

SOUTH AFRICA / JUDGMENT

Robert Maree v Nissan SA (Pty) Ltd (NCT/95354/2017/75(1)(b)) [2019] ZANCT 61 (15 May 2019) [2019] ZANCT 61

COURT

National Consumer Tribunal

BEFORE

D Terblanche, B Dumisa, K Moodaliyar

CASE / FILE NUMBER

NCT/95354/2017/75(1)(b)

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case Number NCT/95354/2017/75(1)(b)

IN THE MATTER BETWEEN:

ROBERTO MAREE

APPLICANT

And

NISSAN SA (PTY) LTD

RESPONDENT

Panel

Ms D Terblanche – Presiding Tribunal Member

Prof B Dumisa

- Tribunal Member

Prof K Moodaliyar - Tribunal Member

Date of hearing

3 May 2019

JUDGMENT AND

REASONS

THE PARTIES

1. The Applicant is Roberto Maree, an adult male consumer, hereinafter referred to as “Maree” or the “Applicant”.
2. The Respondent is Nissan SA (Pty) Ltd, duly registered under the company laws of South Africa, with company registration number 1963/007428/076 and registered address at 56 Ernest Oppenheimer Street, Rosslyn, Pretoria, Gauteng Province.

THE APPLICATION

3. Maree brought this application in terms of s75(1)(b) of the Consumer Protection Act, Act 68 of 2008 (hereinafter the “CPA”).

The section 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—

- (a) ... ; or
 - (b) the Tribunal, with leave of the Tribunal.”
4. An application in terms of s75(1)(b) of the CPA comprises two stages – the first; the application for leave to refer directly to the Tribunal. The second; once leave to refer has been granted, for the Tribunal to determine whether prohibited conduct took place and if so, making the appropriate orders.
 5. The Tribunal granted the Applicant leave to refer on 16 October 2018, finding that “ ... it is satisfied that the Applicant has laid a foundation for a complaint in terms of the CPA”. That concluded the first stage of the process.
 6. The current hearing before the Tribunal, pertains to the second stage, namely for the Tribunal to determine whether the Applicant has made out a case of prohibited conduct against the Respondent and is entitled to the relief he seeks.

BACKGROUND

7. The Applicant purchased a Nissan Hardbody, MP300 2.5 TDI LWB 2016 Model, from Auto City Nissan Hermanus, an authorised dealer of the Respondent.
8. Applicant alleges that, a month after he purchased the vehicle, he discovered various areas with rust on the vehicle; a water leak under the dashboard on the driver’s side; he heard suspension noises; identified a problem with a tyre; and a discovered a leak at the canopy’s rear window.

9. The Applicant alleges that because of the defects in the vehicle, the Respondent contravened various sections of the CPA, specifically s56 read with s55(2) of the CPA.
10. Applicant alleges that he informed the dealership as well as Nissan SA of this. Following on his complaint an agent of the Respondent inspected the vehicle. The agent allegedly told the Applicant subsequently that "...Nissan must replace the vehicle."
11. The Applicant approached both the Motor Industry Ombudsman of South Africa, hereinafter "MIOSA", and the National Consumer Commission, hereinafter the "Commission", with his complaint.
12. The Commission issued a notice of non-referral to the Applicant dated 11 October 2017.
13. In the notice of non-referral the Commission informed the Applicant that it would not pursue the Applicant's complaint because "... (The Commission) has assessed your complaint, the redress sought, as well as MIOSA report, and has determined that Nissan SA is entitled to repair the vehicle in terms of section 56(2) of the CPA. We recommend that you return the vehicle for the relevant repairs. We cannot pursue your matter." The Commission concluded that the complaint "does not allege facts which, if true, would constitute grounds for a remedy under the Consumer Protection Act, 2008."
14. Unhappy with the outcome of his complaint by MIOSA and the NCC, the Applicant then approached the Tribunal for leave to refer his complaint directly to the Tribunal.
15. The Applicant wants to return the vehicle to the Respondent and for the Respondent to refund him the purchase price he paid.

THE HEARING

16. The hearing into the complaint was set down and heard on 3 May 2019 at the Tribunal's offices in Centurion.

THE PARTIES'

SUBMISSIONS

17. The parties agreed on the following facts, namely, that –
 - 17.1. The Applicant purchased the vehicle from the Respondent on 20 June 2016;
 - 17.2. Approximately one month after the Applicant purchased the vehicle, he saw that the vehicle had rust on the hinges, bin and tailgate; a water leak under the dashboard on the driver's side; problems with the tyre; made noises from the suspension and had some problems with the rear window of the canopy;
 - 17.3. These problems were attended to on 2 August 2017, at the cost of the Respondent, by Nissan Hermanus and Overstrand Panelbeaters in Kleinmond;

17.4. The problems with the tyre; noises from the suspension and the rear window of the canopy were repaired properly;

17.5. The rust on the hinges, the tailgate and the bin may not have been repaired properly, as claimed by the Applicant. Nissan has not had the opportunity to inspect the vehicle to confirm this and needs to inspect the vehicle to confirm this;

17.6. With regard to the servicing, and the implications of it being done or not as per the manufacturer's directions for warranty purposes, the parties agreed that the vehicle was serviced on –

17.6.1. 18 Jan 2017 at Helderberg Nissan with an odometer reading of 20 793 kilometres; and

17.6.2. 26 March 2018 at Hermanus with an odometer reading of 33 589 kilometres; and

17.7. The vehicle's odometer reading, at the date of the hearing, is between 55 000 and 60 000 km.

18. The Applicant –

18.1. Maintains that due to the defects in the vehicle and that he has lost confidence in Nissan, he is entitled to a refund of the purchase

price he paid to the Respondent;

18.2. Maintains that, despite what the Respondent has to say about the defects, they are not cosmetic; and

18.3. Submits that, with regard to the high mileage, had Nissan refunded him the purchase price when he complained initially, he would not have had to use the vehicle and it would not have built up the mileage it has on the odometer.

19. The Respondent –

19.1. Submitted that the vehicle is fit for purpose, safe to use and the defects in the vehicle are purely cosmetic - this is evidenced by the fact that the Applicant drove the vehicle for up to approximately 55 000 and 60 000 kilometres;

19.2. Accepts the Applicant's view that the repairs were not done properly;.

19.3. Is willing to fix all the remaining problems. The Respondent has not seen the vehicle since the initial repairs were done;

19.4. Is willing to repair the defects, once it has had an opportunity to examine the vehicle, and has given a mandate to repair it to the manufacturer's standards;

19.5. Is prepared to reinstate the warranty of 6 years or 150 000 kilometres, once repairs have been completed. The warranty was

cancelled due to the Applicant not having serviced the vehicle at the prescribed intervals;

19.6. Submitted that it is not prepared to take the vehicle back and refund the Applicant the purchase price for the vehicle, as Applicant would be unduly enriched;

19.7. Submitted that Nissan SA is prepared to pay for a third party inspection to confirm that the repairs had been done, and done to manufacturer's standards; and

19.8. Submitted that Nissan SA commits, that should the problems re-occur, it will repair it again at its expense.

ISSUES FOR

DETERMINATION

20. The questions the Tribunal has to determine to make a finding in this matter are:

20.1. Is the vehicle defective as envisaged in terms of the CPA? and

20.2. If the vehicle is defective, what relief is the Applicant entitled to?

DISCUSSION

21. The sections relevant to the dispute between the parties are contained in s56(1) read with s55(2) and S53(1)(a) of the CPA. They provide as follows:

Section 56(1) of the CPA:

"In any transaction or agreement pertaining to the supply of goods to a consumer there is an implied provision that the producer or importer, the distributor and the retailer each warrant that the goods comply with the requirements and standards contemplated in section 55, except to the extent that those goods have been altered contrary to the instructions, or after leaving the control, of the producer or importer, a distributor or the retailer, as the case may be."(emphasis added)

Section 55(2) of the CPA:

"Except to the extent contemplated in subsection (6), every consumer has a right to receive goods that—

- (a) are reasonably suitable for the purposes for which they are generally intended;
- (b) are of good quality, in good working order and free of any defects;
- (c) will be useable and durable for a reasonable period of time, having regard to the use to which they would normally be put and to all the surrounding circumstances of their supply; and
- (d) comply with any applicable standards set under the Standards Act, 1993 (Act 5 No. 29 of 1993), or any other public regulation."

(Emphasis added)

Section 53(1)(a) defines "defect":

“(a) “defect” means—

- (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; ...”

- 22. There are no allegations that the vehicle is not safe, nor that it is not reasonably suitable for the purposes for which it is generally intended. The Respondent submitted that it is evidenced by the fact that the Applicant drove the vehicle for almost 60 000 kilometres up to the date of the hearing.
- 23. The parties are in agreement that the vehicle is not “free of defects” as set out in s55(2)(b) of the CPA. The Tribunal accordingly does not have to deliberate and determine whether the vehicle “is free of defects” or not.
- 24. We then move on to determine whether the defects that had not been fixed, namely the rust on the hinges, bin and tail gate, are of such a nature that it warrants the return of the vehicle to the Respondent and the refund of the purchase price to the Applicant.
- 25. The Tribunal considered this matter in the light of the relief available for this type of prohibited conduct, the nature of the defects and other relevant factors.
- 26. The relief the Tribunal may order is contained in s150 of the National Credit Act, Act 34 of 2005 (hereinafter the “NCA”) and s56(2) of the CPA.
- 27. Section 150 of the NCA provides that the Tribunal may make –
 - “(i) any other appropriate order required to give effect to a right, as contemplated in this Act or the Consumer Protection Act, 2008; (and)
 - (j) any other appropriate order required to give effect to a right, as contemplated in this Act or the Consumer Protection Act, 2008.”
- 28. Section 56 of the CPA allows for specific relief. It provides that –
 - “(2) 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.”

“(Emphasis added)”

29. It is common cause between the parties and it is clear to the Tribunal, that that the rust did not render the vehicle unroadworthy or unsafe. It did however render the vehicle less acceptable than persons generally would be reasonably entitled to expect in the circumstances; was an eyesore and caused inconvenience to the Applicant.
30. The above defects are not, in the view of the Tribunal, of such a nature that justifies the Applicant to return the vehicle to the Respondent and get a refund of the purchase price.
31. Bearing the above in mind and the decisions by both the MIOSA and the NCC, the Tribunal is of the view that it would be fair and reasonable for the Respondent to repair the defects, then subject it a third party inspection to verify that those defects had been repaired properly, and if not, fix any outstanding or faulty repairs.

ORDER

32. The Tribunal accordingly -

32.1.

Orders

the Applicant to avail the vehicle to the Respondent for Respondent to inspect the vehicle; and report to the Applicant by no later than 31 May 2019; on the repairs it will effect to the vehicle;

32.2.

Orders

the Respondent to -

32.2.1. Repair the defects on the vehicle to manufacturers' specifications by no later than the 30 June 2019;

32.2.2. Pay for a third party assurance provider to assess the repairs effected on the vehicle, to provide assurance to the Applicant that the repairs had been effected correctly and appropriately;

32.2.3. Re-instate the 3-year 150 000 kilometre warranty on the vehicle for the remainder of the period and mileage immediately upon completing the repairs, subject to its ordinary terms and conditions thereafter; and

32.3. Makes no order for any of the parties' costs.

Dated and signed at Centurion on this 15th day of May 2019.

Signed

Ms D Terblanche

Presiding Tribunal Member

Prof B Dumisa and Prof K Moodaliyar, Tribunal members, concurring.

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