

SOUTH AFRICA / JUDGMENT

Modisakeng v Lichtenburg Motors CC (NCT/292567/2023/75(1)(b)) [2024] ZANCT 55 (3 October 2024) [2024] ZANCT 55

COURT

National Consumer Tribunal

BEFORE

A Potwana, M Peenze, C Ntsoane

CASE / FILE NUMBER

NCT/292567/2023/75(1)(b)

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case number: NCT/292567/2023/75(1)(b)

In the matter between: ENOCH TSIETSI MODISAKENG APPLICANT and LICHTENBURG MOTORS
CC RESPONDENT

Coram:

Dr A Potwana

- Presiding Tribunal Member

Dr M Peenze

- Tribunal Member

Mr C Ntsoane

- Tribunal Member

Date of hearing: 1 October 2024 (Via a Microsoft Teams technology link)

JUDGMENT AND REASONS

THE PARTIES

1. The applicant is Mr Enoch Tsietsi Modisakeng, an adult male consumer. During the hearing, the applicant represented himself and was aided by his son, Mr Remmone Modisakeng.

2. The respondent is Lichtenburg Motors CC, a close corporation with registration number: 2003/064237/23. During the hearing, the respondent was represented by its Finance and Insurance Manager, Ms Petro Wessels (Ms Wessels), and Mr Justin Blignaut (Mr Blignaut), a legal adviser from SEESA (Pty) Ltd.
3. Mr Matshana Michael Thibakhgana acted as an interpreter during the hearing.

INTRODUCTION AND

BACKGROUND

4. On 1 October 2023, the applicant filed an application in terms of section 75(1)(b) of the Consumer Protection Act 68 2008 (the CPA) for leave to refer a complaint to the Tribunal. In Part D of the prescribed form for referring

complaints to the Tribunal, Form TI.73(3) & 75(1)(b) & (2) CPA, the applicant stated that:

“We request that the dealer fix the issues in the car, because the issues has persisted from the first 10 days of purchase and they attempted to fix it but the issues are still there. If the dealer does not want to fix the issues, we would like the contract to be cancelled and have a reasonable price we pay for the period we used.” (sic in toto)

5. A single member of the Tribunal granted the application for leave.
6. It is undisputed that on or about 11 March 2022, the applicant bought a 2015 Mazda BT050 2.2 TDI vehicle from the respondent for the sum of R278 870.00. The applicant alleges that about seven days after taking delivery of the vehicle, he conveyed his concerns about the vehicle to the respondent. The respondent agreed to repair the vehicle but did not address all the applicant’s concerns. Once again, the applicant requested the respondent to repair the vehicle. Within six months of purchase, the applicant returned the vehicle to the respondent for repairs four times. The respondent tried to repair the vehicle several times, but the defects persisted even though the respondent claimed to have repaired the vehicle.
7. The applicant alleges that the last repair was conducted on 1 September 2022, within 3 months after the previous one. The issues persisted within 13 days after the last repair. The respondent refuses to repair the vehicle anymore because the applicant signed a document confirming that the vehicle was repaired to the applicant’s satisfaction and that the issues complained of were caused by the applicant’s failure to service the vehicle.
8. At the end of February 2023, the applicant returned the vehicle to the respondent and requested that it cancel the purchase agreement because it did not want to repair the vehicle. The respondent informed him that he had to repair the vehicle and pay the costs of using it. He is not willing to repair the vehicle and seeks redress under sections 55 and 56(3) of the CPA.

9. The respondent denies that all the applicant's concerns were not addressed. It argues that between 11 February 2022 and 19 May 2022, the respondent repaired and replaced the sleeve, the top gasket rings, the oil pump, the oil filter, the brake pads, and the prop-shaft. On or about 18 May 2022, the applicant took the vehicle to the respondent and complained about an oil leak and that the water bottle was dirty. Upon inspection, the respondent found that there was water in the air cleaner. According to the respondent, this was an indication that the applicant misused the vehicle.
10. On or about 9 June 2022, the respondent repaired the vehicle to the value of R67 961.04 by replacing the sleeves, the top gasket, the oil pump, oil, battery, front brakes, wiper blades, fuel filter, four tyres, brushes on the starter motor, prop shaft, anti-freeze, four injectors, and gear oil. It also calibrated the injectors, repaired the window motor, and serviced the turbo.
11. On or about 29 July 2022, the respondent caused a letter to be sent to the applicant informing him that he had failed to have the vehicle serviced on or before the vehicle reached 202 034 kilometres and had only informed the respondent of a water leak after driving the vehicle for 2 923 kilometres after becoming aware of the water leak and the vehicle had travelled 204 957 kilometres. Based on this, the respondent argues that the applicant "failed to mitigate his own damages." [1] However, the respondent still assisted the applicant and repaired the vehicle at its own cost on or about 22 August 2022. The respondent repaired the vehicle to the value of R67 961.04. On or about 31 August 2022, the respondent replaced the head gasket to the value of R45 385.21.
12. On or about 1 September 2023, the applicant collected the vehicle and confirmed that the vehicle was repaired to his satisfaction. He further confirmed that he failed to service the vehicle every 10 000 kilometres and that the air filter was not replaced because of his failure to service the vehicle every 10 000 kilometres and that this caused the filter to be dirty, which, in turn, caused damage to the turbo of the vehicle.
13. On 1 December 2022, the applicant complained of an oil leak, a water leak, worn discs and a diesel leak. He stated that he wanted to return the vehicle or have it replaced. On 15 December 2023, the respondent informed the applicant that the vehicle was repaired on or about 22 August 2022. It informed the applicant that it was willing to replace the vehicle if the applicant would be "held responsible for all and any repair work that must be done and has been done to the motor vehicle" and "a value adjustment would be done on the motor vehicle for kilometres already driven." [2]
14. On 24 February 2023, the applicant left the vehicle at the respondent's premises. On or about 6 March 2023, the respondent had the vehicle assessed by Action Ford Lichtenburg. It claims that all the items that need to be repaired are wear and tear items.

15. In his replying affidavit, the applicant averred that he tried to have the vehicle serviced at 198 150 kilometres, but the Mazda franchise could not perform the service due to leaking oil. The respondent tried to repair the vehicle and confirmed that the vehicle was repaired. The applicant tried to have the vehicle serviced again at 199 397 kilometres, but the Mazda franchise could not perform the service due to the same faults. He had to take the vehicle to the respondent for repairs again.

POSTPONEMENT APPLICATION

16. Before the hearing of the main matter, Ms Wessels requested that the matter be postponed because the respondent's legal representative, Mr Blignaut, could not attend the hearing as he was attending to another matter at the Commission for Conciliation, Mediation and Arbitration. She argued that the respondent's right to be legally represented would be violated if the hearing proceeded in the absence of its legal representative. The applicant vehemently opposed the application on the basis that the respondent's conduct was delaying the finalisation of this matter, and he would be prejudiced if the hearing did not take place.

CONSIDERATION OF THE POSTPONEMENT APPLICATION

17. After hearing the parties' arguments, the panel took a short adjournment to consider the postponement application. In making the decision, the panel considered all the arguments presented by the parties' representatives. Upon resumption of the proceedings, the presiding Tribunal member informed the parties *ex tempore* that the hearing would not be postponed and that reasons would be given in written form.
18. In deciding whether to grant the postponement, we considered the parties' arguments and the relevant decisions of the Constitutional Court. In *National Police Service Union and Others v Minister of Safety and Security and Others*[3], Makgoro J wrote:

"The postponement of a matter set down for hearing on a particular date cannot be claimed as of right. An applicant for a postponement seeks an indulgence from the Court. Such postponement will not be granted unless this Court is satisfied that it is in the interests of justice to do so. In this respect the applicant must show that there is good cause for the postponement. In order to satisfy the Court that good cause does exist, it will be necessary to furnish a full and satisfactory explanation of the circumstances that give rise to the application. Whether a postponement will be granted is therefore in the discretion of the Court and cannot be secured by mere agreement between the parties. In exercising that discretion, this Court will take into account a number of factors, including (but not limited to): whether the application has been timeously made, whether the explanation given by the applicant for postponement is full and satisfactory, whether there is prejudice to any of the parties and whether the application is opposed."

In *Psychological Society of South Africa v Qwelane and Others*,[4] the Constitutional Court reaffirmed the above and stated that "[P]ostponements are not merely for the taking." They

have to be properly motivated and substantiated. And when considering an application for a postponement a court has to exercise its discretion whether to grant the application.” In addition to the above-cited cases, we were mindful that in *Van Wyk v Unitas Hospital and Others*[5], the Constitutional Court stated, “A litigant is entitled to have closure on litigation. The principle of finality in litigation is intended to allow parties to get on with their lives.”

19. It is for the above-stated reasons that we decided to refuse the respondent’s postponement application.
20. We further record that the respondent’s legal representative, Mr Blignaut, joined the proceedings whilst the applicant was still arguing his case and answering the panel’s clarity-seeking questions. He was given an opportunity to prepare his arguments and to present the respondent’s case in rebuttal.

THE RELEVANT STATUTORY PROVISIONS

21. Section 55(2) of the Consumer Protection Act 68 of 2008 (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.”

22. Section 56(2) of the CPA states-

“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.”

23. Section 56(3) of the CPA states-

“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.”

CONSIDERATION OF THE MERITS

24. It is common cause or undisputed that a few days after the applicant purchased the vehicle, the vehicle exhibited various defects, and the applicant returned the vehicle to the respondent for repairs. According to the respondent’s own version, between 11 February 2022 and 19 May 2022, it repaired and replaced the sleeve, the top gasket rings, the oil pump, the oil filter, the brake pads, and the prop-shaft. It claims that on or about 9 June 2022, it repaired the vehicle to the value of R67 961.04 by replacing the sleeves, the top gasket, the oil pump, oil, battery, the front brakes, wiper-blades, fuel-filter, four tyres, brushes on the starter motor, prop-shaft, anti-freeze, four injectors, and the gear oil. Furthermore, it claims that on or about 31 August 2022, it replaced the head gasket to the value of R45 385. 21.
25. Annexure “E” to the applicant’s replying affidavit is a Leon’s Mazda’s tax invoice.[6] It shows, among other things, that the vehicle could not be serviced because the sump leaked oil. Annexure “G” to the

applicant’s replying affidavit is a Leon’s Mazda tax invoice dated 20 June 2022.[7] The recorded odometer reading is 199 397. It shows, among other things, that the vehicle could not be serviced because it leaked oil, and the words “refer to previous report. Client took as is” (sic in toto) are typed thereon.

26. Annexure “H” to the applicant’s replying affidavit is a Leon’s Mazda tax invoice dated 1 July 2022 by Leon’s Mazda.[8] It shows, among other things, that there was an “oil leak on turbo.” The recorded odometer reading is 202 034.
27. Annexure “Q” to the applicant’s replying affidavit is Leon’s Mazda tax invoice dated 21 November 2022. It shows, among other things, that the vehicle leaked diesel and was unsafe to drive.
28. In view of the above, it is evident that the respondent repeatedly failed to repair the vehicle even before it was due for service. In terms of section 56(3) of the CPA, it was statutorily obligated to either replace the applicant’s vehicle or refund the applicant the price paid by the consumer for the vehicle after the defects remained both after its first and its last failed attempts to repair the vehicle. The provisions of section 56(3) are peremptory. They clearly state that if “the failure, defect or unsafe feature has not been remedied, or a further failure, defect or unsafe feature is discovered, the supplier must[9] replace the goods or refund to the consumer the price paid by the consumer for the goods.”
29. We turn to consider whether the applicant’s failure to have the vehicle serviced caused the defects that became apparent after 1 September 2022. In our view, the respondent has not tendered any evidence that proves that these defects manifested as a result of the applicant’s failure to have the vehicle serviced every 10 000 kilometres. Evidently, these defects, to wit, the water

leak, oil leak, diesel leak, and the disc manifested within three months after the respondent repaired the vehicle. The respondent's

reliance on the applicant's confirmation that the vehicle was repaired to his satisfaction is objectionable and possibly violates other provisions of the CPA. The applicant's confirmation does not in any way prove that the respondent had properly conducted the repairs.

30. Concerning whether the issues complained of after the last repairs were wear and tear items, Mr Blignaut conceded that only the disc was a wear and tear item.

CONCLUSION

31. By refusing to allow the applicant to return the vehicle or to replace it after the vehicle exhibited defects within three months after the respondent repaired it and, instead, informing the applicant that it was willing to replace the vehicle if the applicant would be "held responsible for all and any repair work that must be done and has been done to the motor vehicle" and "a value adjustment would be done on the motor vehicle for kilometres already driven," the respondent contravened section 56(3) of the CPA.

ORDER

32. The Tribunal makes the following order:

32.1. The respondent contravened section 56(3) of the Consumer Protection Act 68 of 2008.

32.2. The respondent's contravention of section 56(3) of the Consumer Protection Act 68 of 2008 is hereby declared prohibited conduct.

32.3. The respondent must refund the applicant the sum of R278 870.00 within thirty (30) ordinary days of the issuing of this order.

32.4. There is no order as to costs.

THUS, DONE AND DATED 3 OCTOBER 2024.

[Signed]

Dr A Potwana

Presiding Tribunal Member

Dr M Peenze and Mr C Ntsoane (Tribunal members) concur.

[1] On page 233 of the Tribunal's paginated bundle.

[2] Paragraph 24 of the respondent's answering affidavit.

[3] 2000

(4) SA 1110 at paragraph 4.

- [4] [2016] ZACC 48 at paragraph 30.
 - [5] 2008(4) BCLR 442 (CC) at paragraph 31.
 - [6] Page 402 of the Tribunal's paginated bundle. The date of the invoice and the odometer reading are not legible.
 - [7] Page 403 of the Tribunal's paginated bundle.
 - [8] Page 405 of the Tribunal's paginated bundle.
 - [9] Underline added for clarity.
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