (the “Applicant”).
2. The Respondent is Jermaine Investments and Projects (Pty) Ltd a private company duly registered and incorporated in terms of the Company laws of South Africa with its principal place of business at 266 Market Street, Jeppestown, Johannesburg (the “Respondent”).

THE HEARING

3. A hearing in this matter was held on 9 October 2018 in Centurion. The Applicant represented himself at the hearing. There was a non-appearance of the Respondent at the hearing.
4. Accordingly, the Application for leave to refer proceeded unopposed.

APPLICATION TYPE

5. 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”).
6. Section 75(1)(b) 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 ...the Tribunal, with the leave of the Tribunal.”

7. In an application of this nature the National Consumer Tribunal (hereinafter referred to as “the Tribunal”)

considers whether it should grant the Applicant leave to bring a complaint to the Tribunal after the National Consumer Commission (hereinafter referred to as “the Commission”) has issued a notice of non-referral in response to a complaint. If the leave is granted, then the Tribunal will conduct a separate hearing to consider the merits of the complaint.

JURISDICTION

8. Section 75(5)(b) 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...an application for leave as contemplated in subsection (1)(b)”

9. 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).

ISSUE TO BE DECIDED

10. The Tribunal must decide whether or not to grant the Applicant leave to refer this matter directly to the Tribunal. In order to arrive at such a determination, the Tribunal is required to consider, among other things, the Applicant's prospects of success, the importance of the case and whether the Tribunal can grant the relief sought.

PROCEDURAL ASPECTS

11. The Commission issued a notice of non-referral in this matter on 1 June 2018. The Applicant approached the Tribunal during June 2018 with his application using Form TLr30A, Form Tl. 73(3) & 75(1)(b) & (2) of the CPA, together with supporting documents and proof of service.
12. The Respondent did not file an answering affidavit. Rule 13 (1) states that "Any person required by these Rules to be notified of an application or referral to the Tribunal, may oppose the application or referral by serving an answering affidavit on:
 - (a) the Applicant; and
 - (b) every other person on whom the application was served."
13. Rule 13(2) states that "An answering affidavit to an application or referral other than an application for interim relief

must be served on the parties and filed with the Registrar within 15 business days of the date of the application". Accordingly, the Registrar set the matter down for hearing on 9 October 2018 on an unopposed basis, before a single member of the Tribunal in accordance with section 75(5)(b) of the CPA.

14. This judgement follows after consideration of all the papers filed and oral evidence provided during the hearing of 9 October 2018.

BACKGROUND

15. In January 2017, the Applicant purchased two vehicles from the Respondent. The Applicant purchased a 2017 model Hyundai i10 motor vehicle, with registration number F[...]GP, for the purchase price of R131 500,00. The Applicant also purchased a 2013 model Volkswagen Polo, with registration number H[...]GP also for the amount of R131 500,00. The total purchase price paid for the two vehicles was the sum of R263 000,00.
16. According to the Applicant, it was a specific term of the agreement of sale that neither vehicle must be involved in an accident or have any structural damage or be rebuilt or reconditioned in any way. It was a further specific term of the agreement of sale that the service record, of the previous owner, would be provided to the Applicant, by the Respondent. It is on the aforementioned basis that the Applicant entered into the

agreement, in good faith, with the Respondent. When the Respondent failed to provide the Applicant with the service record of the previous owners of the two vehicles, the Applicant decided to take both of the vehicles to Saturn Auto Body and Repairs “Saturn” for an assessment.

17. The assessment report from Saturn confirmed that both vehicles were severely damaged before being re-conditioned and sold to the Applicant. Within 7 days of taking delivery of the vehicles, the Applicant returned both vehicles to the Respondent and requested a refund of the full purchase price of R263 000,00 paid for the two vehicles. The Applicant alleged that there had been a material misrepresentation of the condition of the vehicles by the Respondent and had the Applicant known the true condition of the vehicles, the Applicant would have “made a better decision about the purchase of the cars.” The Respondent refused to refund the purchase price of R263 000,00 to the Applicant. Instead, the Respondent told the Applicant to “book to sell” the cars in order to receive a refund.
 18. In February 2018, the Applicant approached Legal Wise for assistance. A letter of demand was sent to the Respondent, by Legal
- Wise, in terms of which the Applicant demanded a full refund of the purchase price of R263 000,00. The Respondent ignored the letter of demand sent to the Respondent, by Legal Wise.
19. In March 2018, the Applicant approached the Motor Industry Ombudsman for assistance “MIOSA.” MIOSA found that the sale agreement did not specifically state that the vehicles should be “accident free,” have a service history or a warranty, as a condition of the sale. MIOSA further referred to another agreement entered into by the Applicant, with the Respondent to re-sell the vehicles. Accordingly, it was the finding of MIOSA that Section 56 of the CPA has no application in the matter. Further MIOSA informed the Applicant that MIOSA does not assist consumers who require a refund or compensation.
 20. MIOSA referred the Applicant to the National Consumer Commission (the “Commission”) and closed their file. The Commission

determined that there was a dispute of fact in this matter and issued a notice of non-referral.

21. The Applicant submitted that the NCC erred in its decision not to refer the complaint to the Tribunal on the basis that there was a dispute of fact without providing any evidence of what influenced their decision in the matter.
22. The Applicant seeks to rely on the undertaking given by the Respondent that the vehicles were free of specific defects referred

to in 16 above, which the Applicant submits formed part of the agreement of sale of the vehicles. The Applicant seeks relief

from the Tribunal in the form of an order that the full purchase price be refunded to the Applicant of R263 000,00 with interest

on this amount, together with the Applicant's legal fees and expenses incurred in the legal process.

APPLICATION FOR LEAVE

23. 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.
24. 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".
25. 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."

26. 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:
 - (a) the Applicant's reasonable prospects of success with the referral; and
 - (b) whether the matter is of substantial importance to the Applicant, the Respondent or both.
27. It is clear that the matter is of substantial importance to the Applicant. This is obvious from the amount paid for the

vehicles by the Applicant; the Applicant was not able to take delivery of the vehicles free of defects as specifically outlined by the Applicant prior to entering into the agreement with the Respondent; and the process followed by the Applicant to obtain relief.

Prospects of Success

28. In considering the prospects of success, it is to be considered by the Tribunal, whether it was a term of the agreement of sale that the vehicles purchased were not involved in an accident and were not re-conditioned vehicles; whether the Respondent materially misrepresented the condition of the vehicles to the Applicant; and whether the vehicles were reasonably fit for purpose, free of

defects. The Respondent has not placed the Respondent's version before the Tribunal. The assessment report from Saturn clearly shows that substantial repairs in excess of R100 000,00 are required on both vehicles which represents 50% of the purchase price of the vehicles. The Applicant's prospects of success also lie in proving that the Tribunal has the powers to grant the order sought.

29. Section 4(5) of the Act makes it clear that in any dealings with a consumer in the ordinary course of business, a person is not allowed to:
 - (a) engage in any conduct contrary to, or calculated to frustrate or defeat the purposes and policy of the Act;
 - (b) engage in any conduct that is unconscionable, misleading or deceptive, or that is reasonably likely to mislead or deceive; or
 - (c) make any representation about a supplier or any goods or services, or a related matter, unless the person has reasonable grounds for believing that the representation is true.
30. In Section 1 of the CPA, "goods" are defined to include [at (d)] a "legal interest in land or any other immovable property, other than an interest that falls within the definition of 'service' in this section..." The Consumer Protection Act also affects a wide range of consumers and transactions. The definition of a "consumer" includes not only the person (either a natural or juristic person) to whom goods or services are promoted or supplied, but also the actual user of the goods or the recipients or beneficiary of the services.
31. As the Applicant in this matter is the "user of the goods" that forms the subject of the complaint against the Respondent, the Applicant is found to be a consumer for purposes of this application. Locus Standi of the Applicant in this matter is therefore acknowledged in terms of the CPA.
32. The CPA defines "prohibited conduct" as "an act or omission in contravention of this Act". Section 55 of the CPA deals with a consumer's right to safe, good quality goods. More specifically, subsections 55 (2) (a) and
 - (b) respectively give to a consumer the "right to receive goods that are reasonably suitable for the purposes for which they are intended" and "are of good quality, in good working order and free of any defects".
33. Section 56 of the CPA deals with implied warranty of quality. Subsection 56 (1) provides that where there is an agreement pertaining to the supply of goods there is an implied provision that the retailer, amongst others, warrants that the goods comply with the requirements and standards contemplated in section 55. Subsection 56 (2) gives the consumer the right to within six months after taking delivery of the goods to return the goods to the supplier, and if the requirements and standards contemplated in section 55 are not met then the supplier must without imposing a penalty and at the supplier's risk either under subsections 56 (2) (a) or (b) respectively "repair or replace the defective goods" or "refund the consumer the price

the consumer paid for the goods".

34. Subsection 56 (3) goes further and provides, amongst other things, that if the defect has not been remedied within a period of three months after the repair envisaged in subsection 56 (2) (a); then the supplier must either "replace the goods" or "refund the consumer the price paid by the consumer for the goods".
35. The evidence taken as a whole reveals that when the Applicant purchased the vehicles, it is the Applicant's version that it was a term of the sale agreement that the Respondent provides the Applicant with a vehicle that is "accident free" and not reconditioned. The report from Saturn indicates repairs to the value of 50% of the purchase price of the vehicles which assessment report on the face of it shows that there were material defects in the vehicles sold by the Respondent, to the Applicant. On the Applicant's version the Applicant returned both vehicles to the Respondent within 7 days of taking delivery of the vehicles. The Applicant is requesting relief as allowed for in the CPA, which is appropriate relief to be considered to be granted by the Tribunal in terms of the CPA.

CONCLUSION

36. The Tribunal finds that the Applicant does enjoy reasonable prospects of success in the main application, based on the following:
- (a) The Applicant's claim falls within the jurisdiction of the CPA and the Tribunal;
 - (b) The Applicant is a consumer within the definition of a consumer in the CPA; and
 - (c) The relief sought is relief that the Tribunal is empowered to order.

ORDER

37. Accordingly, the Tribunal makes the following order –

37.1 The Applicant's application for leave to refer the matter directly to the Tribunal is granted; and

37.2 There is no order as to costs.

SIGNED AND DATED ON THIS 4th DAY OF NOVEMBER 2018

{Signed}

PA BECK

PRESIDING MEMBER

[1] 1986

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

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