

SOUTH AFRICA / JUDGMENT

Nqunqa v Eerste Geluk Motors CC (NCT/131419/2019/75(1)(b)) [2022] ZANCT 2 (25 January 2022) [2022] ZANCT 2

COURT

National Consumer Tribunal

BEFORE

D Terblanche, B Dumisa, F Sibanda

CASE / FILE NUMBER

NCT/131419/2019/75(1)(b)

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Policy**IN****THE NATIONAL CONSUMER TRIBUNAL****HELD****VIA THE MICROSOFT TEAMS AUDIO AND VISUAL PLATFORM****CASE****NUMBER: NCT/131419/2019/75(1)(b)****In****the matter between:**

MAWETHU

ELESTER NQUNQA

APPLICANT

and

EERSTE

GELUK MOTORS CC

RESPONDENT

PANEL

Ms.

D Terblanche – Presiding Tribunal member

Prof

B Dumisa - Tribunal member

Mr

F Sibanda - Tribunal member

DATES

OF HEARING:

1

December 2021; 08 December 2021

(via

the

Microsoft Teams audio and video platform)

15

December 2021 – Date of final submissions

DATE

OF JUDGMENT:

25

January 2022

JUDGMENT

AND REASONS

THE PARTIES

1. The Applicant, a consumer, is Mawethu Elester Nqunqa (hereinafter referred to as the “Applicant”).
2. The Respondent is Eerste Geluk Motors CC, a close corporation duly registered in terms of the Close Corporations Act No 69 of 1984 (hereinafter referred to as the “Respondent”).

THE APPLICATION

3. The Applicant brought this application before the National Consumer Tribunal (the “Tribunal”) in terms of section 75(1)(b) of the Consumer Protection Act 68 of 2008 (the “CPA”).
4. Section 75(1)(b) of the CPA provides that –

“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 leave of the Tribunal.”

BACKGROUND

5. On or about 26 June 2017, the Applicant lodged a complaint with the Motor Industry Ombudsman of South Africa (MIOSA). On 18 July 2017, MIOSA wrote to the Respondent requesting the Respondent’s response to the Applicant’s complaint. The Respondent failed to respond to MIOSA’s letter. On 9 November 2017, MIOSA informed the Applicant that it had no option but to close its file because it had not received a response from the Respondent. MIOSA recommended that the Applicant register his complaint with the National Consumer Commission (the “Commission” or the “NCC”).

6. The Applicant filed his complaint with the NCC on 27 November 2017. On 2 April 2019, the NCC issued a notice of non-referral on the basis that the CPA does not provide for the redress the Applicant seeks; and that the disputes of facts between the parties about the repairs to the vehicle and the cancellation require adjudication. The NCC advised the Applicant that he could refer his matter to the Tribunal within 21 days of receiving the notice of non-referral for the Tribunal to adjudicate on his complaint.
7. On 26 April 2019, the Applicant filed his application with the Tribunal. On 18 November 2019, the Tribunal granted the Applicant leave to refer his matter directly to the Tribunal for adjudication.

THE HEARING

8. The Tribunal set the hearing for the Applicant's complaint down for 1 and 8 December 2021 via the MICROSOFT TEAMS audio and video platform. The Tribunal finalized the hearing into the merits of the Applicant's complaint on 8 December 2021; and received the parties' final submissions on 15 December 2021.
9. At the hearing -
 - 9.1. Mr. Ashley Meyer from Ashley Meyer Attorneys represented the Applicant. Mr. Meyer called the Applicant and led his oral evidence at the hearing; and
 - 9.2. Mr. Frank Maritz, a senior legal advisor from SEESA Bloemfontein, represented the Respondent. Mr. Maritz called the Respondent's owner, Mr. Van Heerden, and one other employee, Mr. Myburgh, to give oral evidence at the hearing.

THE APPLICANT'S CASE

10. The Applicant purchased a Toyota 3L D4D Hilux Pick-up (the "vehicle"), [...], from the Respondent in Bloemfontein on 25 January 2017.
11. The Applicant alleged that the Respondent sold him a vehicle with defects in contravention of the provisions of section 55 read with section 53(1) of the CPA. According to the Applicant, that entitled him in terms of section 56(2) of the CPA to, amongst others, cancel the sale of the vehicle; for the Respondent to refund the purchase price he paid and to return the vehicle he traded in to him.
12. The Applicant noted problems with the vehicle on the same day of the sale. On his way to King Williams Town two (2) warning lights came on, the Applicant smelt burning oil and had some difficulties with the brakes (the "initial defects"). The Applicant immediately contacted the salesperson he dealt with at the Respondent's dealership, Mr. Willers ("Willers") to report the problems. Willers assured the Applicant that he could continue with his journey.

13. The following day, on 26 January 2017, the Applicant again contacted Willers and informed him of further defects he noticed in the vehicle. Willers told the Applicant to take the vehicle to Shaun Mechanics in King Williams Town to assess the faults.
14. Shaun from Shaun Mechanics, the workshop employee, confirmed the other defects the Applicant observed, namely, that the brakes were tied together with ordinary wires; the cubby hole was stuck together with prestick; that the rim on the spare tyre was different from other three rims; and that the step is loose (the “additional defects”).
15. The Applicant immediately contacted Willers again, on 26 January 2017, and told him he is cancelling the deal, that he wants the Respondent to return his trade-in vehicle and refund his costs.
16. The Applicant returned the vehicle to the Respondent on 6 February 2017. The Applicant continued paying the financier of the motor vehicle for the vehicle.
17. The Applicant alleged he never test-drove the vehicle. The salesperson (Willers) showed the vehicle to him, and the Applicant bought the vehicle based on that viewing and his visual observations.
18. The Applicant said that the Respondent never communicated to him that the Respondent repaired the vehicle and that it was ready for collection from 8 February 2017.

THE RESPONDENT’S CASE

19. The Respondent agrees that the -
 - 19.1. Applicant purchased the vehicle from the Respondent on 25 January 2017;
 - 19.2. Applicant contacted the Respondent’s salesperson, Willers, about specific problems the Applicant had with the vehicle;
 - 19.3. Respondent requested the Applicant to return the vehicle to the Respondent for inspection; and
 - 19.4. The Applicant returned the vehicle to the Respondent on 6 February 2017.
20. The Respondent denies–
 - 20.1. The vehicle was defective to the extent the Applicant alleged; and
 - 20.2. That the defects in the vehicle justified the Applicant cancelling the sale.
21. According to the Respondent, after the Applicant had taken the bakkie for a test drive, the Applicant never pointed out any defects in the vehicle to the Respondent. There was no evidence of oil spills on the showroom floor where the Respondent keeps the vehicle.

22. The Respondent averred that the Applicant never cancelled the sale but instructed the Respondent to repair the defects in the vehicle. The Respondent repaired the vehicle. The vehicle had been ready for collection at the Respondent's premises since 9 February 2017. Despite the Respondent contacting the Applicant on numerous occasions to collect the vehicle, the Applicant has failed to date to collect the vehicle from the Respondent's premises.
23. The Respondent lastly averred that the Applicant wanted to cancel the sale not because of the alleged defects, but because he suffered from buyer's remorse - the Applicant's wife did not want a bakkie.
24. The Respondent averred that if the vehicle had the defects defined in section 53(1) of the CPA, the Applicant could not have driven the vehicle safely for more than 1000 (one thousand) kilometres from Bloemfontein to King Williams Town and back.
25. The Respondent submitted that the Applicant is not entitled to a refund of the purchase price or a cancellation of the sale under section 56(3) of the CPA. The Respondent repaired the vehicle, and the Applicant never collected

the vehicle. The Applicant's right to a refund or cancellation in terms of section 56(3) of the CPA only arises if the Applicant can prove the vehicle had not been adequately repaired or new defects or failures in the vehicle came to light.

ISSUES

TO BE DECIDED

26. The disputes between the parties and the issues the Tribunal has to judge are –
 - 26.1. The extent of the defects in the vehicle;
 - 26.2. Whether the defects in the vehicle constituted defects as defined in the CPA, entitling the Applicant to cancel the sale; and
 - 26.3. Whether the Applicant cancelled the vehicle's sale in terms of section 56(2) of the CPA.

THE APPLICABLE LAW

27. The relevant sections of the CPA provide as follows:
28. Section 55(2) of the CPA provides that -

"... 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 5 No. 29 of 1993), or any other public regulation.

(Emphasis added)

29. Section 55(4) of the CPA provides that –

“In determining whether any particular goods satisfied the requirements of Subsection

- (2) or (3), all of the circumstances of the supply of those goods must be considered, including but not limited to—
- (a) the manner in which, and the purposes for which, the goods were marketed, packaged and displayed, the use of any trade description or mark, any instructions for, or warnings with respect to the use of the goods;
- (b) the range of things that might reasonably be anticipated to be done with or in relation to the goods; and
- (c) the time when the goods were produced and supplied.”

30. Section 55(5) of the CPA provides that –

“For greater certainty in applying subsection (4)—

- (a) it is irrelevant whether a product failure or defect was latent or patent, or whether a consumer could have detected it before taking delivery of the goods; and”

31. The CPA defines “defect” in section 53(1) 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;”

32. Section 56(2) of the CPA provides that -

“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.”

ANALYSIS

OF THE EVIDENCE AND REASONS FOR JUDGMENT

33. The common cause facts are that–

33.1. The Applicant identified and experienced some problems with the vehicle;

33.2. The Applicant returned the vehicle to the Respondent on 6 February 2017;

33.3. There is nothing in writing from the Applicant to the Respondent cancelling the sale of the vehicle;

33.4. There is no written instruction or a record of an instruction by the Applicant to the Respondent to repair the vehicle;

33.5. The vehicle has been with the Respondent since 6 February 2017;

33.6. The Applicant did not and could not dispute that the Respondent repaired the vehicle; and

33.7. The Applicant never returned to the Respondent’s premises to inspect or collect the vehicle.

THE APPLICANT’S EVIDENCE:

The defects:

34. The Applicant’s evidence before the Tribunal of the defects, derives from the Applicant’s various statements to the multiple entities he approached for assistance, the affidavit the Applicant deposed to under oath in support of his application before the Tribunal, and the oral, electronic and documentary evidence the Applicant gave at the hearing.
35. The Applicant’s oral evidence was that the vehicle had initial and additional defects (see paragraphs 12 and 14 above). The Applicant has no corroborating evidence of the defects - not for the initial, nor the additional defects - though he communicated with Willers throughout. The Applicant did not put them in writing to the Respondent. Applicant was alone when he experienced the initial defects and the mechanic who confirmed the additional defects was not willing to give evidence at the hearing about what he observed when he checked the vehicle in King Williams Town.

The cancellation:

36. The Applicant testified that he elected to cancel the agreement in terms of section 56(2) of the CPA. The Applicant insisted that he tried to cancel the transaction at all times after he became aware of the initial and additional defects in the vehicle.

37. On 26 January 2017, the Applicant informed the Respondent's salesperson, Willers, and on 6 February 2017, his financier (Motor Finance Corporation or "MFC"), that he was cancelling the agreement.
38. The Applicant placed the recording of a conversation between himself and an employee of MFC before the Tribunal to prove that he discussed the cancellation of the sale with MFC. This happened during a call MFC made to him on 6 February 2017, to inquire whether he is happy with the transaction. This call was on the same day the Applicant returned the vehicle to the Respondent and sought Legalwise's help to cancel the sale after the Respondent failed to assist the Applicant with the cancellation.
39. Under cross-examination, the Applicant refuted the Respondent's averment that he returned the vehicle and wanted to cancel the sale because he suffered buyer's remorse as his wife did not want a bakkie. The Applicant said he could not have said this as he does not have a wife.
40. The Applicant testified that he did not hear from the Respondent after he returned the vehicle, and he did not check on the status of repairs of the vehicle, unsurprisingly so, as he cancelled the sale and never agreed to the Respondent repairing the vehicle. The Applicant at all times wanted to cancel the sale; and for the Respondent to refund him the purchase price and return the car he traded-in to him.

THE RESPONDENT'S EVIDENCE:

41. Van Heerden of the Respondent testified that –
 - 41.1. He never dealt with the Applicant directly when the Applicant engaged with the dealership. All the interactions between the Applicant and the Respondent during the sale and afterward were between the Respondent's salesperson Willers and the Applicant. Willers is no longer in the Respondent's employ. The Respondent did not call Willers as a witness to give evidence at the hearing about the interactions and communications between Willers and the Applicant;
 - 41.2. The vehicle did not have the defects the Applicant testified to, though he did not see or inspect the vehicle when the Applicant returned it and he sent the bakkie to Final Touch to assess and repair the vehicle in 2017;
 - 41.3.
As far as he is concerned Final Touch identified and fixed all the defects in the vehicle;
 - 41.4. The vehicle had been ready for collection from 8 February 2017;
 - 41.5.
The Respondent contacted the Applicant numerous times to tell him the Respondent repaired the vehicle and that it is ready for collection. The Applicant to date failed to collect the vehicle; and
 - 41.6.

In 2020 van Heerden instructed an employee, Myburgh, to make a video of the vehicle's condition and to arrange a DEKRA inspection to attest to and show that the vehicle is fully repaired and in good condition.

42. Myburgh gave evidence about the video he made and the DEKRA inspection report he obtained to attest to the vehicle's condition to the Tribunal.
43. Van Heerden testified that the Applicant did not cancel the vehicle sale, but instructed the Respondent to repair it. In this respect, Van Heerden for the Respondent relied on what Willers told him.

ANALYSIS

OF THE EVIDENCE AND JUDGMENT REGARDING THE DEFECTS

44. The relief in section 56(2) is available to a consumer if the defects were material as per the definition of defects in section 53(1) of the CPA. The onus is on the Applicant to show on the balance of probabilities^[1]

44.1. The defects in the vehicle; and

44.2. The defects were of such a nature that he could cancel the sale in terms of section 56(2) of the CPA.

45. The invoice from Final Touch workshop, dated 8 February 2017, shows that the brakes - brake drums, spring kit, and brake lining

- had been fixed. The Respondent relied on Final Touch' invoice that Final Touch identified and repaired all the defects in the vehicle.

46. It appears unlikely to the Tribunal that the defects Final Touch repaired were all the defects the Applicant experienced and complained about in the vehicle -

46.1. The Respondent, in his letter dated 9 May 2017, "To whom it may concern," refers to the Applicant's complaint about an oil leak and brakes the Respondent fixed

46.2. It, therefore, appears highly likely to the Tribunal that Final Touch might not have been the only workshop that worked on the vehicle and fixed its defects; and

46.3. It is more probable that the Respondent sent the vehicle elsewhere to fix other defects, and that the Respondent either does not have the records relating to other repairs that have been effected in the vehicle, or that the Respondent has not taken the Tribunal into its confidence in that regard.

47. Under cross-examination, the Respondent conceded that the two warning lights would have come on if the vehicle had an oil leak and a brake problem, as the Applicant reported to Willers during his onward journey to King Willam's Town.

48. The Respondent also gave evidence that there was a problem with the cubby hole, though minor, as the lock had to be adjusted. That was done.
49. The Respondent did not call Willers to give evidence, yet he was the primary person who dealt with the Applicant on the Respondent's behalf at all relevant times. The Tribunal noted that the Respondent no longer employs Willers. In the view of the Tribunal, that does not prevent the Respondent from calling Willers to give evidence or the Respondent requesting the Tribunal to summons Willers to give evidence at the hearing in this matter.
50. Regarding the Respondent's assertion that the Applicant took the car on a test drive and did not point out any defects (the Applicant denied he took the car for a test- drive), this is irrelevant to the Tribunal in considering whether the vehicle had the defects the Applicant complained about. Section 55(5)(b) of the CPA provides that "... it is irrelevant whether a product failure or defect was latent or patent, or whether a consumer could have detected it before taking delivery of the goods; and ...". The Respondent does not rely on the defence in section 55(6)[2] of the CPA. This means it does not matter whether the Applicant took the vehicle on a test drive or not; identified the defects in the vehicle and accepted the vehicle with the defects or not.
51. The Applicant submitted that even if at the time of the sale, the vehicle may not have been defective as defined in the CPA, the defects the Applicant identified might in future lead to defects that might establish a right of cancellation for the Applicant, implying the Applicant might as well exercise the right of cancellation when he did.
52. The Tribunal disagrees with this contention. Section 56(2) allows for a remedy for "... goods (that) fail to satisfy the requirements and standards contemplated in section 55", not goods that might in future fail to satisfy the requirements and standards contemplated in section 55 of the CPA. The CPA does not apply to future defects. Such interpretation and application of the CPA would create an untenable situation and inject such uncertainty in transactions for the sale of goods that it simply could not have been what the legislature intended. The CPA relates to defects brought to the supplier's attention within 6 (six) months of the sale.

FINDING

53. In the Tribunal's view, the Applicant had been consistent throughout about the defects he complained about. The Applicant proved on the balance of probabilities that the vehicle had the defects the Applicant complained about. The Tribunal rejects the Respondent's evidence that the flaws the Applicant complained about were not present in the vehicle at the relevant times of this complaint.

Did the defects constitute defects as defined to warrant cancellation?

54. The next question the Tribunal has to consider is whether the defects in the vehicle were such that they warranted cancellation of the sale under section 53(1)(a)(ii) of the CPA, i.e., whether “... 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; ...”.
55. It is common cause between the parties that the Applicant drove the vehicle for more than 500 kilometres from the time he became aware of the initial defects, and then drove the vehicle for another 500 plus kilometers with the initial and additional defects, after he became aware of the additional defects.
56. The Tribunal finds it improbable that the Applicant would have chosen to drive the vehicle for more than 1 000 kilometres if the vehicle had defects of the nature described in section 53(1) of the CPA. For example, if the vehicle’s brakes were tied with ordinary wires, it is unlikely the Applicant would have arrived safely in Bloemfontein after driving it from King Williams Town for over 500 (five hundred) kilometres. On the balance of probabilities, it is more likely that the brake problem related to the brake drums which the Respondent replaced) which would not have rendered the vehicle defective in the terms of section 53(1) of the CPA.
57. In this instance, the defects would not have caused the vehicle to be unusable, albeit it would have imposed some level of discomfort and lack of aesthetics, the latter particularly with regard to the cubby hole held together with prestick; the one tyre rim being different from the other three (even if true) ; and the loose step. In *Motus Corporation (Pty) Ltd and another v Wentzel*[3], regarding the reasonable expectations of motor vehicle purchasers, the Supreme Court of Appeal found that a Bluetooth system was merely an accessory to the motor vehicle and a deficiency concerning it did not render the motor vehicle less acceptable.
58. The 2020 DEKRA report and video the Respondent placed before the Tribunal as evidence of the condition of the vehicle is of no assistance to the Tribunal in deciding the state of the vehicle at the time when the Applicant bought the vehicle, to assess whether the car was in a condition that would have triggered the Applicant’s rights under section 56(2) of the CPA to return the vehicle and cancel the transaction.
59. The Tribunal finds that the defects in the vehicle were not of the nature described in the definition of defects in section 53(1) of the CPA entitling the Applicant to cancel the sale in terms of section 56(2) of the CPA.

ANALYSIS

OF THE EVIDENCE AND JUDGMENT REGARDING THE CANCELLATION:

60. There is a dispute between the parties whether the Applicant cancelled the sale of the vehicle (on the Applicant's version), or agreed to the Respondent repairing the vehicle (on the Respondent's version). If the Applicant's version is correct, and the Respondent supplied the Applicant with a vehicle with defects as defined in section 53(1) in contravention of section 55(2) of the CPA, that would entitle the Applicant to cancel the sale and receive a refund of the purchase price from the Respondent.
61. In the light of the findings above, the Tribunal will not consider and make a finding whether the Applicant cancelled the sale or agreed to the Respondent repairing the vehicle. The right to cancel is only available to the Applicant had the Respondent supplied the Applicant with materially defective goods, which is not the case in this matter.
62. The Respondent raised that the Applicant did not meet the requirements of section 56(3) of the CPA to trigger his right of cancellation of the transaction of the CPA. In the view of the Tribunal, section 56(3) of the CPA is not applicable in this matter. The Applicant's case at all times has been that he cancelled and did not ask for repairs; he never went back for the vehicle to inspect repairs. Hence his cancellation did not arise out of his unhappiness with the Respondent's vehicle repairs under section 56(3) of the CPA.
63. Lastly, the Tribunal considered that according to the Respondent, the vehicle had been repaired and ready for collection since 8 February 2017 and that the Respondent, at some point, raised the spectre of charging the Applicant storage fees for the vehicle.
64. In the view of the Tribunal, for the Applicant to be held liable for storage costs for his vehicle for the duration of the time he was pursuing a legitimate dispute through the channels available to him, would have a chilling effect on consumers exercising their legitimate rights under the CPA.

ORDER

65. In the light of the foregoing, the Tribunal makes the following order –
- 65.1. The Tribunal dismisses the Applicant's application;
- 65.2. The Tribunal orders the Respondent to return, and the Applicant to collect his Toyota Hilux Bakkie 3L Diesel vehicle bearing registration letters and numbers [...] within 15 (fifteen) days of the date of this order;
- 65.3. The Respondent does not levy, and the Applicant does not become liable to pay storage costs for the vehicle from 8 February 2017, until 15 (fifteen) days after the date of this order; and
- 65.4. The Tribunal makes no costs order.

Dated on this 25th day of January 2022.

Ms. D Terblanche

Presiding Tribunal member

Prof B Dumisa, Tribunal member, and Mr. F Sibanda Tribunal member concurring, it is so ordered.

[1] Section 117 of the CPA prescribes the Standard of proof “In any proceedings before the Tribunal, or before a consumer court in terms of this Act, the standard of proof is on a balance of

probabilities.”

[2] Section 55(6) of the CPA provides that – “Subsection (2)(a) and (b) do not apply to a transaction if the consumer—

(a) has been expressly informed that particular goods were offered in a specific condition; and
(b) has expressly agreed to accept the goods in that condition, or knowingly acted in a manner consistent with accepting the goods in that condition. “

[3] Motus Corporation (Pty) Ltd and Another v Wentzel (Case no 1272/2019) [2021] ZASCA 40 (13 April 2021)

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