

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

Case number: **NCT/117375/2018/75(1)(b)**

In the matter between:

JOHANNES DANIEL POWELL

APPLICANT

and

AUTO XTREME CC

RESPONDENT

Coram:

Dr. MC Peenze: Presiding Member

Date of hearing: 20 June 2019

JUDGMENT

THE PARTIES

1. The Applicant is Johannes Daniel Powell, an adult major male person, residing at 34 Kouga Street, Noordheuwel, Krugersdorp, North-West ("the Applicant").
2. The Respondent is Auto Extreme CC, a closed corporation duly registered and incorporated in terms of the company laws of South Africa with its principal place of business at 426 Pretoria Street, Silverton, Gauteng ("the Respondent").
3. This Application for leave to refer was opposed.

APPLICATION TYPE

4. This is an application in terms of Section 75(1)(b) of the Consumer Protection Act, Act 68 of 2008, (hereinafter referred to as "the CPA").
5. Section 75(1) of the CPA states the following –

"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) ...
(b) the Tribunal, with the leave of the Tribunal."
6. In an application of this nature the National Consumer Tribunal (hereinafter refer to as "the Tribunal") considers whether it should grant the Applicant leave to bring a complaint to the Tribunal after the National Consumer Commission (hereinafter referred to as "the Commission") has issued a notice of non-referral in response to a complaint. If the leave is granted, then the Tribunal will conduct a separate hearing and consider the merits of the complaint.

JURISDICTION

7. Section 75(5) of the CPA states that:

"The Chairperson of the Tribunal may assign any of the following matters arising in terms of this Act to be heard by a single member of the Tribunal, in accordance with section 31(1)(a) of the National Credit Act:

(a)...

(b) an application for leave as contemplated in subsection (1)(b)"
8. Accordingly, the Tribunal has jurisdiction to hear this application for leave to refer a complaint to the Tribunal as contemplated under section 75(1)(b).

ISSUE TO BE DECIDED

9. The Tribunal must decide whether to grant leave to the Applicant to refer this matter directly to the Tribunal. In order to arrive at such a determination, the Tribunal is required to consider, among other things, the Applicant's prospects of success, the importance of the case and whether the Tribunal can grant the relief sought.

THE HEARING

10. A hearing was held on 20 June 2019 in Centurion. The Applicant represented himself and the Respondent was represented by Adv. J Stroebe as legal counsel.

The Applicant's Submissions

11. The Applicant explained his case and detailed his reasons for his allegations of poor service and the alleged contraventions of the Consumer Protection Act by the Respondent. In particular, he submitted that the matter was of grave importance to him and that he would like to be refunded for his expenses in terms of the Consumer Protection Act.
12. The Applicant confirmed that he purchased a pre-owned Land Rover vehicle during November 2016 and identified certain repairs and missing parts that needed attention, which the Respondent allegedly agreed to attend to after the conclusion of the sale.
13. In the period after the vehicle had been sold, various letters between the parties confirmed that attempts had been made to settle matters relating to parts and other problems with the vehicle.
14. It is alleged by the Applicant that the undertakings of the Respondent had not been honoured by the Respondent and that the inherent warranty of six months should have applied.

15. During January 2017 the vehicle broke down, whereafter the Applicant informed the Respondent of the unfortunate circumstances. The Respondent refused to accept liability for repairs at the time, whereafter the Applicant enlisted a third party to repair the vehicle.
16. The Applicant requested compensation for the costs incurred from the Respondent. However, the Respondent was of the view that the vehicle had a 1000 km warranty and that the implied six months warranty was not applicable.
17. The Applicant stated that he had lost complete faith in the ability of the Respondent to repair the vehicle and that he wanted to be refunded for his expenses in repairing the vehicle. The Total cost of all the repairs amounted to R44 087.56, which is the relief that the Respondent is requesting from the Tribunal.

The Respondent' Submissions:

18. The Respondent outlined its process of putting all vehicles through a roadworthy test before delivery to confirm that the shocks and air shock system work 100% correctly at the time of delivery. The Respondent therefore denied that any of the faults as claimed existed at the time, as the test station would have picked it up.
19. The Respondent confirmed that there were no cuts in the tires as claimed by the Applicant, but that the roadworthy test confirmed that the tires were in a roadworthy condition at the time of sale. The Respondent also outlined that, as a token of goodwill, the company gave the Applicant a R10 000.00 (Ten Thousand Rand) discount for the tyres, irrespective.
20. The Respondent was never provided with the opportunity to repair the vehicle and would have gladly done so if approached or requested. The Applicant took the vehicle to the third party without their permission or with them being present. The Respondent was not informed about the inspection by the third party and considered the claims now being made by the Applicant regarding the faults on the vehicle as "hearsay".

21. The Respondent is of the view that, since no damages to the shocks were brought under their attention to repair, that such damage was inflicted by the client. According to the Respondent, they never had the opportunity to inspect the vehicle, as the Applicant never brought the vehicle to the Respondent for inspection and repair. According to the Respondent, the Applicant made the submission to it that he had some repairs done and then requested the Respondent to pay half the repair cost. The Respondent was not prepared to do that, as the Respondent never agreed to that. This approach angered the Applicant.
22. The Respondent claimed to have attempted to assist the Applicant through goodwill by giving further discount and by putting the vehicle through the roadworthy test.

CONSIDERATION OF THE MERITS OF THE APPLICATION FOR LEAVE

23. The Tribunal set out the factors that must be evaluated in order to ascertain whether to grant leave in *Coertze and Burger v Young*.¹ In that case, which has been referred to by the Tribunal in a number of other decisions,² the Tribunal held that the following two factors should be considered:
- (i) The Applicant's reasonable prospects of success with the referral; and
 - (ii) Whether the matter is of substantial importance to the Applicant or the Respondent.
24. It is very clear that the matter is of substantial importance to both parties. On the one hand, the Applicant was not able to have the pleasure and enjoyment of the vehicle that he bought with the understanding that it was in good running condition. He also went to a great deal of effort to attempt to resolve the matter with the Respondent, to lodge the complaint with the MIOSA and the Commission and to pursue it further with the Tribunal.

¹ NCT/7142/2012/75(1)(b)&(2).

² See also *Mbekeni v Freeway Toyota* (NCT/36177/2015/75(1)(b) [2016] ZANCT 18 (1 April 2016) and *Papo v Standard Bank of South Africa Ltd* (NCT/69527/2016/14 [2017] ZANCT 81 (27 July 2017).

25. On the other hand, the Respondent is expected to pay for the repairs made by another dealer without having had the opportunity to assess or consider alleged problems and conducting such repairs during the warranty period or at the time of identification of problems by the Applicant. In addition, the matter seems equally important to the Respondent from a reputational point of view.
26. Regarding the prospects of success, it is to be determined whether the Applicant could retrospectively claim his expenses to repair the vehicle from the Respondent.
27. The Applicant's prospects of success lie in proving that the Tribunal could grant damages in the amount as claimed by the Applicant to be paid by the Respondent.

APPLICATION OF LAW

28. In considering the reasonable prospects of success in this matter, the Tribunal had to consider:
 - the request to the Tribunal to grant damages; and
 - the use of a different party than the Respondent to repair the vehicle in question.
29. The CPA defines "prohibited conduct" as *"an act or omission in contravention of this Act"*. This Act is the CPA. Section 55 of the CPA deals with a consumer's right to safe, good quality goods. More specifically, subsections 55 (2) (a) and (b) respectively give to a consumer the *"right to receive goods that are reasonably suitable for the purposes for which they are intended"* and *"are of good quality, in good working order and free of any defects"*.
30. Section 56 of the CPA deals with implied warranty of quality. Subsection 56 (1) provides that where there is an agreement pertaining to the supply of goods, there is an implied provision that the retailer, amongst others, warrants that the goods comply with the requirements and standards contemplated in section 55. Subsection 56 (2) gives the consumer the right to within six months after taking delivery of the goods to return the goods to the supplier, and if the requirements and standards contemplated in section 55 are not met, then the supplier must without imposing a

penalty and at the supplier's risk either under subsections 56 (2) (a) or (b) respectively *"repair or replace the defective goods"* or *"refund the consumer the price the consumer paid for the goods"*.

31. Subsection 56 (3) goes further and provides, amongst other things, that if the defect has not been remedied within a period of three months after the repair envisaged in subsection 56 (2) (a) then the supplier must either *"replace the goods"* or *"refund the consumer the price paid by the consumer for the goods"*.
32. The evidence reveals that the Applicant purchased the vehicle from the Respondent in a seemingly good condition. It is not in dispute that the Respondent failed to approach the Applicant within the warranty period but opted to take the vehicle to another dealer for repairs. As a result, the value chain was broken, and the particular relief provided for in the Act became irrelevant:
- Firstly, because the vehicle already got repaired and therefore the Respondent cannot repair the vehicle again;
 - Secondly, the goods cannot be replaced because it is not in the same condition as it was bought;
 - Thirdly, the consumer cannot be refunded the price paid by the consumer, since the goods are not the same anymore; and
 - Fourthly, the Applicant did not request the relief as allowed for in the NCA, but opted to request payment of damages in the amount of his past expenses to repair the vehicle, which option is not an appropriate relief to be granted by the Tribunal in terms of the NCA.
33. The relief to be granted and the orders to be issued by the Tribunal are outlined in the National Credit Act, Act 34 of 2005 and the CPA. In particular, the payment of damages falls outside the ambit of the orders the Tribunal may issue in terms of these Acts.³

³ See section 150 of the National Act, Act 34 of 2005. Also see Sherazaan Mia V Car King Second-Hand (Pty) Ltd And Rabutla Trading 33 CC NCT 29083/2015/73(3)&75(1)

34. Following the above, the relief requested by the Applicant cannot be considered by the Tribunal, resulting in the Applicant not having any chance of success in the main application.

CONCLUSION

35. The Tribunal finds that there is no reasonable chance of success in the main application, based on the following:
- (i) The claim for damages does not fall within the jurisdiction of the Tribunal;
 - (ii) The failure to provide the Respondent with an opportunity during the first six months of the purchase to rectify any alleged defect in the goods purchased or to consider refunding the goods on return by the Applicant, amounted to the forfeiting of relief in terms of section 56 of the CPA.
36. Since the Applicant does not enjoy reasonable prospects of succeeding in his application against the Respondent, the Tribunal finds it necessary not to grant the leave to refer the matter to the Tribunal.

ORDER

37. Accordingly, the Tribunal makes the following order –
- 37.1 The Applicant's application for leave to refer the matter directly to the Tribunal is refused; and
- 37.2 There is no order as to costs.

Dated at Centurion on this 1st day of July 2019

[Signed]

MC PEENZE

PRESIDING MEMBER

Authorised for Issue by National Consumer Tribunal

Case Number: NCT-117375-2018-75(1)(b)

Date: 16-07-2019

National Consumer Tribunal
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