

SOUTH AFRICA / JUDGMENT

Mosana v Kempster Sedwick (Pty) Ltd t/a CMH Volvo Silver Lakes (NCT /95011/2017/75(1)(b)) [2018] ZANCT 93 (27 June 2018)

[2018] ZANCT 93

COURT

National Consumer Tribunal

BEFORE

D Terblanche

CASE / FILE NUMBER

NCT /95011/2017/75(1)(b)

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IN

THE NATIONAL CONSUMER TRIBUNAL

HELD

IN CENTURION

Case

number: NCT /95011/2017/75(1) (b)

In

the matter between:

Cleopatra
Mosana
Applicant
and
Kempster
Sedwick (Pty) Ltd t/a CMH Volvo Silver
Lakes
Respondent
Tribunal

member:

Ms D Terblanche
Date

of hearing:

11 June 2018
Last
date of adjudication: 13 June 2018

JUDGMENT**AND REASONS IN RESPECT OF APPLICATION FOR LEAVE TO REFER****THE PARTIES**

1. The Applicant is Cleopatra Mosana, an adult female consumer ("the Applicant").
2. The Respondent is Kempster Sedwick (Pty) Ltd t/a CMH Volvo Silver Lakes ("the Respondent").

THE APPLICATION

3. This is an application by the Applicant to the National Consumer Tribunal (the "Tribunal") filed on 14 November 2017, for leave to directly refer her complaint, which was non referred (decided not to prosecute her complaint before the Tribunal) by the National Consumer Commission (the "Commission"), to the Tribunal in terms of section 75(1)(b) of the Consumer Protection Act, Act 68 of 2008 (the "CPA").

4. Section 75 (1) of the CPA states as follows:

"(1) If the Commission issues a notice of nonreferral in response to a complaint, other than on the grounds contemplated in section116, the complainant concerned may refer the matter directly to

- (a) ...; or
- (b) the Tribunal, with leave of the Tribunal..."

RELIEF SOUGHT

5. The Applicant seeks relief in terms of sections 110(d) (sic) and 110(2) of the CPA, which provide as follows:

"Offences relating to prohibited conduct

110.

- (1) It is an offence for any person to alter, obscure, falsify, remove or omit a displayed price, labelling or trade description without authority.
- (2) It is an offence to fail to act in accordance with a compliance notice, but no person (15) may be prosecuted for such an offence in respect of the compliance notice if, as a result of the failure of that person to comply with that notice, the Commission has applied to the Tribunal for the imposition of an administrative fine. "

BACKGROUND**HISTORY**

6. This application has a long history.
7. It passed twice through the hands of the Motor Industry Ombudsman of South Africa (hereinafter referred to as the 'MIOSA'). On the first occasion the file was closed due to the pending Magistrate's Court case by Respondent against the Applicant. On the second occasion the file was closed after submissions by the Respondent to MIOSA, with MIOSA concluding amongst others that

7.1. It has no jurisdiction to pursue matters for compensation and damages; and

7.2. There is a dispute of fact between the parties that only a court of law can adjudicate on.

8. The Applicant thereafter lodged her complaint with the Commission on 8 March 2017.

9. The Commission nonreferred her complaint on 20 October 2017, as per its letter of even date, setting out the bases for its decision to nonrefer her complaint as follows

The NCC does not have jurisdiction to pursue matters involving claims for compensation for damages. ; and

- 9.1. The Applicant's complaints relate to a dispute of facts which can be appropriately addressed in a court of law.

10. The Applicant then filed this application with the Tribunal on 14 November 2017.

11. The Respondent opposed the application.

12. Rule 14(1) of the Regulations For Matters Relating To The Functions Of The Tribunal And Rules For The Conduct Of Matters Before The National Consumer Tribunal^[1] (the "Rules") permits an Applicant to file a replying affidavit within 10 (ten) business days of being served with an answering affidavit.

13. The Respondent received the application on 13 January 2018 and filed its answering affidavit by 2 February 2018. The Respondent applied to the Tribunal for condonation for the 'late' filing of its answering affidavit. The Tribunal found that the Respondent filed its answering affidavit within the time period permitted by the Rules.

14. The Applicant filed a replying affidavit dated 9 May 2018 with the Tribunal and seemingly on the Respondent. Though it appears to be filed outside the time period permitted by the Rules, the Respondent did not take issue with it being considered by the Tribunal in its consideration of the matter before it.

THE PARTIES' SUBMISSIONS

15. The application relates to a demonstration vehicle, a Volvo XC60 T5 Powershift Elite, with an odometer reading of 12 000 kilometers in 2013, which the Applicant purchased from the Respondent during August 2013.

16. The Applicant alleges that

16.1. The vehicle was defective.

16.2. She had problems on numerous occasions with the vehicle after repairs by the Respondent.

16.3. When taking the vehicle for a service the Respondent did not do proper work, for example when the service was done on the vehicle on 30 December 2014, the service book was not stamped.

16.4. The Respondent did not allow her an opportunity to take the vehicle for an inspection; though ordered to do so by MIOSA in its letter dated 17 January 2018.

16.5. The Applicant suffered financial detriment in that she had to get her own assessor from the Automobile Association ("AA"), two DEKRA reports and had to pay R 16 000,00 in December 2016 for the service of the vehicle as the warranty on the vehicle was unilaterally terminated.

17. Respondent alleges that

17.1. The Applicant bought the vehicle from it on 6 August 2013 with 9 100 kilometres on the odometer;

17.2. The vehicle was in an accident in 2013 and brought in for repairs which were done and paid for by the Applicant, and again brought in for repairs during April 2014 after it had been in another accident;

17.3. The warranty on the vehicle was voided due to the vehicle having being in an accident/s and the repairs were accordingly not covered by the service plan. As a consequence; the Applicant or her insurer had to pay, hence the R 16 000, 00 she had to pay for the service during December 2016;

17.4. The Applicant's complaint that the warranty had been unilaterally terminated is without foundation:

17.4.1. The warranty could not be reinstated after (some) repairs were done to the vehicle due to it being in an accident. Having been in accident, it had to be returned to the dealer to undergo certain processes, after which the warranty would be reinstated . The outstanding processes are

17.4.1.1. Repairs;

17.4.1.2. Required services to be scheduled and completed; and

17.4.1.3. A 110point test of the vehicle.

17.5. The Applicant was informed of the above requirements on 22 July 2016. The Applicant did not return to the Respondent to have the matters attended to for the reinstatement of the warranty;

17.6. It had not seen reports from the AA and DEKRA;

17.7. The service book was not stamped due to an oversight. The Respondent however submitted that there was at all times a full service record of all the services the vehicle underwent with the Respondent and its associated companies, and that there could not have been any prejudice to the Applicant due to the service book not having been stamped;

17.8. MIOSA reopened the Applicant's file. After the Respondent made submissions to it, MOISA did not as alleged by the Applicant, make a recommendation that Respondent allows her an opportunity to take the vehicle for an independent inspection;

17.9. The Respondent denies that the vehicle was defective and that it did not do the repairs properly. Respondent avers that the repairs

necessitated to the vehicle were as a result of accidents; and

17.10. As a result of the repairs having been necessitated by the accidents, the warranty on the vehicle was voided. The reason it was not reinstated was due to the Applicant not approving all the required repairs and the quotations provided therefore; effecting the scheduled services on the vehicle; and having the 110 point inspection done.

18. It is common cause between the parties that

18.1. The Applicant took the vehicle to the Respondent for repairs on more than one occasion;

18.2. The Respondent effected a first set of repairs, charged the Applicant for them and the Applicant paid for them;

18.3. The Respondent effected a second set of repairs but had to sue the Applicant for payment, and obtained summary judgment against her. The Applicant's insurer (Alexander Forbes) eventually paid for the repairs; and

18.4. The Applicant had the vehicle insured.

19. The main disputes between the parties are whether

19.1. The required repairs related to the alleged defects present in the vehicle at the time of purchase or poor repairs as alleged by the Applicant, or as a result of accidents as averred by the Respondent; and

19.2. Is it that, as the Applicant alleges, the Respondent unilaterally cancelled the warranty as alleged by the Applicant. Alternately is it that, as the Respondent alleges, the warranty was voided due to the accidents in which the car was involved, and because the Applicant subsequently did not meet the requirements to have the warranty reinstated as set out in paragraphs 17.4.1, 17.5 and 17.10 above.

POINTS IN LIMINE

20. The Respondent raised various points in limine at the start of the hearing.

21. The points in limine are that

- 21.1. The Applicant's pleadings are vague and embarrassing;
- 21.2. The Applicant does not have locus standi :
 - 21.2.1. There is no proof that the vehicle is her property; and
 - 21.2.2. The vehicle is not registered in the Applicant's name and does not belong to her;
- 21.3. The Tribunal lacks jurisdiction to hear the matter in that :
 - 21.3.1. The Tribunal cannot order damages;
 - 21.3.2. There is a dispute of fact that only the High Court, and not the Tribunal, can resolve; and
 - 21.3.3. The alleged problems with the Applicant's vehicle do not fall within the definition of "defect" and the Respondent has no liability.
- 22. I will deal with the points in limine first and, if the need arises, consider the merits to make the required determinations.

Applicant's pleadings are vague and embarrassing

- 23. It is pertinent at this point to mention that the Applicant in this matter is a lay person and has appeared before the Tribunal without legal representation. The Respondent was legally represented.
- 24. The pleadings filed by the Applicant do not disclose any allegation that any specific provision of the CPA has been contravened. It appears that the Applicant chose to narrate her 'story' and trusted that the Tribunal will find some causal connection between that and specific contraventions of the CPA.
- 25. In light of the submissions made by the Respondent that the Applicant's pleadings are vague and embarrassing, it is apt at this stage to consider the provisions of section 142(1) of the National Credit Act 34 of 2005 ("NCA").
- 26. This section requires of the Tribunal to conduct its hearings in an inquisitorial manner, as expeditiously as possible, as informally as possible and in accordance with the principles of natural justice.
- 27. There is some guidance to be found in South African law on the concept of what it means for a Tribunal or a court to be 'inquisitorial'.
- 28. In..Mlifi vs Klingenberg[2] the honourable Justice Meer stated that:

"The inquisitorial system rejects the notion of a passive judge. On the contrary the judge is expected actively to undertake a comprehensive investigation into the facts surrounding the dispute. He or she need not rely solely on the evidence adduced by the parties. His or her role is to find the objective or material truth. The dismissal of a case on the basis of inadequate evidence would be seen to be a failure in the part of the judiciary. The judge must manage the case for the outset to ensure that it is run efficiently. He or she interviews the parties separately at an early

stage of the proceedings, discusses with them points they need to consider, advise them on their rights and responsibilities determines what witnesses are to be called (and this may include witnesses the Judge wishes to call) and what documentary evidence is required, makes settlement proposals and decides when the matter is ripe for hearing. At the hearing the judge plays an active role in the presentation of evidence and the questioning of witnesses and determine the order in which they testify."

29. The Honourable Justice Meer went further in *Mlifi* in her analyses of the adversarial versus the inquisitorial approaches to adjudication as stated in paragraph 110

"The adversarial system relies heavily on the assumption that the contesting parties will be legally represented, and by lawyers of equal competence. Where this is not so there is a serious risk of the result reflecting the relative social and financial strength of the parties and not the true merits of their respective cases."

30. The Tribunal had occasion to consider the question of its inquisitorial powers in *Tshwale v Faitzan Properties* (at Para 61)[3] where Adv Simpson on behalf of the Tribunal, made the following observation (amongst others)

"It is a common occurrence in the Tribunal that parties are not represented by legal counsel. It is indeed within the very nature of the Tribunal, as set out in Sections 4(2) of the CPA, that the Tribunal offers a forum where unrepresented parties are able to state their case without the need for carefully drafted legal argument and to receive redress where appropriate... It can further come to the aid of an unrepresented party in appropriate circumstances by providing guidance and direction so as to ensure that the full facts and applicable law may be placed before the Tribunal. This approach must however always be balanced against the principles of natural justice in that the parties must be granted an opportunity to be heard on all the issues raised and there must never be any possibility of a perception of bias on the part of the Tribunal. The Tribunal must therefore always take heed not to advocate for any party or be perceived to be doing so. (Footnote and emphasis added)

31. With regard to contraventions of the CPA, from the Applicant's narration of her complaints, namely the alleged defects in the vehicle and alleged poor repairs, the Tribunal can identify a clear correlation between her complaints and specific sections of the CPA.
32. This point in limine that the Applicant's pleadings are vague and embarrassing is dismissed.
33. The mere allegations by the Applicant however do not end the inquiry into her complaints and render the Respondent automatically liable under the CPA. The Tribunal has to exercise its inquisitorial powers mindful of the principles of natural justice. In addition, the Tribunal has to bear in mind the factual averments made by the parties in support of their cases, for example, witnesses may have to be identified, etcetera. The Applicant bears the burden of proof on a balance of probabilities as prescribed by the NCA. This will be dealt with further below on the discussion regarding the Applicant's prospects of success.

Locus standi

34. The next point in limine is that the Applicant does not have legal standing to bring the application before the Tribunal.
35. The Respondent bases its averment of the Applicant's lack of standing on its assertion that the Motor Finance Corporation (the "MFC")

was the owner of the vehicle in question at all relevant times and not the Applicant. In their view, the Applicant cannot make any claims in respect of the vehicle.

36. The Applicant admitted that the vehicle was registered in the MFC's name as she financed the purchase price of the vehicle through them. She however disputes that she does not have standing before the Tribunal. She submitted that she was at all relevant times in possession of and had full use of the vehicle.
37. The principle of locus standi in judicio relates to the right or legal capacity of a party to sue or be sued.[4]
38. The court outlined the test for determining this right or legal capacity to sue or be sued in *United Watch and Diamond (Pty) Ltd v Disa Hotels Ltd* 1972 (4) SA 409 (C) at 415A, stating that

"to establish that one has locus standi in judicio, one must show,... that he has an interest in the subject matter of the judgment or order sufficiently direct or substantial..."

39. In *Amalgamated Engineering Union v Minister of Labour*[5] 'direct and substantial interest' in the order the court might make in proceedings' was elucidated as follows:

'If a party has a direct and substantial interest in the order the court might make in proceedings, or if such order cannot be sustained or carried into effect without prejudicing that party he is a necessary party and should be joined in the proceedings'...

40. The court stated in *Bunton*[6], with reference to *Ex parte Johannesburg Congregation of the Apostolic Church*[7] that Locus Standi is a matter of law and cannot be conferred by consent or condonation of the court.
41. In *Rapotsonyane v Sekhukhu Syndicate*[8], the court adopted the analysis of the law in *Morenane Syndicate and Others v Loeto*[9], by Kirby J that:
"1. Locus standi is fundamental to due process without it the proceedings are invalidated.
2. Locus standi is a matter of law and cannot be conferred by consent or by the condonation of the court. ..."
42. According to CORBETT J in *United Watch & Diamond Co (Pty) Ltd & Others v Disa Hotels Ltd & Another*[10] the concept of a "direct and substantial interest" connoted "an interest in the right which is the subject matter of the litigation". Corbett J went on to say at 415H:

'This view of what constitutes a direct and substantial interest has been referred to and adopted in a number of subsequent decisions, including two in this Division... and it is generally accepted that what is required is a legal interest in the subject matter of the action which would be prejudicially affected by the judgment of the Court '.

43. I accept that the Applicant should have locus standi to institute proceedings before the Tribunal, in the manner described in the case law quoted above.

44. I further accept that the 'sufficiency of the interest'

" ... is a matter that must be determined on a case by case basis.[11]

"Once established, it duly qualifies that person to be regarded as a litigant for purposes of the matter in question".[12]

45. In this matter the Respondent attacks the Applicant's locus standi on the basis that that the motor vehicle in question remained registered in the name of the Motor Finance Corporation until the Applicant traded it in.

46. MASUKU A.J. in *Uvanga v Steenkamp* (I19682014) [2015] NAHCMD 273 (13 November 2015} paragraphs 24, 25 and 38 sets out the basic nature and character of ownership as follows:

"It is described as a most comprehensive right and one which embraces not only the power to use (ius utendi) but also the power to consume the thing (ius abutendi) and the right to possess the thing (ius possedendi) and the right to dispose of the thing (ius disponendi). This also includes the right to reclaim the thing from any person who wrongfully withholds it and or to resist any unlawful invasion of the thing (ius negandi). See for instance *Johannesburg Minicipal Council v Rand Township Registrar*[13] and *Chetty v Naidoo*. [14]

According to Lexis Nexis EPublication Vol 27., 2nd ed at 134, the following appears:

'The powers enumerated above do not necessarily provide a complete list of the powers inherent in ownership. Even though an owner has disposed of all the aforementioned powers, he or she can still remain the owner of a thing. By granting third parties powers of use, enjoyment, and so on, he or she only suspends his or her power to exercise his or her ownership to that extent. Once the powers granted are extinguished, his or her ownership automatically becomes unencumbered again. This quality of ownership is referred as the "elasticity" of ownership and in this context ownership is sometimes called a "reversionary right".[15] (Emphasis added)

I am of the opinion that the thread that runs through both cases is that the ownership of a motor vehicle cannot always be properly

inferred solely from the information contained In a registration document issued in terms of the law. The mere fact of registration

may be said to constitute an inducium of ownership which may be rebutted by facts actually led in evidence properly when laid before

court. I am of the view that the instant one is such a case." (Emphasis added)

47. It is common cause between the parties that that the Applicant purchased the vehicle in question from the Respondent during 2013, financed it through MFC, insured it through Alexander Forbes, and that the vehicle remained registered in MFC's name until the Applicant traded it in.
48. It is further common cause that the Applicant paid for certain repairs done by the Respondent to the vehicle during 2014 and that she was held liable by the Respondent for further repairs effected to the vehicle during 2016, paid for by her insurer. The manner in which the payment, by her insurer came about for the repairs done during 2016 is in dispute between the parties. Nothing turns on this dispute insofar as the issue of locus standi is concerned, save for the uncontroverted fact that the Applicant's insurer paid for repairs.
49. In applying the case law enumerated above to the common cause facts, the Tribunal is satisfied that the Applicant has locus standi to bring these proceedings before the Tribunal.

The Tribunal lacks jurisdiction

50. Another point in limine by the Respondent is that the Tribunal lacks jurisdiction because

50.1. The Tribunal cannot order damages; and

50.2. There is a dispute of fact that only the High Court, and not the Tribunal, can resolve.

Damages

51. The Respondent is correct in its submission that the Tribunal cannot order damages.
52. The NGA sets out in section 150 the orders the Tribunal may impose in respect of prohibited conduct committed under both the NGA and the CPA. Section 111 and 112 of the CPA contain the provisions in respect of administrative penalties in respect of prohibited conduct committed under the CPA.
53. The fact that the Tribunal cannot order general damages does not mean that the Tribunal cannot entertain matters where, as a result of a finding of prohibited conduct, the Tribunal may impose an administrative penalty or a successful party may; consequent to the Tribunal having made a determination of prohibited conduct. approach the high court with a claim for damages.
54. Section 115 of the CPA allows a party to approach the civil court for damages on "...notice from the Chairperson of the Tribunal in the prescribed form ...certifying whether the conduct constituting the basis for the action has been found to be a prohibited or required conduct in terms of this Act;..."[16]

55. The above provision read with section 69(d)[17] of the CPA obliges the Applicant to first exhaust the provisions of the CPA through the structures set up in the CPA, namely the National Consumer Commission and the National Consumer Tribunal, the latter for the determination whether prohibited conduct occurred or not.
56. In *Joroy 4440 CC v Potgieter and Another NNO*[18] the debate before the High Court turned on the proper interpretation of section 69(d). The Respondent in *Joroy* took the point that the court did not have jurisdiction to hear the matter by virtue of the fact that, properly interpreted, the effect of section 69(d) was that the applicant had not exhausted their other remedies provided for in section 69(a) to section 69(c). The court found that

"It is specifically stated that the consumer may approach the court if all the aforementioned avenues of redress have been exhausted. The legislature was very specific in prescribing the redress that a customer has in terms of this section. I fail to see how any other interpretation can be given to the word "if.""

57. Accordingly the court found that the mechanisms of the CPA have to be exhausted before the court can be approached. The honourable Judge stated that

"From the Preamble of the CPA it is evident that the purpose of this act is amongst others to "protect the interests of all consumers" and to "ensure accessible, transparent and efficient redress for consumers who are subjected to abuse or exploitation in the market place.(My emphasis)."

and that:

"It was held by the Constitutional Court that, where a specialised framework has been created for the resolutions of disputes, parties must pursue their claims primarily through such mechanisms. See: *Chirwa v Transnet Ltd and Others* [2007] ZACC 23:

[2007] ZACC 23; 2008 (4) SA 367 (CC)"

58. The Applicant thus has to exhaust its remedies through the "specialised framework that has been created for the resolutions of disputes".[19]
59. That includes the Applicant having to approach the Tribunal for the Tribunal to determine whether the Respondent committed prohibited
- conduct or not, in spite of the Tribunal not having the authority to order damages.
60. If the Tribunal makes a determination in favour of the Applicant the Applicant can then approach the Tribunal Chairperson for a
- certificate in terms of section 115 of the CPA to launch her damages claims in the civil court.
61. For the Tribunal to make the determination to populate the notice in terms of section 115, it must be clear which provisions of the CPA have been contravened.

62. With regard to the damages, the Applicant did not place amounts before the Tribunal for the damages she believes she is entitled to from the Respondent. The Tribunal's role does however not extend to a determination and award of damages. Its role is circumscribed to making a determination whether prohibited conduct was committed or not, and if so, that might entitle the party to approach the High Court for damages, should he or she so wish.
63. Again however, mindful of the guidance from the case law quoted above, the Tribunal can come to the assistance of the parties in respect of determining the relief the parties might be entitled to and that is within the jurisdiction of the Tribunal.
64. The Tribunal accordingly dismisses the Respondent's point in limine, namely that the Tribunal does not have jurisdiction in this matter as it cannot order damages.

Disputes of fact

65. The functions of the Tribunal are set out in section 27 of the NCA that provides as follows
- "The Tribunal or a member of the Tribunal acting alone in accordance with this Act or the Consumer Protection Act, 2008, may
- (a) adjudicate in relation to any
 - (i) application that may be made to it in terms of this Act, and make any order provided for in this Act in respect of such an application; or
 - (ii) allegations of prohibited conduct by determining whether prohibited conduct has occurred and, if so, by imposing a remedy provided for in this Act;
 - (b) grant an order for costs in terms of section 147; and
 - (c) exercise any other power conferred on it by law."
66. It is unthinkable that the legislature would have charged the Tribunal with the function to adjudicate on applications and referrals brought before the Tribunal, and not empowering it to determine disputes of fact between the parties.
67. This point in limine is accordingly dismissed.

Defect

68. The essence of this point is that the Respondent avers that the issues the Applicant complained about do not fall within the ambit of the definition of "defect" in the CPA.
69. In view of the Tribunal's inquisitorial powers enumerated above; this issue is more appropriately suited for discussion when considering
- the Applicant's prospects of success.

LEAVE TO REFER

70. I now turn to considering whether I should grant the Applicant leave to refer her complaint directly to the Tribunal.

71. In determining whether to grant leave to refer the matter directly to the Tribunal, the Tribunal has previously taken guidance from

jurisprudence established through the courts.

72. The matter of *Westinghouse Brake and Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd*^[2] is instructive in this regard, where it was stated 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. This was so irrespective of whether the appeal lay to the full court or to the Appellate Division."

73. Based on the foregoing I will, also in this case, consider the two factors identified, that is

(1) Reasonable prospects for success; and

(2) Substantial importance of the matter.

74. With respect to the substantial importance of the matter, the Applicant has persisted with the matter over a period of time and has demonstrated her resolve to take it to every possible forum. The Respondent has also been seized with the matter right from the start, defending itself against the allegations levelled against it. The matter is therefore important to both parties.

75. In so far as the prospects of success are concerned I will first consider the allegations made against the Respondent and whether

these qualify as prohibited conduct in terms of the Act.

76. I can only assess the reasonable prospects of success by considering whether the CPA finds application in the dispute and may therefore be adjudicated on by the Tribunal.

77. The Applicant complained about defects in the vehicle and repairs that were not done properly.

78. Defect is defined in section 53(1)(a) of the CPA as follows:

"(i) any material imperfection in the manufacture of the goods or components, or in performance of the services, that renders the goods or results of the service less acceptable than persons generally would be reasonably entitled to expect in the circumstances; or

(ii) any characteristic of the goods or components that renders the goods or components less useful, practicable or safe than persons generally would be reasonably entitled to expect in the circumstances;"

79. The Applicant at no point enumerated the defects allegedly present in the vehicle when she bought it.
80. The provisions in the CPA dealing with repairs are contained in section 56(3) namely
- " 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."
81. The Applicant does not set out the specific complaints regarding the repairs that were not done properly. Considering the papers filed by the parties and the lack of detail of the alleged poor repairs, it seems to me that the problems with the vehicle were linked to the incidents the vehicle was involved in and repairs the Applicant did not authorise rather than the Respondent's workmanship.
82. Moreover as the Applicant insisted on getting reports from the Respondent about problems it identified with the vehicle rather than taking the Tribunal in her confidence in setting out her assertions of what the problems were that she experienced with it, raises a red flag to me that that the Applicant might be fishing for a case to make against the Respondent.
83. The complaint the Applicant raised about the service book that was not stamped when she took the vehicle for a service, is not a matter that can amount either to a defect of the vehicle or poor repairs.
84. The Tribunal's inquisitorial powers do not extend to "making a case" for the Applicant. Rather the role of the Tribunal is confined, as per the honourable Justice Meer quoting Justice Ipp, to assistance with defining the cause of action through narrating her experiences to draw the causal link to the prohibited or required conduct, in terms of the CPA, support with getting the correct witnesses and evidence before the Tribunal, and matters in similar vein.
85. The Applicant as the initiator of the case bears the onus to prove that the Respondent contravened the CPA on a balance of probabilities as prescribed in section 167 of the National Credit Act.
- 86.1. The first time the Applicant returned to the Respondent was for repairs after a so called "pothole incident";
- 86.2. The Applicant paid for those repairs without demur;
- 86.3. The second time the Applicant returned the vehicle to the Respondent for repairs was after yet another "incident;" and

86.4. The Applicant's insurer paid for the second set of repairs, after the Respondent sued the Applicant in the Magistrate's' court and obtained judgment against her.

FINDING

87. I find that the Applicant does not have reasonable prospects in succeeding with a direct referral to the Tribunal.

ORDER

88. Accordingly

88.1. This application is dismissed; and

88.2. There is no order as to costs.

DATED ON THIS 27H DAY OF JUNE 2018

[SIGNED]

D Terblanche

Tribunal member

[1] Published under GN 789 in GG 30225 of 28 August 2007 as amended by GenN 42B In GG 34405 of June 2011 (published In terms of the

Consumer Protection Act 68 of 2008) GNR203 In GG 38557 of 13 March 2015 and GN 157 in GG 39663 of 4 February 2016

[2] 1999 (2) SA 674 (LCC)

[3] (NCT/ 12505/ 2014/ 75(1)(b) & (2) CPA) (2014(7.ANCT32 (30 September 2014)

[4] In Bunton and Another v Coetzee and Another (A423/2012) (2014) ZAGPPHC 553 (11 August 2014) paragraph 14

[5] 1949 (3) SA 631 at 637

[6] In Bunton and Another v Coetzee and Another (A423/2012) (2014) ZAGPPHC 553 (11 August 2014) paragraph 19

[7] 1968 (3) SA 377 (W),

[8] 2006 (2) BLR 60 7 CA

[9] {2005} 2 B.L R 37

[10] 1972 (4) SA 409 (C)

[11] Masuku A.J. In Uvan90 v Steenkamp (I 1968 ·2014)

[2015] NAHCMD 273 (13 November 2015)

[12] Jacobs v Waks 1992 (1) S A52 1 (A) a t S 43 D and Gross v Pentz 1996 (4) SA 617 (SCA)

[13] 1910TPD 131419.

[14] 1974 (3) SA 12 () at 20

[15] as per MASUKU A.J. in Uvanga v Stccnkamp (11968 · 2014) (20

15) NAHCMD 273 (13 November 2015) paragrpahs 24 and 25

[16] “A person who has suffered loss or damage as a result of prohibited conduct or dereliction of required conduct (a) may not institute a claim In a civil court for the assessment of the amount or awarding of damages if that person has consented to an award of damages In a consent order; or (b) If entitle d to commence an action referred to In paragraph (a), when Instituting

proceedings, 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 has been found to be a prohibited or required conduct In terms of this Act; (ii)stating the date of the Tribunal's finding, if any; and (iii) settling out the section of this Act In terms of which the Tribunal made Its finding, If any”.

[17] "A person contemplated in section 4 (1) may seek to enforce any right In terms or 15 this Act or in terms or a transaction or agreement. or otherwise resolve any dispute with a supplier, by (d) approaching a court with Jurisdiction over the matter, If all other remedies available to that person in terms national legislation have been exhausted."

[18] 2016 (3) SA 465 (FB)

[19] Chirwa vTransnet Ltd and Others [2007] ZACC 23; 2008 (4) SA 367 (CC)"

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ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZANCT/2018/93.html>

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