

SOUTH AFRICA / JUDGMENT

Netshivhuyu v Kia Motors South Africa (Pty) Limited t/a Kia Hatfield (NCT/96644/2017/75(1)(b)) [2018] ZANCT 144 (12 November 2018)

[2018] ZANCT 144

COURT

National Consumer Tribunal

BEFORE

K Moodaliyar, A Potwana, L Best

CASE / FILE NUMBER

NCT/96644/2017/75(1)(b)

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN

THE NATIONAL CONSUMER TRIBUNAL

HELD

IN CENTURION

Case

number: NCT/96644/2017/75(1)(b)

In

the matter between

MBAVHALELO

JIMMY

NETSHIVHUYU APPLICANT

and

KIA

MOTORS SOUTH AFRICA (PTY) LIMITED

T/A

KIA

HATFIELD RESPONDENT

Coram: Prof
K Moodaliyar – Presiding Tribunal Member
Mr
A Potwana – Tribunal Member
Dr
L Best – Tribunal Member
Date
of hearing – 14 August 2018

JUDGMENT

AND ORDER

PARTIES

1. The Applicant is an adult male consumer.
2. The Respondent is Kia Motors SA (Pty) Ltd t/a Kia Hatfield, a motor vehicle dealership incorporated as a company and duly registered in terms of the company laws of the Republic of South Africa, with its place of business situated at 1303 Frances Baard Street, Hatfield, Pretoria.

BACKGROUND

3. The Applicant's complaint relates to a dispute involving a pre-owned motor vehicle, a VW Golf 6 2010 TSI Highline, which he purchased from the Respondent on 8 March 2016.
4. The Applicant alleges that the motor vehicle started to show problems towards the end of March 2016. He returned the vehicle to the Respondent on 1 April 2016 having complained that the turbocharger and the corner light was faulty.
5. The Applicant states that the dealer verbally advised him that it took the vehicle to VW Hatfield for a diagnostic test and repairs. The Applicant was informed that the turbocharger needed to be replaced and that VW Hatfield charged Kia Hatfield a sum of R45 000. It is unclear whether the Respondent gave VW Hatfield the go ahead to replace the turbocharger.
6. The Applicant states that after about 2 months or so; the Respondent informed him that his car was taken to Stallion Turbo for the turbocharger to be replaced. However, the turbocharger was not replaced but repaired. This was verbally confirmed to him by an employee of Stallion Turbo.
7. As a result of the vehicle's performance problems, the Applicant returned the vehicle to Stallion Turbo within the 12 month warranty period which Stallion Turbo provided for the original work done on the turbocharger. Stallion Turbo declined to deal with the Applicant directly in this regard, and referred the Applicant back to the Respondent.

8. The Applicant and the Respondent continued to have multiple engagements regarding the problematic performance of the vehicle. The vehicle was taken back to VW Hatfield for a further diagnostic test; where it was confirmed that some sort of electrical wiring was done on the vehicle and that the turbocharger had malfunctioned.
9. The Applicant alleges that the Respondent intentionally misrepresented to him that the turbocharger was replaced when, in fact, it was sent to Stallion Turbos for repairs. He submits that the Respondent's conduct was unjust.
10. The Applicant was dissatisfied with the Respondent's failure to attend to the vehicle's performance, and filed a complaint against the Respondent with the Motor Industry Ombudsman of South Africa (MIOSA) on 13 July 2016.
11. On 8 September 2017; the MIOSA issued a finding that the Respondent had adhered to the provisions of Section 56 of the Consumer Protection Act[1]("the CPA") "by applying corrective measures to you [the Applicant's] vehicle and therefore we are satisfied with their [Respondent's] actions. Furthermore, it should be noted that your vehicle's cornering light and right blown head lamp was only brought to the attention of Kia Hatfield after the six (6) month implied warranty has lapsed and therefore they have no obligation to attend to it."(sic in toto).
12. The Applicant was not satisfied with the MIOSA's decision and accordingly referred the matter to the National Consumer Commission ("the Commission") on 12 September 2017.
13. The Commission issued a notice of non-referral, dated 1 November 2017, stating that "the complaint does not allege any facts, which, if true, would constitute grounds for a remedy under the Consumer Protection Act, 2008".
14. The Applicant thus invoked his rights under the CPA to apply for leave to refer the matter directly to the Tribunal, which leave was granted on 14 April 2018.
15. The matter was set down for a hearing on 14 August 2018. Before the hearing could commence the Tribunal was informed that the parties wished to settle the matter. The Tribunal gave the parties time to reach a settlement.
16. A signed settlement agreement was provided to the Tribunal for confirmation as a consent order.
17. On the date of the hearing the Tribunal declared ex tempore that the settlement agreement would be made an order of the Tribunal. However, having revisited the terms of the settlement agreement, the Tribunal has decided to come to a different conclusion. The Tribunal has thus decided to vary its pronouncement on the settlement order (mero motu).

18. The Tribunal is entitled to vary its decision or order when it becomes aware of an error. Section 165 of the National Credit Act [2] ("the NCA") provides for the rescission or variation of an order granted by the Tribunal "acting of its own accord or on application by a person affected by a decision or order." Section 165 further prescribes that such a rescission or variation may only be granted in the following instances:

- (a) When the order of the Tribunal had been erroneously sought or granted in the absence of a party affected by it;
- (b) There is ambiguity, or an obvious error or omission, but only to the extent of correcting that ambiguity, error or omission; or
- (c) Made or granted as a result of a mistake common to all the parties to the proceedings.

19. This was further highlighted in the Bakoven-case[3] where it was stated:

"An order or judgment is 'erroneously granted' when the Court commits an 'error' in the sense of 'a mistake in a matter of law appearing on the proceedings of a Court of record' (The Shorter Oxford Dictionary). It follows that a Court in deciding whether a judgment was 'erroneously granted' is, like a Court of Appeal, confined to the record of proceedings. In contradistinction to relief in terms of Rule 31(2)(b) or under the common law, the applicant need not show 'good cause' in the sense of an explanation for his default and a bona fide defence (Hardroad (Pty) Ltd v Oribi Motors (Pty) Ltd (supra) at 578F-G; De Wet (2) at 777F-G; Tshabalala and Another v Pierre 1979

- (4) SA 27 (T) at 30C-D). Once the applicant can point to an error in the proceedings, he is without further ado entitled to rescission."

20. Accordingly the words "erroneously granted" mean that the Tribunal must have committed an error or mistake in law. The court, in the matter of First National Bank of SA Bpk v Jurgens and Another,[4] the learned Judge Leveson stated:

"That leaves me only with the task of considering para (a) of the same sub-rule which makes provision for rescission or variation of an order or judgment erroneously sought or erroneously granted. I look first at the remedy available before the rule came into force. Ordinarily a court only had power to amend or vary its judgment if the court had been approached to rectify the judgment before the Court had risen. That relief was available at common law and with the only relief that could be obtained until the provisions of rule 42 were enacted. The proposition at common law is simply that once a court has risen it has no power to vary the judgment for it is functus officio. Firestone South Africa (Pty) Ltd v Genticuro AG, 1977(4) SA 298 (A). A principal judgment could be supplemented if an accessory had been inadvertently omitted, provided that the court was approached within a reasonable time. Here the judgment was granted two years ago and a reasonable time has expired. The question then is whether the limited relief at common law has been extended by this provision. In the first place I must express considerable doubt that power exists in the Rules Board to amend the common law by the creation of a Rule. Leaving aside that proposition, however, the question that arises is whether the present case is one of a judgment 'erroneously sought or granted', those being the words used in Rule 42(1)(a). The

ordinary meaning of 'erroneous' is 'mistaken' or 'incorrect'. I do not consider that the judgment was 'mistakenly sought' or 'incorrectly sought'. The relief accorded to the plaintiff was precisely the relief that its counsel requested. The complaint now is that there is an omission of an accessory feature from the judgment. I am unable to perceive how an omission can be categorised as something erroneously sought or erroneously granted. I consider that the rule only has operation where the applicant has sought an order different from that to which it was entitled under its cause of action as pleaded. Failure to mention a form of relief which would otherwise be included in the relief granted is not in my opinion such an error."

21. It is on this basis that the Tribunal relies upon to vary its decision to make the settlement agreement an order of the Tribunal. The rationale is explained below.

APPLICABLE LAW

22. Section 150 of the NCA provides that:

"In addition to its powers in terms of this Act, the Tribunal may make an appropriate order in relation to prohibited conduct or required conduct in terms of this Act, or the Consumer Protection Act, 2008, including-

- (a)...
 - (b) ...
 - (c) ...
 - (d) confirming a consent agreement in terms of this Act or the Consumer Protection Act, 2008 as an order of the Tribunal..."
23. In section 1 of the CPA, "prohibited conduct" is defined as "an act or an omission in contravention of this Act".

CONSIDERATION OF THE MERITS

24. The Tribunal takes cognizance of the efforts made by the parties to reach a settlement in this matter.
25. As a creature of statute, the Tribunal can only exercise jurisdiction over matters that it is allowed or required to decide by the enabling legislation, and in this case, the CPA.
26. Having considered the terms of the settlement agreement entered into by the parties, the Tribunal has difficulty with particular clauses in the agreement.
27. Clause 1.3 of the agreement states that: "Without admitting liability for the claim set out in the action in any respect whatsoever, the Respondent shall settle all outstanding

amounts with VW Hatfield". Clause 1.5 of the agreement further states: "The vehicle was sent to Centurion Diesel and Petrol Centre t/a ACD for diagnosis of the Turbo to be carried out. The diagnostic scan showed no faults and it was confirmed that the Turbo was mechanically sound. No leaks were found on the boost pipes or intercooler." The Tribunal can only make a settlement

agreement an order of the Tribunal if the conduct relates prohibited conduct, or required conduct. The Tribunal is not empowered to address agreements that fall outside of the scope of our jurisdiction. Both clauses are an express denial of any prohibited conduct or failed required conduct.

28. Furthermore, clause 1.12 of the agreement states that: “If any part of this Settlement Agreement is or becomes void or unenforceable, that part is, or will be severed from this Settlement

Agreement so that all parts that are not or do not become void or unenforceable remain in full force and effect, and are unaffected by that severance.” This clause has the potential of nullifying the Tribunal’s powers to confirm the settlement agreement post facto as the severed part of the agreement may result in the conduct mentioned in the settlement agreement not relating to prohibited or required conduct.

29. Also; clause 1.2 is in conflict with Section 160(1) of the NCA which deals with the powers of the Tribunal. Section 160(1) states- “A person commits an offence who contravenes or fails to comply with an order of the Tribunal”. In addition, section 161 of the NCA provides that:

“Any person convicted of an offence in terms of this Act, is liable-

- (a) In the case of a contravention of section 160(1), to a fine or to imprisonment for a period not exceeding 10 years, or to both a fine and imprisonment; or
- (b) In any other case, to a fine or to imprisonment for a period not exceeding 12 months, or to both a fine and imprisonment.”

It is evident that this clause seeks to exclude the application of section 160(1) of the NCA by providing for the excision of any possible failure to abide by the agreement.

30. The Tribunal is thus under no obligation to make this settlement agreement an order of the Tribunal.[5]
31. The parties are at liberty to withdraw their settlement agreement and amend the offending clauses should they wish for the Tribunal to confirm their settlement agreement as an order of the Tribunal.

ORDER

32. After consideration by the Tribunal, it is hereby ordered that:

32.1 The settlement agreement entered into between the Applicant and the Respondent on 14 August 2018 falls outside the Tribunal’s jurisdiction to confirm an agreement as a consent order.

32.2 There is no order made as to costs.

DATED ON THIS 12 NOVEMBER 2018

[signed]

Prof. K MOODALIYAR

Presiding Tribunal Member

Mr A Potwana (Tribunal Member) and Dr L Best (Tribunal Member) concurring.

- [1] 68 of 2008.
- [2] 34 of 2005.
- [3] Bakoven Ltd v G J Howes (Pty) Ltd 1990(2) SA.
- [4] 1993(1) SA 245 at page 246 to 247.
- [5] See the following cases where the Competition Tribunal refused to make a settlement order an order of the Tribunal: Competition Commission v Netcare Hospital Group (Pty) Ltd and another in re large merger between Netcare Hospital Group (Pty) Ltd and Community Hospital Group (Pty) Ltd, case no 27/ CR/Mar07; American Natural Soda Ash Corporation and another v Competition Commission and others, case no 49/CR/Apr00; and The Competition Commission v AECI Limited and others, CT case no C0204OCT2017.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZANCT/2018/144.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/unknown-plaintiff-v-unknown-defendant-consumer-protection-act-anct-2018-2>

Prepared on 11 October 2026 · Esheria