

SOUTH AFRICA / JUDGMENT

Tshehla v Aucamp Eiendomsbeleggings t/a CA Motors (NCT/95341/2017/75(1)(b)) [2019] ZANCT 92 (1 April 2019)

[2019] ZANCT 92

COURT

National Consumer Tribunal

BEFORE

MC Peenze, D Terblanche, A Potwana

CASE / FILE NUMBER

NCT/95341/2017/75(1)(b)

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IN

THE NATIONAL CONSUMER TRIBUNAL

HELD

IN CENTURION

Case

number: NCT/95341/2017/75(1)(b)

In

the matter between:

MATLAKE
JAMES
TSHEHLA
APPLICANT
and
AUCAMP
EIENDOMSBELEGGINGS t/a CA
MOTORS
RESPONDENT
Coram
Dr.
MC Peenze - Presiding Tribunal Member
Ms
D Terblanche - Tribunal Member
Mr
A Potwana - Tribunal Member
Date
of Hearing - 01 April 2019
Place
of Hearing - Centurion

JUDGMENT

THE PARTIES

1. The Applicant is Matlake James Tshehla, an adult major male person ("the Applicant "). The Applicant represented himself at the hearing with the assistance of an interpreter.
2. The Respondent is Aucamp Eiendomsbeleggings TIA CA Motors, a car sales dealership operating from premises domiciled at 596 Barage Road Vereeniging {"the Respondent"}. At the hearing the Respondent was represented by Ms Heidie Aucamp, employed at the Respondent.

THE APPLICATION

3. This is an application by the Applicant for relief in terms of the Consumer Protection Act, 68 of 2008 ("the CPA or "the Act"). The application arises from the Applicant having purchased a second hand previously owned vehicle from the Respondent, which vehicle experienced performance problems and which the Applicant wishes attended to by the Respondent. The Applicant seeks to get a full refund of the purchase price of the vehicle (R55 000) or any other relief the Tribunal deems fit.
4. The Applicant initiated his complaint with the Motor Industry Ombudsman of South Africa ("MIOSA") and the National

Consumer Commission ("NCC"), in terms of Section 72(1)(a) of the CPA.

5. After the NCC issued a notice of non-referral, the Applicant applied for leave from the Tribunal for the complaint to be referred directly to the Tribunal in terms of section 75{1}(b). The Tribunal granted leave to refer the main application for adjudication by the Tribunal on 4 December 2018, confirming that the normal rules and time frames for filing an answering affidavit to the main application would then apply.
6. The Respondent filed an opposing affidavit and the hearing was set down for 1 April 2019. At the hearing of 1 April 2019, this Tribunal confirmed proper service. The matter was heard on an opposed basis and this judgment is based on the documents before the Tribunal as well as evidence provided by the parties at the hearing held on 1 April 2019.

BACKGROUND

7. The Applicant is a consumer, who purchased a motor vehicle, a Mercedes Benz C180 2002 model ("the vehicle"), on 15

September 2016.

8. As part of the Agreement of Sale for the car the Applicant signed a document titled "Declaration and Acknowledgment by the

Purchaser". Pertinent provisions, reiterated in the "Terms and Conditions", are the following:

"9.1 I hereby confirm that I was informed that the above vehicle is a used vehicle of a specific age and mileage as indicated above. I acknowledge that I have inspected the vehicle, conducted a road test, and that the condition was expressly disclosed and stipulated in the offer by the Seller."

9.2 "I hereby accept the vehicle in this condition and expressly confirm that the Seller offers no warranty on the vehicle in respect of mechanical failure, and defect of any material imperfection".

9. The Applicant confirmed and the Respondent did not dispute the fact, that the day after he bought the vehicle from the Respondent, he started experiencing problems with the vehicle. It is not disputed that the Applicant returned the vehicle the next day (16 September 2016) to the Respondent to fix the dashboard and to check why the vehicle does not retain any oil. The Respondent took the vehicle back to their workshop and the Applicant collected it on the 22nd of September 2016.
10. After the vehicle was driven from Vereeniging to Groblersdorp, the vehicle light again showed water and oil problems, although the vehicle could still drive. The Applicant registered the vehicle on the Monday; with the Vehicle Licence Plate No NTD935GP.
11. On the 27th of September, when the Applicant returned the vehicle to the Respondent, the owner, Mr "Riaan", indicated that he would "check" the vehicle and that the Applicant should return the next Monday. After the vehicle was returned to the Applicant again, the vehicle experienced further problems within days; this time it was standing at the church and would not start again after church. The Applicant requested the Respondent to tow it to its premise, shut the Respondent refused. The Applicant towed the vehicle to the Respondent's premises at his own expense on 1 October 2016, and then requested the Respondent for an exchange. The Respondent disagreed with the proposal, but agreed to repair the vehicle if the Applicant would procure the spare parts.
12. The Respondent indicated to the Applicant that he has a mechanic that could repair the vehicle and indicated to the Applicant which spare parts should be purchased for example ringbearers, oil filter, hooter, top gasket, etc. The Applicant bought all these spare parts and provided same to the Respondent. After some time, the Applicant enquired about the progress in the repair of the vehicle from the owner, Mr "Riaan", who then referred him to Mr "Leon". The Respondent then indicated that the spare parts did not seem to work and that they were waiting for the "right spares". However, the "right spares" never seemed to come and the Respondent started to avoid the Applicant's calls and never wanted to see the Applicant when the latter enquired about the progress in repairing his vehicle. Hereafter, the Applicant approached the MIOSA.

13. At the MIOSA, the Respondent alleged for the first time that the Applicant's car was in a collision and that the bumper was damaged when the Respondent brought the vehicle in for repair the first time. The first time that the Respondent brought the vehicle in for repair, was on the 27th of September 2016, according to the undisputed testimony of the Applicant.
14. The MIOSA issued a finding on 27 March 2017 "that the above mentioned vehicle must be taken back to CA Motors, inspected for quantum of damage and costs of usage calculated for the upliftment of this transaction". The Respondent has failed to date to adhere to the finding.
15. The Applicant then approached the NCC to assist him with resolving his complaint with the Respondent. The NCC issued a notice of non-referral to the Applicant on the basis that there is a dispute of fact between the parties. According to the NCC, the Respondent

alleged that the car was in an accident whilst in the Applicant's possession and presented with damage to the front bumper when it was brought in for the first time for repair.

ISSUES

TO BE DECIDED

16. The Tribunal considered all evidence in order to decide on the following two issues:
 - 16.1 The refund of the selling price; and
 - 16.2 The refund of the amount paid for parts and towing of the vehicle.

AT THE HEARING

17. At the hearing on 1 April 2019, the Applicant presented his case fully, inclusive of physical evidence in the form of photos that were sent to him by the Respondent [marked as Exhibits A-E and a SANRAL tax invoice with a photo of a white Mercedes vehicle with registration number NTD935GP (marked as Exhibit F)].
18. The Applicant testified to the tax invoice and confirmed that the photo on the tax invoice from SANRAL was indeed a photo of his vehicle as taken by SANRAL on 26 September 2016 as indicated on the invoice, with the licence plate clearly visible on the front bumper. On the photo the vehicle is presenting without any scratches or damage to the front bumper. On the photo there is also no sign of any rust on the front bumper. This photo was clearly taken one day before the vehicle was returned for the first time to the Respondent for attending to the oil problem (27 September 2016).
19. The Respondent did not dispute the evidence as presented by the Applicant with regard to Exhibit F.

20. The Applicant also presented the Tribunal with photos provided to him by the Respondent, which photos showed what was alleged by the Respondent to be the damaged bumper of the Applicant's vehicle (Mercedes with registration number NTD935GP as brought in for repairs on 27 September 2016). {Exhibit A-E). The Applicant disputed the fact that the damage to the bumper was caused by himself, alternatively that the bumper on the photo was indeed the bumper of his vehicle.
21. The Tribunal concludes that doubt was created in the mind of the Tribunal that the photos of the damaged bumper was proof that the Applicant brought his vehicle back with such a damaged bumper as reflected in the photos as taken by the Respondent. Reasons are as follows:
- the photos presented only a part of a bumper of an unidentified vehicle;
 - the Respondent did not testify to the originality of the photos; and the Tribunal was not convinced that the photos were indeed representing the front bumper of the Applicant's vehicle; and
 - if anything, the photos showed that the vehicle was terribly neglected, since it appears rusted on the photo and not at all in the same condition as reflected in the e-toll photo as taken the day before the vehicle as returned to the Respondent which was the day the Respondent alleged the front bumper was already damaged.
22. The Applicant referred to the amounts that he had spent to procure parts for the vehicle, indicating that the Respondent requested him to procure the parts. The Applicant implored that he be refunded the money that he spent on the vehicle. He also referred to an amount that he spent on towing the vehicle back to the Respondent's place of work when the vehicle broke down.
23. The receipts for the parts as purchased were included in the Tribunal documents. Details of the amounts are as follows:
- (i) DJ's Cilinder Heads & Motor Reconditioning
R1 250.00
 - (ii) M & R Motor Spare
R1 500.00
 - (iii) New Vaal Motors (Pty) Ltd
R1 068.80
24. The Respondent also referred to an amount of R1 400.00 that he spent to hire a tow truck on 01 October 2016 to tow the vehicle to the Respondent's premises. The Applicant outlined that the vehicle was stranded in Johannesburg CBD as from 30 September 2016 and could not start. The Applicant gave oral testimony that the Respondent indicated that "he would send

someone to come and assist...but the dealer never got back to me". As the Respondent also instructed the Applicant not to take the vehicle to any other dealership for repairs, the Applicant had no other choice but to tow the vehicle back to the Respondent's place.

The testimony with regard to the towing of the vehicle to the Respondent's place and the amount of R1 400.00 spent by the Applicant to tow the vehicle, was not disputed by the Respondent, either in the pleadings or during the proceedings. Although no invoice was provided for the amount of R1 400.00, the amount was accepted as reasonable in terms of industry norms for the distance travelled and the circumstances of the particular case. The Respondent confirmed that the vehicle was indeed towed to its premises as outlined by the Applicant and did not dispute the amount of R1 400.00 spent on the towing.

25. With regard to the quantification of the "amounts paid on the vehicle" as referred to by the Applicant, the only issue in dispute between the parties was the actual calculation of the expenses on the parts as outlined above:

25.1 According to the Applicant: "I spent R5 000.00 on the parts"; and

25.2 According to the Respondent: "The Applicant stated that he bought parts to the value of R5 000.00 but the invoices attached only amount to R2,318.80."

26. A careful calculation of the amounts as reflected in the invoices as attached to the Applicant's Founding Affidavit reflects the total sum of: R3 818.80. If the amount for the parts and the amount spent on the towing are added together, the calculation of the total sum would be as follows:

Parts R3 818.80

Towing R1400.00

TOTAL R5 218.80

27. It followed that both parties calculated the total amount of the expenses incorrectly, although both parties agreed that the

particular expenses were incurred and did not dispute the individual amounts.

APPLICABLE SECTIONS OF THE ACT AND CASE LAW RELATING TO THE APPLICATION FOR RELIEF

28. The Applicant had identified a number of sections in the Consumer Protection Act which are relevant to the matter. These include section 54, section 55 and 56 (3).

29. Section 54 provides that a consumer is entitled to safe, good quality goods, and to demand good quality service. The Applicant alleged that

throughout his dealings with the Respondent he had been treated poorly and therefore the Respondent had acted in contravention of this section. In terms of section 54(2), when a supplier fails to perform a service to the standards contemplated in the section, the consumer may require the supplier to remedy any defect in the quality of the services performed or goods supplied; or refund the consumer a reasonable portion of the price paid for the services performed and goods supplied, having regard to the extent of the failure.

30. Section 55 of the Act deals with the consumer's rights to safe, good quality goods. Section 55(2) provides as follows -

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

- (i) Are reasonably suitable for the purposes for which they are generally intended;
- (ii) Are of good quality, in good working order and free of any defects;
- (iii) 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

(iv) Comply with any applicable standards set under the Standards Act, 1993 (Act 5 No. 29 of 1993), or any other public regulation".

31. Section 55(2) is not without qualification. Section 55(6) qualifies consumers' rights in section 55(2) as follows:

"(6) 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."

32. Applying this section to the Applicant's matter, he had the right to receive a motor vehicle that was reasonably suitable for the purpose for which it was generally intended. The vehicle must be of

good quality, in good working order and free of any defects and must be usable and durable for a reasonable period in time, having regard to the use to which vehicles of this nature would normally be put. The Applicant had argued that his vehicle was defective from within a month that he purchased it and that his attempts to have this addressed by the Respondent were unsuccessful.

33. Though the Applicant signed the "Declaration and Acknowledgment" as referred to above, the Tribunal took into account and gave weight to whether the consumer's rights in terms of section 55(2){c) "to receive goods that 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 ...H have been infringed or not.
34. According to the Applicant, it is important to have a trustworthy vehicle in order to execute daily functions; and was under the impression that the vehicle was safe and sound at the time that the vehicle was bought. The vehicle turned out to be unusable, untrustworthy and unsafe because of the oil leak and unpredictability with engine starting.
35. With regard to section 56(3), 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 replace the goods; or refund the consumer the price paid by the consumer for the goods.
36. The Applicant alleged that he purchased a defective vehicle and attempts to have the Respondent repair the vehicle have failed to the point where the Applicant has lost faith in the Respondent. This matter therefore clearly falls within the ambit of the CPA. It should be noted that, in line with section 56 (4) of the CPA, the implied warranty imposed by 56(1) and the right to return goods set out in 56(2) are each in addition to any other implied or expressed warranty or condition stipulated by the producer or retailer.
37. In this matter, the consumer paid for a vehicle of which he hardly had the use of, due to it breaking down repeatedly. This indicates prohibited conduct in terms of the CPA. It needs to be pointed out that the Respondent did not oppose any point raised by the Applicant during the hearing, except the fact that the Respondent kept confirming that the front bumper was damaged at the time that the Applicant brought the vehicle in for the first repair, and that all the mechanical problems related to the damage to the front bumper.
38. With regard to the submissions made in the application or referral papers before the Tribunal on the amounts paid by the Applicant for parts or the towing of the vehicle, Rule 13(5) bears reference. It 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"

39. The Respondent did not specifically deny or admit in the answering affidavit that the Applicant incurred the expenses as alleged, apart from arguing that the calculation of the amounts was incorrectly done by the Applicant. Accordingly, the expenses of the Applicant and the particular amounts as outlined in the papers and confirmed through oral evidence and invoices during the hearing, are deemed to have also been admitted by the Respondent. During the hearing, the Respondent confirmed such stance, by not disputing any of the expenses of the Applicant, either for parts or for the towing of the vehicle.

FINDING

40. The Tribunal finds that the parties had ample opportunity to fully ventilate all issues before the Tribunal.
41. The Tribunal finds that the Respondent has contravened the CPA and has engaged in prohibited conduct. The following reasons are provided:
- (i) The Applicant's version of the facts, namely that the vehicle had been provided to the Respondent without a damaged front bumper at his first return to the Respondent's premises on 27 September 2016, is believed to be the true version on a balance of probabilities; as supported by the evidence as led during the hearing;
 - (ii) The Applicant proved to be a truthful and reliable witness during the proceedings;
 - (iii) The Respondent did not dispute any submission made by the Applicant, except with regard to the damaged bumper alluded to in subparagraph (i) above;
 - (iv) The Respondent's submission, namely that the damaged bumper, as shown in Exhibit A·E, was responsible for the electronic failures and oil leaks of the vehicle from the second day of purchase onwards, is not accepted by the Tribunal. The submission by the Respondent had not been substantiated or proven. It also had not been logically motivated or argued. The Applicant argued successfully that the scratches on the front bumper, which he denied was caused by himself, could not have caused the oil leak or mechanical failure, as it was clearly surface scratches and no evidence was led that such surface scratches could damage the oil tank and lead to mechanical failures to the extent as explained by the Applicant during the hearing;
 - (v) The Applicant acted in terms of the CPA by returning the vehicle as soon as possible for repair. The Respondent acted in contravention of the CPA by including an ultra vires clause in the sale agreement, creating the impression with the Applicant that he does not have an inherent warranty. The Respondent was expected to honour the 6 months inherent legislative warranty and to replace the vehicle or return the purchase price if the vehicle could not be repaired. By expecting from the Applicant to buy motor parts to repair the vehicle at an additional cost to the Applicant, the Respondent acted in bad faith and displayed serious prohibited conduct;
 - (vi) The Applicant provided the Respondent with ample opportunity to repair the vehicle in line with the MIOSA finding. The failure to do so is perceived as serious;
 - (vii) Applied to the actual provision of goods and services as delivered by the Respondent, the Tribunal finds that the Applicant did not receive good quality goods or services as required in terms of Section 54 of the CPA;
 - (viii) The Tribunal finds that the Applicant did not receive the vehicle suitable for the purpose for which it is generally intended for, namely the safe transport of people and goods. It is found that the vehicle was not of good quality, in good working order and free of any defects;

(ix) The Tribunal finds that the Respondent did not remedy any further failure, defect or unsafe feature that was discovered after a repair of the vehicle or any component of the vehicle within three months after such repair; and

(x) The Tribunal further finds that the Applicant did, on a balance of probabilities, prove the quantum and payment for the parts and towing of the vehicle to the total amount of RS 218.80, set out in paragraph 26 above.

42. The Tribunal is expected to make any appropriate order required to give effect to a consumer's right as contemplated in the CPA.[1] The repayment of the costs of the vehicle and parts bought by the Applicant will assist in providing some relief as requested, but it had been noted by the Tribunal that the Applicant was not able to use the vehicle he had bought for over two years.

43. In the light of the evidence presented by the Applicant, the Tribunal made a negative deduction of the Respondent's failure to implement and respond to the finding made by MIOSA, the ombud established for the motor industry in terms of section 82 of the CPA.

44. Also, in terms of the contract signed by the Applicant when he purchased his vehicle, the Respondent stated that it does not provide any warranty on the vehicle. In terms of Section 55(6)(a) and (b), a consumer's rights to safe and good quality goods do not apply to a transaction if the consumer has been expressly informed that particular goods were offered in a specific condition; and has expressly agreed to accept the goods in that condition, or knowingly acted in a manner consistent with accepting the goods in that condition"[2]. In view of these exceptions provided for under section 55(6)(a) and (b), it is important to explain that these exceptions do not apply unconditionally to the statutory implied warranty period of 6 months as outlined in section 56 of the CPA. The implication is therefore that, where the legislator decided to impose a specific standard or specification, contracting parties will not be able to lower the quality or safety standard, unless the actual detail of the poor quality goods are stipulated and the implications of the lack of safe or poor quality goods are detailed in the agreement.

45. Where agreements of sale, like in this matter, include a general clause referring to the exclusion of a warranty, the contractual

stipulation will be perceived as ultra vires, as section 56 of the CPA imposes an implied warranty of quality for a period of 6 months. Accordingly, although the Respondent claims to have told the Applicant that it did not provide a warranty in view of the exceptions provided for under section 55(6)(a) and (b), the Tribunal found that the Respondent still contravened section 56 based on the premises that the contractual exclusion of a warranty was ultra vires.

ORDER

46. Accordingly, the Tribunal makes the following order:

46.1 The Respondent shall repay the Applicant the purchase price of R55 000 within 20 business days of the date of this order;

46.2 The Respondent shall refund the Applicant the amount of R5 218.80 within 20 business days of the date of this order; and

46.3 No order is made as to costs.

Dated at Centurion on this 30th day of May 2019.

[Signed]

MC PEENZE

PRESIDING TRIBUNAL MEMBER

Concurring: Tribunal Members: Ms D Terblanche and Mr A Potwana

[1] See section 150 of the National Credit Act, 34 of 2005

[2] Section 55(6){a} and (b)

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