

**IN THE CONSUMER AFFAIRS COURT FOR THE NORTH WEST PROVINCE
HELD AT MMABATHO**

Case number: NW12/2017

In the matter between:

HENDRIK JACOBUS FOURIE

PLAINTIFF

and

**AGENBAG MOTOR GROUP
(REGISTRATION NUMBER:1991/018456/23)**

DEFENDANT

Coram: J. Nkomo(Chairperson), P.Hlahane and K.Kgomongwe.

Heard on: 24 April 2018

Decided on: 04 May 2018

Summary: Consumer Protection Act 68 of 2008 on *Voetstoots* Clause in contract of sale- defects need to be disclosed in terms of section 55(6). Legality of discount of R 5 000.00 as a tradeoff for responsibility to repair defects in terms of Section 56. Consumer's rights to have defects repaired in terms of Section 56 not affected by *Voetstoots* Clause or discount.

Result: Voetstoots clause not enforceable to contract between parties, Defendant to reimburse R 35 000.00 to plaintiff within 15 days and to collect motor vehicle at own costs.

JUDGEMENT

J.Nkomo (P.Hlahane and K.Kgomongwe concurring)

Introduction

1. This matter has one special feature. It is the first matter since the establishment of this court in which the court is to give a judgment after a full trial. All the other matters have been resolved by way of settlement agreements, others were

interlocutory in nature. The Consumer Protection Act¹(hereinafter referred to as “the CPA”) aims to protect consumers who historically did not have protections from the law. A consumer that wanted to protect or enforce his/her then limited rights needed to approach a court of law at a huge expense. The CPA now offers protections and dispute resolution mechanisms other than the usage of the mainstream courts. These dispute resolution mechanisms will be of great benefit to the consumers within the province. It had been a long time that the community of the North West Province had been waiting for the establishment of this court. The Consumer Affairs Courts of other provinces such as the Gauteng Province were already running for some time before the North West Province joined in.

Background

2. The plaintiff is Mr. Jacobus Hendrick Fourie(Mr. Fourie), an adult male person who resides in Klerksdorp which is in the North West Province. It seems that Mr. Fourie and his wife had been shopping for a motor vehicle for themselves. In this regard Mr. Fourie visited the defendant, Agenbag Motor Group (hereinafter referred to as “Agenbag”) at their premises which are situated at Corner Bram Fischer & Anderson Street in Klerksdorp. At first Mr. Fourie was attracted to a Volvo motor vehicle. The details of this motor vehicle were not given, they are in any event not relevant to the dispute.

3. As a second option Mr. Fourie settled for a Chevrolet Spark hatchback motor vehicle. It is a 2005 model, the mileage of which has not been disclosed. The motor vehicle had a price tag of R 40 000.00 which was after negotiations reduced to R 35 000.00. The purchase price was paid in two tranches. An amount of R 30 000.00 was paid on 03 March 2017. At a later stage the balance of R 5 000.00 was paid.

4. Having taken delivery of the motor vehicle on 03 March 2017, Mr. Fourie took it to a routine service on 06 March 2017. It was reported to Mr. Fourie that the motor

¹ Act 68 of 2008.

vehicle had an engine problem. In his testimony Mr. Fourie added that the motor vehicle had a noisy gearbox and its air conditioner did not work. He was advised to return it to Agenbag. He did so and was being assisted by Mr. Venter who advised him to go and look for quotations for the repairs that were needed. He did exactly that and presented two quotations. One was from DRC Service Centre and was in the amount of R 5 800.00. The other was in the amount of R 12 996.00 and was issued by Toyniss Motors. Both are dated 17 March 2017. On being presented with the quotations Mr. Venter stated that these were too high. The parties then reached a deadlock. Eventually Mr. Fourie demanded that he return the motor vehicle and be refunded the purchase price. They also could not agree on this point.

5. Amongst the documents that were presented to evidence is a waiver of Warranty and a Vehicle Sales Quality Delivery Checklist. It has the following words inscribed on it in pen:-

“R 5 000.00 discount no warranty.(voetstoots).”

6. These words (“the words”) were relied upon by Agenbag as a defense against the claim. The view of Agenbag was that with the words Mr. Fourie waived his rights to return the motor vehicle and as such there was no obligation on the part of Agenbag to entertain Mr. Fourie’s complaint or dissatisfaction.

The issue to be decided

7. The court is enjoined to decide as to whether the words were capable of releasing Agenbag from the responsibility of repairing the motor vehicle or refunding its purchase price. If the answer to the question is in the affirmative this would be the end of Mr. Fourie’s case. In the event the answer is in the negative, Agenbag will be obliged to make good of the defects or to at the election of Mr. Fourie refund the purchase price.

The legal position

8. The CPA amongst others aims to protect the interests of all consumers, ensure accessible, transparent and efficient redress for consumers who are subjected to abuse or exploitation in the marketplace².

9. The CPA³ provides as follows:-

“ (2) 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 usable and durable for a reasonable period of time having regard to the use which they would normally be put and all the surrounding circumstances of their supply; and...”

10. It was not disputed that the motor vehicle suffers from defects and that the defects manifested themselves very early. The only issue had been that Agenbag was of the view that it was not the responsible for repairing such defects. It is questionable as to whether Agenbag genuinely believed that it was not responsible for the repairs. This is brought about by the fact that when he first went to present the problem, Mr. Fourie was asked to obtain quotations for the repairs. He was never told that they were not responsible for repairing the defects. Mr. Venter was only concerned that the prices were high. With this in mind the court comes to the conclusion that Agenbag knew that it was obliged to make good of the defects but

² Id preamble (b).

³ Id Section 55(1)

was discouraged by the costs thereof. Therefore, the issue of the motor vehicle being defective is a foregone conclusion.

11. The CPA⁴ further provides 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.”

12. It seems that the CPA does allow for the invocation of the Voetstoots clause by the supplier. The court is however of the view that the supplier needs to disclose all the defects that the motor vehicle suffers from. This view is motivated by the fact that the CPA aims to ensure that consumers are dealt with in a transparent and honest manner by the suppliers of goods⁵. It will be unfair for a consumer to accept to purchase a motor vehicle “with all the defects” without it being disclosed to him/her as to what the defects are. Lack of knowledge of what the defects are will go to the root of the transaction in that the consumer will not have sufficient information at his/her disposal to decide to contract or not to. Section 51(1) reads as follows:-

“Prohibited transactions, agreements, terms or conditions

(1) A supplier must not make a transaction or agreement subject to any term or condition if-

⁴ Id Section55(6). See also the preamble.

- (a) *its general purposes is to-*
 - (i) *defeat the purposes and policy of this Act;*
 - (ii) *mislead or deceive the consumer; or*
 - (iii) *subject the consumer to fraudulent conduct;*
- (b) *it directly or indirectly purports to-*
 - (i) *waive or deprive a consumer of a right in terms of this Act;*
 - (ii) *avoid a suppliers' obligation or duty in terms of this Act;*
 - (iii) *set aside or override the effect of any provision of this Act; or*
 - (iv) *authorise the supplier to-*
 - (aa) *do anything that is unlawful in terms of this Act; or*
 - (bb) *fail to do anything that is required in terms of this Act;”*

13. Agenbag sought also to rely on clause 2 of its document entitled The Delivery Document for New and Pre owned Vehicles. It reads as follows:-

“I confirm that I have inspected the vehicle and that I am satisfied with its condition, there are either no defects that I can see, or those that are present that have either been pointed out to me⁶, or I have found myself are so minor that I am prepared to accept the vehicle in its current condition.”

⁶ Underlining inserted for emphasis only.

14. It is common cause between the parties that no defects were disclosed to Mr. Fourie when he took delivery of the motor vehicle and as such it is found that he cannot be bound by any clauses that purport to suggest that the Voetstoots clause is applicable. Nothing in the general body of the contract suggests that the motor vehicle might be suffering from any defects.

15. Having said the above the question that remains is what should have happened under the circumstances. In this regard reliance is placed on section 56 which provides as follows:-

“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 requirements and standards contemplated in section 55, and the supplier must, at the direction of the consumer either⁷-

(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.

16. It is clear from the above that Agenbag was under an obligation to have the defects fixed if the motor vehicle was returned within 6 months of its delivery. The two quotations are dated 17 March 2017 which is about 14 days after the date of the delivery of the motor vehicle. Mr. Fourie was therefore within the prescribed period of six months. Agenbag was supposed to have ensured that the defects are dealt with.

⁷ Underlining inserted for emphasis only.

17. It was argued on behalf of Agenbag that Mr. Fourie is under the circumstances obligated to pay a further amount of R 5 000.00 to Agenbag seeing that they now have the obligation to repair the defects. The court rejects this approach because it is trite that when there is a dispute about the interpretation of a contract, such contract must be construed against the party that drew it up. The court therefore finds that the discount of R 5 000.00 was a mere discount on the advertised price and should not have a bearing on the rights of Mr. Fourie arising from the CPA.

Repair or refund?

18. In terms of Section 56, a consumer is the one to decide as to whether he wants the goods repaired, replaced or whether he wants to be refunded the full purchase price. In the beginning Mr. Fourie wanted the motor-vehicle to be repaired and cooperated with the Agenbag in so far as the sourcing of quotations is concerned. When Mr. Venter stated that the estimations were too high and that Agenbag was not willing to pay for such, Mr. Fourie stated that he wanted to be refunded, he repeated the same position in his testimony in court.

19. In a recent case⁸ that was handled by the National Consumer Tribunal (hereinafter referred to as “the Tribunal”), the Tribunal was faced with clauses similar to the ones in this case. The Tribunal found the clauses to be misleading to the consumer and to be aimed at avoiding responsibility on the part of the supplier⁹. The Tribunal amongst others ordered the supplier to refund the purchase price and to at its own costs take delivery of the motor vehicle from the consumer¹⁰.

⁸ *National Consumer Commission V Western Car Sales t/a Western Car Sales* (NCT/81554/2017/73(2)(b)[2017] ZANCT 102 (14 September 2017). The facts of the case are identifiable with the facts in this one.

⁹ *Id* at paragraph 41.

¹⁰ *Id* at paragraph 59.

20. For all of the above reasons the court comes to the following conclusions:-

1. The voetstoots clause as contained in the contract between the parties is found to be of no force or effect for the reasons given in this judgement.
2. The Defendant is ordered to reimburse Mr. Fourie the amount of R 35 000.00 within 15 business days of the date of this judgement.
3. Having paid the amount of R 35 000.00 to the plaintiff, the defendant may at its own costs collect the motor vehicle (2005 model Chevrolet Spark) from the plaintiff.
4. Each party shall pay its own costs except that the defendant shall be liable to plaintiff for the costs that may be incurred by the plaintiff in the process of enforcing this judgment.

Dated at Mmabatho on the 4th day of May 2018.

John Nkomo
Chairperson

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