

SOUTH AFRICA / JUDGMENT

Mosaka v Bryanston Executive Cars CC (NCT/195557/2021/75 (1)(b)) [2022] ZANCT 6 (31 January 2022) [2022] ZANCT 6

COURT

National Consumer Tribunal

BEFORE

MC Peenze, A Potwana, T Bailey

CASE / FILE NUMBER

NCT/195557/2021/75 (1)(b)

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case number: NCT/195557/2021/75 (1)(b)

In the matter between:

MICHAEL MOSAKA

APPLICANT

And

BRYANSTON EXECUTIVE CARS CC

RESPONDENT

Coram:

Dr MC Peenze – Presiding Tribunal Member

Mr A Potwana – Tribunal Member

Mr T Bailey – Tribunal Member

Date of hearing – 21 January 2022 via the Microsoft Teams digital platform

Date of judgment – 31 January 2022

JUDGEMENT AND REASONS

PARTIES

1 The Applicant is Michael Mosaka (the applicant). He is an adult male and a consumer who resides in K[....] Park, Gauteng.

2 The applicant represented himself at the hearing of this application (the hearing).

3 The Respondent is Bryanston Executive Cars CC (the respondent), a close corporation duly registered in terms of the company laws of the Republic of South Africa. The respondent's principal place of business is at 252 Main Avenue Corner Republic Road, Randburg, Gauteng.

4 The respondent is a dealer and supplier of motor vehicles to members of the public.

5 Ms Adele le Roux from A le Roux Attorneys represented the respondent at the hearing.

TYPE OF APPLICATION AND RELIEF SOUGHT

6 The applicant makes this application in terms of section 75 (1) (b) of the Consumer Protection Act, 2008 (the CPA). That section provides that if the National Consumer Commission issues a notice of non-referral in response to a complaint, the complainant may refer the matter directly to the Tribunal, with leave of the Tribunal. On 10 November 2021, the Tribunal granted the applicant leave to refer his complaint directly to the Tribunal.

7 The applicant seeks an order for the following relief:

7.1. Bryanston Executive Cars CC to take their vehicle back; and

7.2. Standard Bank to refund all instalments paid up to date with interest.

ISSUES TO BE DECIDED

8 The Tribunal must decide whether the respondent engaged in prohibited conduct, by selling a defective vehicle to the applicant, in contravention of section 56 read with section 55 of the Act. The Tribunal must also decide whether it can grant the relief sought, should it find in favour of the applicant.

TERMINOLOGY

9 A section in this judgment refers to a section in the CPA.

THE COMMON CAUSE OR UNDISPUTED MATERIAL FACTS

10 The matter was heard on an opposed basis. However, the material facts determining this application were either common cause or not disputed by the parties. The Tribunal sets them out below.

11 The applicant purchased a second-hand BMW 523i, 2010, from the respondent on 24 August 2018. The applicant conducted an inspection of the vehicle prior to purchase and signed the defects disclosure document as prepared by the respondent.

12 On 28 August 2018, the applicant attempted to return the vehicle, following the outcome of an inspection that he requested from DEKRA. The DEKRA report reflects various faults in the vehicle. The applicant expected a refund of the purchase price, but Bryanston Executive Cars refused to accept the cancellation of the purchase.

13 The respondent submits that Mr Mosaka was specifically informed regarding the condition of the vehicle. The various documents signed by Mr Mosaka were attached as evidence. The documents reflect complete evaluation of every aspect of the vehicle and the various faults.

14 As the respondent refused to accept the return of the vehicle, the vehicle remains stationed at the applicant's place. The applicant submits that, although he drives short distances with the vehicle, he believes the vehicle is unsafe to drive. The respondent disputes the alleged unsafe condition of the vehicle.

15 Mr Mosaka lodged a complaint with numerous entities, including the Motor Industry Ombudsman of South Africa (MIOSA), but could not obtain a finding in his favour. He lodged a complaint with the National Consumer Commission (the NCC), but a notice of non-referral, dated 10 June 2021, was issued.

ISSUES IN DISPUTE

16 The applicant submits that he returned his vehicle within the five-day cooling-off period as referred to in section 16 of the CPA. Accordingly, he alleges that the respondent infringed upon his right to return the vehicle without penalty and that he as consumer has the right to a full refund. The applicant searched for a vehicle on the internet and found an advertisement marketing the vehicle on a dealer website. The applicant was not individually targeted in the marketing of the vehicle and cannot explain on what basis this transaction could be classified as direct marketing.

17 The applicant further submits that the vehicle was defective as he was only informed of minor faults with the vehicle and did not realise the extent of the repair work done on the vehicle. The applicant believes that the vehicle was in an accident, although the salesperson assured him verbally that the vehicle had not been in an accident. The respondent's defence to the claim, which comprises the disclosure and evaluation documents signed, was considered in the hearing of the matter.

18 The Tribunal therefore considered the presentations by the parties to determine whether the disclosure documents as signed by the applicant sufficiently disclosed the vehicle's specific condition. Further, the Tribunal also considered whether the vehicle is indeed defective to the extent prohibited by sections 55 and 56 of the CPA.

ANALYSIS

Relevant legislative provisions

19 Chapter 2 of the CPA concerns fundamental consumer rights. It is convenient to set out the relevant sections in chapter 2 that determine this application.

Section 16: Consumer's right to cooling-off period after direct marketing

20 Section 16 (3) gives the consumer the right to rescind a transaction resulting from any direct marketing without reason or penalty, by notice to the supplier in writing, or another recorded manner and form, within five business days after the later of the date on which -

20.1. The transaction or agreement was concluded; or

20.2. The goods that were the subject of the transaction were delivered to the consumer.

Section 53: Meaning of "defect"

21 In the context of goods, section 53 (1) (a) defines a defect as follows: -

21.1. Any material imperfection in the manufactured goods that renders the goods less acceptable than persons generally would be reasonably entitled to expect; or

21.2. Alternatively, as any characteristic of the goods or components that renders them less useful, practicable or safe than persons generally would be reasonably entitled to expect.

Section 55: Consumer's right to safe, good quality goods

22 Section 55 (2) (a), (b) and (c) respectively give a consumer the right to receive goods that are reasonably suitable for their intended purpose; are of good quality, in good working order and free of defects; and usable and durable for their normal use for a reasonable time.

Section 56: Implied warranty quality

23 Section 56 (1) provides that it is implied in an agreement concerning the supply of goods that the retailer warrants that the goods comply with the requirements and standards contemplated in section 55.

24 Section 56 (2) gives the consumer the right to return the goods to the supplier within six months after delivery if the supplier does not meet the requirements and standards contemplated in section 55. In that event, the supplier must, at the consumer's discretion, without imposing a penalty and at the supplier's risk and expense, either –

(a) repair or replace the failed, unsafe or defective goods, or

(b) refund the price the consumer paid for the goods.

25 A consumer's rights as outlined in Section 56 (2) is limited by subsection (6). Section 56 (2) (a) and

(b) do not apply to a transaction if the consumer –

25.1. Has been expressly informed that particular goods were offered in a specific condition; and

25.2. Has expressly agreed to accept the goods in that condition, or knowingly acted in a manner consistent with accepting the goods in that condition.

The cooling-off period issue

26 From a marketing perspective, direct marketing is a system of marketing where the marketer communicates directly with a customer with the goal that the interaction will exact a measurable response or transaction.[1]

27 From a legal perspective, section 1 of the CPA defines direct marketing as an approach to a person, either in person or by mail or electronic communication, for the direct or indirect purpose of promoting, offering to supply, in the ordinary course of business, any goods or services or to request a donation of any kind.

28 In section 1 of the CPA, electronic communication is defined as “... a communication by means of electronic transmission, including by telephone, fax, SMS, wireless computer access, email or any similar

technology or device”.

29 The CPA limits its protection to direct marketing, arguably a more restrictive version of “unsolicited commercial electronic messages” (UCE).[2] Accordingly, the supplier must have initiated the approach and such approach must have been directed to the particular consumer to fulfil the requirement of direct marketing in terms of the CPA.

30 From the evidence and arguments presented to the Tribunal, it is clear that there was no direct solicitation of the goods. Also, as confirmed in the written agreement of sale, parties both confirmed that the sale was not initiated by the respondent.[3]

31 As the sale of the goods did not occur because of direct marketing, the protection as contained in section 16 of the CPA does not apply in this instance. Accordingly, the applicant cannot rely on any automatic right to return goods, without penalty, within the first five days of purchase.

The defective vehicle issue

32 The essential basis for the applicant’s claim is that the respondent sold him a defective vehicle. The applicant relies on section 55 (2) and his right to receive goods that –

32.1. Are reasonably suitable for the purposes for which they are generally intended;

32.2. Are of good quality, in good working order and free of any defects;

32.3. Will be useable and durable for a reasonable period of time; and

32.4. Comply with any applicable standards set under the Standards Act 1993.

33 The applicant referred the Tribunal to the DEKRA report which outlines various defects. The applicant emphasized DEKRA’s confirmation of the vehicle’s faulty alignment and non-operative electronics.

34 On close examination of both the DEKRA report and the agreement of sale, the Tribunal found that all the defects reflected in the DEKRA report had been declared and disclosed by the respondent in its inspection report, as included into the agreement of sale. The applicant admitted to having signed the inspection report but submitted that he did not realise the extent of the damages. According to the applicant, the respray of the vehicle covered most of the prior damage to the vehicle.

35 The inspection report confirmed the various faults and body work done on the vehicle, including the following:

- 35.1. The front bumper not aligned;
- 35.2. Misaligned left side;
- 35.3. Faulty front wheel;
- 35.4. Faulty spotlights;
- 35.5. Faulty doorknobs;
- 35.6. Spotlights water damaged and loose; and
- 35.7. Various scratches and spray work.[4]

36 The applicant also confirmed in the agreement that all electronics were working at the time of sale and that he understood the vehicle not to be in its original state, “because previous owners could have modified, changed, replaced, any parts/panels/paint/interior/exterior, or any accident damage which is not visible or able to be confirmed or denied by us as a 2nd hand vehicle dealer.”[5]

37 The respondent further submitted the applicant’s written confirmation that he was expressly informed that the vehicle was

offered in a specific condition and that the applicant expressly agreed to accept the goods in that condition.[6] The applicant did not dispute this confirmation but argued that his signing of the agreement was based on what he could see.

38 Although the Tribunal must decide this application on a balance of probabilities, it will become apparent in our analysis that the

Supreme Court of Appeal has recently provided helpful guidance when considering what may constitute a defect entitling a purchase price refund within the meaning of the CPA.[7]

39 The Supreme Court of Appeal has found that not every small fault is a defect as defined. The defect must either render the goods less acceptable than people generally would be reasonably entitled to expect from goods of that type. Or, it must render the goods less useful, practicable or safe for the purpose for which the consumer purchased them.

40 In *Motus Corporation (Pty) Ltd and Another v Wentzel*[8], Ms Wentzel brought a case in the Gauteng Division of the High Court, against Motus Corporation (Pty) Ltd, trading as Zambezi Multi

Franchise (Renault). Ms Wentzel sought to return a Renault Kwid motor vehicle, against the refund of the purchase price, claiming that Renault had sold her a brand-new car that was ‘woefully defective’, in breach of sections 49 (1)(b), 55 (2)(b) and (c), 56 (2)(a) and (b) and 56(3) of the Act. The court found in Ms Wentzel’s favour. Renault took the matter on appeal at the Supreme Court of Appeal (SCA).

41 The SCA had to decide, among other things, whether Ms Wentzel made out a case in terms of section 56 (2) and (3) of the Act for the refund of the purchase consideration paid to Renault in respect of the vehicle. The court opined that –

“Not every small fault is a defect as defined. It must either render the goods less acceptable than people generally would be reasonably entitled to expect from goods of that type, or it must render the goods less useful, practicable or safe for the purpose for which they were purchased... Is every rattle or unfamiliar noise a defect in terms of the statute? A defective module may be readily replaced, as occurred with the immobiliser. Does that render the vehicle defective so as to entitle the purchaser to return it and demand repayment of the purchase price? Clearly not.”

42 In the end the court found that a consumer is not entitled to a refund of the purchase price unless they satisfy the court that all requirements stipulated in section 56 (3) have been met. Ms Wentzel failed to show that the requirements of section 56 (3) were satisfied and that she was entitled to return the vehicle against refund of the purchase price of the vehicle. Thus, the SCA upheld the appeal.

43 In the case at hand, the question that arises is whether the damage as resprayed by the respondent, and the particular electronic defects could be considered defects within the meaning of section 53 read with section 55 and 56 of the Act, having regard to the nature of the vehicle: being a used vehicle, that had done about 108 369 kilometres on purchase. The Tribunal was not proffered with evidence indicating that the faulty electronics, such as the key not being detected, rendered the vehicle defective as opposed to being the result of normal wear and tear to be expected of a vehicle of this nature.

44 Similarly, with respect to the other ‘cumulative defects’ the applicant did not provide evidence to prove that these were defects within the meaning of the Act as opposed to normal wear and tear.

45 The Tribunal does not accept the applicant’s argument that dents not visible on the day of purchase constituted a misrepresentation by the respondent. As the applicant agreed to buy a vehicle after full disclosure of all respraying done on the vehicle, the applicant was informed that damage existed that was repaired through the respraying of the vehicle. According to the Tribunal, the mere fact that the dents are no more visible due to the respraying, is not adequate cause to then allege misrepresentation by the respondent. The evidence before the Tribunal

supports the view that the respondent went out of his way to disclose all the bodywork done on the vehicle as well as the remaining flaws.

46 As the applicant was therefore well informed of the defects and damages, the right to return the vehicle without penalty is limited by section 55 (6). By confirming his knowledge of these defects and the purchase of the vehicle irrespective, the applicant cannot demand a refund when he perceives such defects as unacceptable after purchase.

47 Consequently, the Tribunal is satisfied that the applicant entered into a legitimate transaction in terms of section 56 (6), having been expressly informed that the vehicle was offered in a specific condition and having expressly agreed to accept the goods in that condition knowingly acting in a manner consistent with accepting the vehicle in that condition.

48 Further, despite section 55 (6), the applicant would have been entitled to return the vehicle to the respondent, without penalty, and at the respondent's risk and expense, if the vehicle was defective and satisfied the requirements of section 56 of the Act.

49 The applicant did not provide convincing evidence of any serious faults or damages to the vehicle not disclosed to the applicant. Also, the applicant confirmed that the vehicle was still drivable and did not provide any evidence to the tribunal that the vehicle is indeed unsafe.

CONCLUSION

50 Consequently, the applicant has not made a case for a purchase price refund. He failed to bring his claim within the ambit of section 56 (2) (b). Therefore, the applicant is not entitled to the relief he seeks from the respondent in this application.

ORDER

51 Accordingly, for the reasons set out above, the Tribunal makes the following order:-

51.1. The application is refused; and

51.2. No order is made as to costs.

Thus, done and signed on 31 January 2021. [signed]

Dr MC Peenze

Presiding Tribunal Member

Mr A Potwana (Member) and Mr T Bailey (Member) concurring

[1] Yordaan "Factors motivating consumers to engage in direct purchasing" 2005 South African Journal of Psychology 346; Dibb, Simkin, Pride & Ferrell Marketing concepts and strategies (2012) 491.

[2] See Geissler Bulk Unsolicited Electronic Messages (SPAM): a South African perspective (LLD dissertation 2004 (UNISA)) 36.

- [3] See page 121 of the tribunal bundle, paragraph 5.3 of the agreement of sale.
- [4] See page 115 and 116 of the tribunal bundle.
- [5] See page 113 of the tribunal bundle.
- [6] See page 118 of the tribunal bundle.
- [7] Motus Corporation (Pty) Ltd t/a Zambezi Multi Franchise and Another v Wentzel [2021]All SA 98 (SCA) at para [41].
- [8] SCA. Case no 1272/2019) [2021] ZASCA 40 (13 April 2021)
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