

SOUTH AFRICA / JUDGMENT

Mtshali v Webb (NCT/85142/2017/75(1)) [2017] ZANCT 120 (1 November 2017)

[2017] ZANCT 120

COURT

National Consumer Tribunal

BEFORE

P Beck

CASE / FILE NUMBER

NCT/85142/2017/75(1)

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IN

THE NATIONAL CONSUMER TRIBUNAL

HELD

IN CENTURION

Case

number: NCT/85142/2017/75(1)

In

the matter between: NTOMBIFIKILE

MTSHALI

APPLICANT

and

MATHEW

WEBB

RESPONDENT

Coram

Ms

P Beck - Presiding Member

Date

of hearing – 14 September 2017

JUDGMENT**AND REASONS****THE PARTIES**

1. The Applicant is Ntombifikile Mtshali an adult female consumer (“the Applicant”) residing in Naturena, Gauteng.
2. The Respondent is Mathew Webb an adult male of Devland, Johannesburg (“the Respondent.”)

THE APPLICATION

3. This is an application by the Applicant for leave to refer her complaint, after receiving a non-referral from the National Consumer Commission (the “NCC” or “Commission”), directly to the National Consumer Tribunal (the “Tribunal”) in terms of section 75(1)(b) of the Consumer Protection Act, 2008 (the “CPA”).
4. In a letter dated 13 June 2017, the Commission informed the Applicant that the Commission could not pursue the Applicants complaint because “... the complainant had the vehicle repaired by a third party, other than Master Radiator Services, and as a result waived your right to a recourse.” A notice of non-referral was issued by the Commission on the basis that the Applicants complaint will not be referred as the complaint “does not allege any facts which, if true, would constitute grounds for a remedy under the Consumer Protection Act.”
5. On or about December 2015 the Applicant’s vehicle was towed to Master Radiator Services for repairs. The cost of repairs was the sum of R38 000, 00 which the Applicant duly paid by way of electronic funds transfers, in instalments, to Master Radiator

Services. The vehicle had previously been repaired by an individual referred to by the Applicant as a “street mechanic” at a cost of R18 000,00. Approximately a week after Master Radiator Services repaired the vehicle, the vehicle started “cutting out.” It is alleged by Master Radiator services that after the initial repairs to the vehicle by Master Radiator Services, when the vehicle presented problems, instead of returning the vehicle to Master Radiator Services for further repairs, the Applicant took the vehicle to a third party for repairs, thereby breaching the warranty of Master Radiator Services. The latter is disputed by the Applicant.

6. The Applicant approached the Motor Industry Ombudsman of South Africa (hereinafter referred to as the MIOSA) who rejected the claim of the Applicant. The reason cited by MIOSA for their decision was that by the Applicant taking the vehicle “to a third party repair workshop, she had lost all recourse against the supplier.” MIOSA referred the Applicant to the Commission who after investigating the complaint of the Applicant issued a non-referral for the complaint for the reasons referred to in 4 above.

7. The Applicant approached the Tribunal and the matter was set down for the hearing of an Application in terms of Section 75(1)(b) of the Act.

THE HEARING

8. A hearing was convened for and held on 14 September 2017 in Centurion. The Applicant represented herself and the Respondent was not present at the hearing.

CONSIDERATION OF THE EVIDENCE ON A DEFAULT BASIS

9. On 30 June 2017, the Applicant filed the application with the Tribunal. The Tribunal Registrar issued a Notice Complete Filing to all the parties on 13 July 2017.
10. In terms of Rule 13 of the Rules of the Tribunal, the Respondent had to respond within 15 days by serving an answering affidavit on the Applicant. The Respondent however failed to do so.
11. The Applicant did not file an application for a default order in terms of Rule 25(2). The Tribunal Registrar however set the matter down for hearing as the pleadings had closed.
12. Rule 13(5) provides as follows:

“Any fact or allegation in the application or referral not specifically denied or admitted in the answering affidavit, will be deemed to have been admitted.”

13. Therefore, in the absence of any answering affidavit filed by the Respondent, the Applicant’s application and the allegations contained therein are deemed to be admitted. In accordance with Rule 25 (3), the Tribunal is satisfied that the application documents were adequately served. The Tribunal therefore proceeded with the matter on a default basis

THE APPLICABLE LAW AND ANALYSIS

14. Ordinarily, in applications of this nature the Tribunal first considers whether to grant leave and then deliberates on the merits of the main application, after having heard the parties.
15. It is trite law that the Tribunal is a creature of statute. As such it is empowered to only hear matters that it is specifically empowered by statute to hear. The Tribunal was established in terms of the NCA (as amended) and had its functions and powers extended with the passage of the Consumer Protection Act, Act 68 of 2008 (CPA) and derives its jurisdiction from these laws.
16. The purpose of the CPA is set out in section 3 which provides that -
“3.
(1) The purposes of this Act are to promote and advance the social and economic welfare of consumers (our emphasis) in South Africa by— ...”

17. Having considered and interpreted the above sections in the context of the facts the Tribunal concluded that it does have jurisdiction to deal with the Applicant's complaint.
18. If one further has regard to the CPA and the provisions relating to the jurisdiction and powers of the Tribunal and other dispute resolution bodies, the Tribunal further does have the jurisdiction to decide the matter for the following reasons:

Section 69 "Enforcement of rights by a consumer"

A person contemplated in section 4 (1) may seek to enforce any right in terms of this Act or in terms of a transaction or agreement, or otherwise resolve any dispute with a supplier, by-

- (a) referring the matter directly to the Tribunal, if such a direct referral is permitted by this Act in the case of the particular dispute;
- (b) referring the matter to the applicable ombud with jurisdiction, if the supplier is subject to the jurisdiction of any such ombud;
- (c) if the matter does not concern a supplier contemplated in paragraph (b)-
- (i) referring the matter to the applicable industry ombud, accredited in terms of section 82 (6), if the supplier is subject to any such ombud; or
- (ii) applying to the consumer court of the province with jurisdiction over the matter, if there is such a consumer court, subject to the law established or governing that consumer court; referring the matter to another alternative dispute resolution agent contemplated in section 70; or
- (iv) filing a complaint with the Commission in accordance with section 71; or
- (c) approaching a court with jurisdiction over the matter, if all other remedies available to that person in terms of national legislation have been exhausted."

CITATION OF THE CORRECT PARTY

19. However, in this particular matter, before the Tribunal can properly apply its mind to the issue of leave to refer, it must ensure that the correct party is before the Tribunal. In this particular matter Mathew Webb was cited as the Respondent. Upon questioning the Applicant at the hearing on the relationship between the Respondent cited and the company Master Radiator Services, who repaired the vehicle, the Respondent said the following:
 - Mathew Webb was the person she dealt with at Master Radiator Services; and
 - She believed Mathew Webb to be the "owner" of Master Radiator Services.
20. The Applicant was requested, other than her say so, to provide further evidence documentary or otherwise of the relationship between Mathew Webb and Master Radiator Services, who repaired the vehicle, but was unable to do so at the hearing. The Tribunal asked the Applicant at the hearing whether she had been issued with a quotation for repairs

to the vehicle or with receipts for any payments made in settlement of the cost of repairs. The Applicant responded that no quotations were provided to the Applicant for the cost of repairs to her vehicle nor were any receipts issued for the electronic funds transfer of amounts paid to Master Radiator Services by the Applicant.

21. The documentary evidence before the Tribunal bears no reference to an individual by the name of Mathew Webb other than the citation. In fact the opposite is on record ie that a company by the name of Master Radiator Services repaired the vehicle and that this is the company against whom the complaint was investigated both by the MIOSA and the Commission. It is clear on the Applicants own evidence, that the company who repaired her vehicle, was indeed Master Radiator Services.
22. In *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* [1995] ZASCA 53; 1995 (4) SA 790 (A) at 31, it was pointed out that “our courts should not lightly disregard a company’s separate personality but should strive to give effect to and uphold it.” Therefore there must be cogent reasons advanced as to why this fundamental principle of law should not apply. The Applicant was unable to advance any legal reasons why Mathew Webb and not Master Radiator Services should be held accountable for repairs to her vehicle.
23. The Tribunal is unable to establish the link between Master Radiator Services and Mathew Webb, who for all intents and purposes could be an employee of Master Radiator Services or the “owner of Master Radiator Services,” as submitted by the Applicant.
24. It is of significant importance in matters such as these that the correct party is cited. More importantly, in the case where an order may be made against a party such order must be capable of being enforced against such a party.
25. For the purposes of this matter, the Tribunal is not satisfied that the correct party is before the Tribunal. It is obvious that Master Radiator Services should have been cited as a party. It is a pity that both parties or at the very least Master Radiator Services was not cited in the Application before the Tribunal and that this aspect was not picked up at assessment level by the Tribunal.
26. Accordingly, it is the finding of the Tribunal that the correct party has not been cited as a Respondent in this matter. The correct Respondent is clearly not before the Tribunal against whom the Tribunal is capable of making a finding and an order capable of being enforced.
27. It was therefore not necessary, based on the reasons stated above, for the Tribunal to look at the prospects of success and the other factors which would have been pertinent to an application such as this.

ORDER

28. Accordingly, the Tribunal makes the following order:

28.1. The Applicant’s application for leave to refer the matter directly to the Tribunal is refused;

28.2. Once the correct Respondent is established, the Applicant may re-launch this application before the Tribunal.

28.3. No order is made as to costs.

Dated at Johannesburg on this 1st day November of 2017

[Signed]

P A BECK

TRIBUNAL MEMBER

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Prepared on 23 October 2026 · Esheria