

**IN THE NATIONAL CONSUMER TRIBUNAL
HELD IN CENTURION**

Case number: NCT/90119/2017/75(1)

In the matter between:

MAPHUMZANE STANLEY SEMELANE

APPLICANT

and

CARGO MOTORS KLERKSDORP, A DIVISION OF IMPERIAL GROUP (PTY) LTD

RESPONDENT

Coram:

Mr. A Potwana	-	Presiding Tribunal Member
Adv. J Simpson	-	Tribunal Member
Ms. H Devraj	-	Tribunal Member

Date of Hearing	-	2 August 2018
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JUDGEMENT AND REASONS

APPLICANT

1. The Applicant is Maphumzane Stanley Semelane, an adult male person (hereinafter referred to as "the Applicant").

RESPONDENT

2. The Respondent is Cargo Motors Klerksdorp, a division of Imperial Group (Pty) Ltd, a company that is duly registered in terms of the company laws of the Republic of South Africa (hereinafter referred to as "the Respondent").

PROCEDURAL ISSUES

3. On 15 September 2017 the Applicant filed an application for leave to refer a complaint to the National Consumer Tribunal (hereinafter referred to as "The Tribunal") with the Registrar of the Tribunal (hereinafter referred to as "The Registrar"). This was after the National Consumer Commission had issued a notice of non-referral dated 28 August 2018. The application was made in terms of section

75(1)(b) of the Consumer Protection Act 68 of 2008. The Applicant used Form TI. R30A, Form TI.73(3) & 75(1)(b) & (2) CPA and also filed supporting documents.

4. Apparently; the initial application documents did not satisfy the requirements prescribed in the Regulations for matters relating to the functions of the Tribunal and Rules for the conduct of matters before the National Consumer Tribunal¹ (hereinafter referred to as "the Tribunal Rules"). Alternatively; they were not properly served on the Respondent. The Applicant then served the application documents on the Respondent by registered mail on 10 October 2017. On 17 October 2017; the Registrar issued a notice of complete filing and sent the same to the Applicant by both electronic and registered mail.
5. In terms of Rule 13(1) and (2) of the Tribunal Rules; the Respondent was entitled to oppose the application; by filing an answering affidavit within had 15 business days of the date of application. The Respondent, however, failed or neglected to file an answering affidavit within the prescribed period.
6. On 14 December 2017; the Registrar issued a notice of set down for the hearing of the application for leave to refer on 22 January 2018. On 18 December 2017; he served the notice of set down by e-mail to the Applicant and the Respondent. The Registrar also issued a certification of set down. On 22 January 2018; the application for leave to refer the Applicant's complaint to the Tribunal; was heard before a single member of the Tribunal as provided for in section 75(5)(b) of the CPA. The Respondent did not place itself on record. But a certain Ms. Natasha Foster appeared on behalf of the Respondent. She confirmed that the Respondent received the Notice of Application but did not place itself on record; because it did not receive a Notice of Complete filing. Ms. Forster submitted that the Respondent was finalising its condonation application. On 7 March 2018; the Tribunal issued an order granting the application for leave to refer; on a default basis.
7. On 19 March 2018; the Registrar issued a notice of set down for the main matter to be heard on 17 April 2018. The Registrar also issued a certification of set down.
8. On 17 April 2018; the Applicant appeared in person; while Ms. Natasha Foster, the Respondent's Risk Manager, appeared on behalf of the Respondent. Ms. Foster requested that the hearing be postponed so that the Respondent could file an answering affidavit. The matter was adjourned *sine die* to give the Respondent an opportunity to file a condonation application for the late filing of an answering affidavit.
9. On 18 May 2018; the Respondent sent an email to the Applicant and the Tribunal's Registry purporting to file an answering affidavit and an application for condonation. On 24 May 2018; the Tribunal's Deputy

¹ Published under GN 789 in GG 30225 of 28 August 2007, as amended.

Registrar sent a letter to Ms. Foster confirming receipt of the Respondent's filing dated 18 May 2018. The letter also advised that the Respondent's submission did not meet the requirements of Rule 34 of the Tribunal Rules. The Respondent was also advised that it was entitled to re-submit the application on 18 December 2017; and that should it elect to re-submit the application; it should complete Forms Tl.34 and Tl.r30A in respect of the condonation application. The Respondent also had to complete an affidavit clearly explaining the reasons for the late filing and why the Tribunal should condone the late filing of the application. The Respondent did not re-submit the application and the application for condonation was never heard. Therefore, the answering affidavit did not form part of the pleadings.

10. On 4 July 2018; the Registrar issued a notice of set down for the matter to be heard on 2 August 2018. He also issued a "Certificate of Set Down-On Merits".
11. On 2 August 2018; the Applicant appeared in person. There was no appearance by the Respondent or its representative. The Presiding member was satisfied that the notice of set down was properly served on the Respondent via three email addresses. The Presiding member was also satisfied that both parties were properly notified of the date, time and venue for the proceedings. The matter then proceeded on a default basis. This was in terms of Rule 24(1)(b)(i) of the Tribunal Rules which states that:

"If a party to a matter fails to attend or be represented at any hearing or any proceedings, and that party-

(a) ...

(b) is not the applicant, the presiding member may-

(i) continue with the proceedings in the absence of that party".

12. Rule 13(5) of the Tribunal Rules states that:

"Any fact or allegation in the application or referral not specifically denied or admitted in an answering affidavit, will be deemed to have been admitted."

13. Therefore, in the absence of the Respondent's answering affidavit, any fact or allegation made by the Applicant in the application will be deemed to have been admitted.

BACKGROUND

14. On 26 July 2016; the Applicant purchased a second hand Jeep Compass 2.4L M5 Limited with Chassis Number IC4NJCDA2ED57079 (Hereinafter referred to as "the car") for a sum of R245 400.00 from the Respondent. When the car was delivered; the Applicant noticed that the engine light was on. When he

asked the gentleman who delivered the vehicle why the engine light did not switch off; the gentleman told him that there was an "engine campaign" going on. It is unknown what "engine campaign" means. A week after he took delivery of the car; he noticed an unusual sound coming out of the car and reported this to the Respondent. The Applicant also testified under oath; that the car's engine was very weak. The car was unable to traverse a normal uphill road without having to shift gears down. The Respondent advised him to take the car to Ronnies Motors East London (hereinafter referred to as "Ronnies Motors").

15. During September 2016 the Applicant took the car to Ronnies Motors. Ronnies Motors advised him that the car's engine had been worked on by a person who was not authorised or qualified to do so. They provided a quote for the repair work that had to be done on the engine. He then reported this to the Respondent and the Respondent gave instructions to Ronnies Motors to repair the vehicle at their cost. The vehicle was repaired in September 2016. Sometime towards the end of September 2016 and on a Friday; the Applicant collected the car but on Monday the engine light came on again. He testified that the car's engine continues to lose power and the engine light only switches off temporarily if he has not driven the car for some weeks but comes on again. The Applicant advised the Respondent of these ongoing problems and the Respondent then undertook to find a replacement vehicle for him. The Respondent subsequently sent him information on numerous suggested replacement vehicles which he was not prepared to accept.
16. In November 2016; the Applicant received a call from the Respondent advising him that it had found a replacement car that was similar to his current vehicle. The Applicant completed and signed the offer to purchase; online; believing that the replacement vehicle was similar to the car in his possession. However, when the replacement vehicle was delivered to him in East London; he had noticed that it did not have the same specifications as the car he initially bought. This was more so, in that the replacement vehicle did not have the extra factory sound system, factory fitted boot speakers, sunroof and factory fitted navigation system. When he called the Respondent; the sales manager informed him that he could buy the Applicant a GPS for R400 at Game stores. The Applicant refused to take the replacement vehicle. The reason for this refusal was that it did not have the same features as the car he had bought from the Respondent.
17. During the hearing; the Applicant testified that the car's engine continues to lose power. Also, the engine light only switches off temporarily; if he has not driven the car for some weeks; but come on again. On one occasion; the car could not start; and the window controller was not working. He wants the Respondent to replace the faulty car with a car that is exactly similar to the one he bought. During the hearing; the Applicant testified that he entered into a 72 months repayment contract for financing the

purchase of the car. He has never skipped a payment. As of June 2018; the outstanding balance was R238 570.01. He has been paying the monthly instalments without fail. The Applicant testified that he would be amenable to receiving a refund.

THE LAW

18. Section 56(2) of the Consumer Protection Act 68 of 2008 (hereinafter referred to as the CPA) provides that:

"Within six months after 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".*

19. For purposes of this matter, the relevant requirements and standards referred to in section 56(2) are found in subsection (2) of section 55 of the CPA which provides that:

"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 regards to the use to which they would be normally put and all the surrounding circumstances of supply; and*
- (d) comply with any applicable standards set under the Standards Act, 1993 (Act No. 29 of 1993), or any other public regulation."*

20. Section 56(3) of the CPA provides that:

"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-

- (a) replace the goods; or*

(b) refund to the consumer the price paid by the consumer for the goods."

ANALYSIS OF THE EVIDENCE

21. It is clear from the evidence that the engine of the Applicant's car was defective within six months of purchase. Also, the car had defects on at least three occasions, namely:
 - 21.1. When the car was delivered and the Applicant noticed that the engine light was on;
 - 21.2. Within two months of purchase when the Applicant reported the defects to the Respondent and the Respondent referred the Applicant to Ronnies Motors; and
 - 21.3. After the car could not be repaired properly and the Respondent agreed to replace the car.
22. In terms of Rule 13(5) of the Tribunal Rules; all the facts that the Applicant has stated in his application documents are deemed to be admitted.
23. In terms of section 56(3) of the CPA; the fact that the defects in Applicant's car could not be remedied within three months after the car was repaired entitles the Applicant to either a replacement or a refund.
24. The Respondent has been unable to procure and deliver to the Applicant a car with exactly the same features as the car that the Applicant bought. This is despite the Respondent's promise, made in November 2016, to find the Applicant a replacement car

RULING

25. The Tribunal is of the view that; given the Respondent's inability to procure and deliver a car with exactly the same features for almost two years; the Respondent is unable to replace the Applicant's car.
26. The only viable remedy is for the Respondent to refund the Applicant the full purchase price of R245 400.00; in accordance with section 56(3)(b) of the CPA. Once the Respondent has refunded the full purchase price; the Applicant must immediately permit the Respondent to collect the car at its own risk and expense.

ORDER

27. Accordingly, the Tribunal issues the following order:

- 27.1. The Respondent must refund the Applicant the sum of R245 400. 00 within 60 days of the issuing of this order. The full amount must be paid to the Applicant's vehicle finance account held with the relevant credit provider from which he obtained the credit to purchase the vehicle;
- 27.2. Upon confirmation that the full sum of R245 400.00 has been paid, the Applicant must immediately permit the Respondent to collect the Jeep Campus 2.4L M5 Limited with Chassis Number IC4NJCDA2ED57079 from the Applicant at its own risk and expense; and
- 27.3. There is no order made as to costs.

Thus done and dated on this 17th day of September 2018.

[signed]

Mr. A Potwana

Presiding Tribunal Member

Adv. J Simpson (Tribunal Member) and Ms. H Devraj (Tribunal Member) concurring.

Authorised for issue by National Consumer Tribunal

Case Number: NCT/90119/2017/75(1)

Date: 2018/09/19
C. Y. / MM / Dth

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National Consumer Tribunal