IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN DURBAN

Case Number: **NCT/128553/2019/75(1) (b)**

In the matter between

KHUTHALA CHALALE APPLICANT

and

MAS CORPORATION (PTY) LTD T/A MASCOR VRYHEID RESPONDENT

Coram:

Prof Tanya Woker – Presiding member

Date of hearing – 13 June 2019

APPLICATION FOR LEAVE TO REFER

JUDGMENT AND REASONS

THE PARTIES

1. The Applicant is Khuthala Chalale ("the Applicant"), a consumer who lodged a complaint with the Motor Industry Ombudsman of South Africa ("the MIOSA") and the National Consumer Commission ("the NCC"), in terms of Section 72(1) (a) of the Consumer Protection Act, 2008 (the CPA). At the hearing the Applicant was represented by Ms Naidoo from Lushen Pillay Attorneys.

2. The Respondent is Mas Corporation (Pty) Ltd t/a Mascor, Vryheid with physical address 113 Pine Street, Greytown KwaZulu-Natal. ("the Respondent"). At the hearing the Respondent was represented by Mr Schaup instructed by Grant and Swanepoel Attorneys.

APPLICATION

3. The application brought before the Tribunal is in terms of section 75(1)(b) of the CPA. The Applicant lodged a complaint with the NCC and received a notice of non-referral in response. The Applicant is now applying for leave from the Tribunal for the complaint to be referred directly to the Tribunal.

4. In accordance with section 75(5)(b), only the application for leave is being considered at this stage by a single member of the Tribunal.

5. This judgment is based on the documents before the Tribunal as well as information provided by the Applicant and the Respondent at the hearing held in Durban on 13 June 2019.

BACKGROUND

6. On 7 August 2017 whilst driving her vehicle, a Volkswagen Polo 1.6 with registration number HLC 579 EC ("the vehicle"), the Applicant noticed that a light on the dashboard was flashing. After consulting with her husband, Teboho Chalale ("Mr Chalale") she checked the vehicle's manual and saw that the flashing light was an indication that the vehicle had a faulty cooling system and needed professional attendance as it was overheating.

7. Mr Chalale arrived to assist her. He filled the radiator with water and drove the vehicle approximately 12 kms back to their home.

8. On 8 August 2017, Mr Chalale contacted Standard Bank Roadside Assistance to assist with the towing of the vehicle to the nearest Volkswagen dealership for the problem to be repaired. The vehicle was collected by a duly appointed tow truck driver on 8 August 2017 and was delivered to the Respondent's premises on 10 August 2017.[1]

9. On 10 August 2017, Mr Chalale confirmed with an employee of the Respondent, Ms Elsie Scheepers that the vehicle had been delivered.

10. On 16 August 2017, the Respondent informed Mr Chalale that it would need to remove the cylinder head and strip the engine in order to generate an accurate quotation for the repairs needed. The Respondent states that it was at that time that it also informed Mr Chalale that the radiator, air conditioner and cradle were damaged.

11. Mr Chalale then informed the Respondent to go ahead with its planned stripping so that a complete quotation could be generated.

[1] The vehicle could not be delivered on 8 August 2017 and 9 August was a holiday therefore it was only delivered on 10 august 2017.

12. The matter was also reported to the Applicant's insurers. On 28 August 2017, the insurers reported that the vehicle had been assessed and that it was found to have accident damage to its radiator, condenser, cradle and front bumper.

13. The Applicant alleges that at the time when the vehicle was delivered to the Respondent, there was no accident damage to the vehicle therefore the vehicle could only have been damaged whilst in the possession of the Respondent.

14. The Respondent denies that any accident damaged occurred whilst the vehicle was in its possession.

15. On 29 August 2017, Mr Chalale was sent a quotation for the repairs to the vehicle. He then informed the Respondent that the repairs were too expensive and that the Respondent should assemble the vehicle to the original state and invoice him for the labour charges. He also stated that he was shocked that the invoice should still mention the accident damages to the vehicle and asked for further clarity in this regard.

16. It seems that no further clarity was forthcoming and so on 31 August 2017 Mr Chalale submitted a complaint to the MIOSA.

17. On 6 November 2017, the MIOSA found in favour of Mr Chalale and in a letter to the Respondent stated as follows:

"After studying the submissions and all documentation at our disposal, this office is of the opinion that the vehicle was accepted by the respondent in a certain condition. We are in possession of a delivery note signed by the representative of the respondent indicating that the vehicle in question was accepted without any damages to the front area of the vehicle being noted, dated 10 August 2017 at a time of 2:15. This indicates that the vehicle was accepted by the respondent without damage to the front of the vehicle, hence the damage was caused while in the possession of the respondent. There is also another document showing that there is damage to the front of the vehicle, though, no signature or date appears on the document."

18. The MIOSA then quoted section 54 of the CPA and said:

"Section 54 (1) states: the consumer is entitled to the performance of the services in a manner that persons are generally entitled to and the return of any property in at least as good a condition as it was when the consumer made it available to the supplier for the purpose of performing such services.

Section 54(2) states: if a supplier fails to perform a service to the standards contemplated in section 1, the consumer may require the supplier to either:

a) Remedy any defect in the quality of the services performed or goods supplied; or

b) Refund to the consumer, a reasonable portion of the price paid for the services performed or goods supplied, having regard to the extent of the failure."

19. With the above in mind the office of the MIOSA found that the damage that was caused to the front of the vehicle should be repaired by the Respondent, at no cost to the complainant, and a quotation for the repairs required to the engine be submitted to Mr Chalale for authorisation. The above action was to be taken within fifteen (15) business days of this correspondence which was dated 6 November 2017.

20. The Respondent appealed against this finding by the MIOSA.

21. On 6 December 2017, the MIOSA dismissed the appeal. In its email to the parties, dismissing the appeal, the MIOSA noted that:

"The evidence submitted to the MIOSA was insufficient to determine the condition of the vehicle when it was booked in at the Respondent's premises. It is the responsibility of a service provider to adequately inspect a vehicle at the time when it is booking and to note any pre-existing damage prior to commencing any repairs or diagnosis and as this was not carried out and due to lack of evidence confirming that Mr Chalale delivered the vehicle in a damaged state, when a legislative body makes a finding based on the documentation provided in support of a complaint and there is a lack of adequate proof, in terms of the Consumer Protection Act 68 of 2008 we reiterate our ruling in favour the complainant being Mr Chalale."

22. On 1 December 2017, Mr Chalale lodged a complaint with the NCC on the Applicant's behalf. The NCC investigated the matter and on 20 July 2018 the NCC issued a notice of non-referral stating that the complaint does not allege any facts which, if true, would constitute grounds for a remedy under the CPA.

23. However, in the letter which accompanied this notice of non-referral the NCC stated that the NCC would not pursue the matter because the matter involved a dispute of fact which would be appropriately addressed through adjudication.

24. On 15 October 2018 Mr Chalale lodged an application on the Applicant's behalf with the NCT. Mr Chalale applied for condonation for the late filing of the application as he had not bought the application

within 15 days of having received the notice of non-referral from the NCC as required by the Tribunal rules.

25. On 12 December 2018, the Tribunal ruled that Mr Chalale did not have *locus standi* to bring the matter to the Tribunal, as the Applicant was Mrs Chalale, an adult female who should have bought the application herself. The application for condonation was therefore dismissed.

26. On 14 December 2018, the Applicant re-lodged the complaint with the NCC and on 22 February 2019 the NCC again issued the same notice of non-referral.

27. On 22 March 2019 the Applicant applied for the matter to be referred to the Tribunal. In the application, the Applicant requested that the Respondent be ordered to:
    (1) Release the motor vehicle;
    (2) Be found to have engaged in an act of prohibited conduct; and
    (3) Be found liable for the damages caused whilst the vehicle was in their custody.

28. The application for leave to refer was opposed by the Respondent.

THE HEARING

Applicant's case

29. At the hearing Ms Naidoo informed me that the motor vehicle has subsequently been returned to the Applicant and that the damage to the motor vehicle has now been fixed by the Applicant's insurers. However, in order to ascertain the damage to the engine, the Respondent stripped the engine of the motor vehicle. This engine has now been returned to the Applicant in a stripped condition. The Applicant is therefore no longer concerned about the damage to the body of the motor vehicle however she is concerned about the fact that the engine has not been re-assembled to its original condition i.e. the state it was in when the engine over-heated.

30. In the circumstances, the Applicant was not prepared to withdraw her complaint that the Respondent had engaged in prohibited conduct under the CPA.

Respondent's case

31. At the hearing the Respondent argued that:
    (1) The vehicle has now been returned to the Applicant therefore this is no longer an issue;

(2) The damage to the vehicle which formed the basis of the complaint against the Respondent has now been repaired by the Applicant's insurers therefore the Applicant no longer has any *locus standi* to refer the matter to the Tribunal. The Applicant lost her *locus standi* by way of the principle of subrogation in the law of insurance; only the Applicant's insurer could bring a claim against the Respondent in the name of the Applicant but the Applicant could not bring a claim in her own name; and

(3) The issue of the state of the engine of the motor vehicle is not an issue before the Tribunal on the papers. The Applicant's only complaint is the issue of the engine to be re-assembled to the state it was before the engine overheated. The damage to the engine does not lay at the door of the Respondent therefore there can be no prohibited conduct on the part of the Respondent.

THE LAW APPLICABLE TO THE APPLICATION

32. The question before the Tribunal is whether or not leave should be granted for the matter to be heard by the Tribunal. The Tribunal must therefore assess whether the CPA finds application in the dispute and may therefore be adjudicated on by the Tribunal.

33. In this regard it must further be borne in mind that the Tribunal is merely considering the application for leave at this stage and is not engaging in a determination of the merits of the main dispute between the parties.

34. In determining whether the Applicant should be granted leave to refer the matter to the Tribunal, the Tribunal must consider the requirements for the granting of "leave". A similar application can be found in the High Court practice, where an Applicant applies for leave to appeal a judgment. It was held in the *Westinghouse Brake and Equipment (Pty) Ltd* – matter, as cited above, that -

> *"in applications for leave to appeal properly brought before the appropriate court in terms of the old sec 20, read with sec 21 as it then was, the only relevant criteria were whether the applicant had reasonable prospects of success on appeal and whether or not the case was of substantial importance to the applicant or to both him and the respondent."*

35. The Tribunal, when considering whether to grant the Applicant leave to refer or not, uses the same test as applied in the High Court for applications for "leave".[2]

36. I will therefore consider the following factors:

(1) whether the matter is of substantial importance to the Applicant;

(2) the Applicant's reasonable prospects of success with the referral.

CONSIDERATION OF THE ISSUES

37. Based on the lengths the Applicant (and her husband) has gone to in order to attempt to resolve the complaint with the Respondent, and then to lodge the complaint with the MIOSA and the NCC, and ultimately the Tribunal, it is clear that the matter is of substantial importance to the Applicant.

38. This dispute arose almost two years ago and the Applicant is still sitting with a vehicle which she cannot use.

39. I therefore find that the requirement that the matter is of substantial importance to the Applicant has been met.

40. The second question, as to the reasonable prospects of success must be answered by considering whether the substance of the Applicant's complaint falls within the ambit of the CPA without deciding on the merits of the matter.

41. Although the Applicant has not formulated her case against the Respondent clearly on the papers within the ambit of the CPA, I note that at the time when this complaint was raised with the MIOSA and the NCC, the Applicant and her husband were unrepresented and they have made a concerted effort to apply their minds to the issues.

42. It is a common occurrence when it comes to consumer related complaints that parties do not have the benefit of legal counsel. The forums created and/or recognised for dispute resolution in the CPA are forums where unrepresented parties are able to state their case, without the need for carefully drafted legal argument, and to receive redress where appropriate.[3]

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[2] This issue has also been considered by the Tribunal in a number of other decisions , see for example, *MV Chauke v Standard Bank et al* NCT/4658/2012/141(1)(P), and *Coertze and Burger v Young* NCTT/7142/2012/73(3)&75(1)(b) CPA and *Esther Rhulani Tshwale (obo True Harvest College) v Faitzan Properties* NCT/12505/2014/75(1)(b) & (2) CPA.

[3] See *Esther Rhulani Tshwale (obo True Harvest College) v Faitzan Properties* NCT/12505/2014/75(1)(b) & (2) CPA.

43. From the outset the Applicant and her husband have maintained that the vehicle was not in a damaged state when it was delivered to the Respondent. When their complaint was not adequately resolved, in their view, by the Respondent, they referred the complaint to the MIOSA.

44. The MIOSA is the accredited industry ombud appointed in terms of section 82 (6) of the CPA that is responsible for the resolution of consumer disputes in the motor vehicle industry. Its code of conduct applies to all those in the industry including the Respondent.[4]

45. The MIOSA found in favour of the complainant (at that stage Mr Chalale) and referred specifically to section 54 of the CPA. The Respondent appealed against the ruling of the MIOSA and the MIOSA explained to the Respondent why it found in favour of the complainant. Notwithstanding this the Respondent did not respond, leaving the Applicant with no alternative but to refer the matter to the NCC.

46. The NCC investigated the matter and established that there was a dispute of fact between the parties.

47. Although it stated, in its notice of non-referral, that it would not pursue the matter because the facts did not establish a cause of action under the CPA, it is clear that the real reason why it did not pursue the matter was because, there was a dispute of fact between the parties which required adjudication.

48. If, as the NCC decided, there is a need for adjudication then the matter should have been referred by the NCC to the Tribunal. The Tribunal is the dispute resolution entity which has been established specifically by the legislature to resolve such issues and which has the power to make certain orders.[5]

49. The NCC should have dealt with the finding by the MIOSA that section 54 of the CPA applied to this dispute. The MIOSA, the accredited industry body, made a finding that, on the basis of section 54, the Respondent should offer certain redress to the Applicant. Although the MIOSA may make certain findings, it does not have the power to enforce these findings. When a supplier does not respond to a finding by the MIOSA an aggrieved consumer has to refer the matter to the NCC and then to the

[4] See *Government Gazette* No 38107 17 October 2014. In accordance with this notice, MIOSA became the accredited industry ombud three months after publication which would have been on 15 January 2015,

[5] It is noted that in its answering affidavit, the Respondent has argued that the Applicant should have referred the matter to a Consumer Court and has not made out a case that the balance of convenience or the interests of justice require the dispute to be referred to the Tribunal instead of the Consumer Court (see para 13.4 of the answering affidavit and page 69 of the documents before the Tribunal). The Tribunal notes further that there is no established Consumer Court in KwaZulu-Natal, therefore the only option for the Applicant is to refer the matter to the Tribunal.

Tribunal which is empowered by legislation to make orders which may be enforced as if they were orders of the High Court.[6]

50. Had the NCC considered section 54 and the conduct of the Respondent and following a full investigation concluded that the MIOSA was incorrect in its findings, there would have been further information to consider for this decision. However, this did not happen and so the NCC has denied the Applicant her right to have the matter appropriately resolved in accordance with the CPA.

51. Section 54 deals with a consumer's right to demand quality service from a supplier and a supplier that does not provide quality service engages in prohibited conduct. Any supplier that engages in prohibited conduct faces a range of penalties that can be imposed by the Tribunal, including an administrative fine.[7] The fact that a third party such as an insurer may have stepped in to assist a consumer does not mean that the supplier concerned did not engage in prohibited conduct. Further this does not mean, in my view, that the Applicant no longer has *locus standi* to argue that she did not receive quality service, as set out in section 54, from the Respondent.

52. The Applicant, based on the allegations made and on the finding by the MIOSA that section 54 has application deserves an opportunity to argue the matter on the merits before a full Tribunal. The Respondent in turn will be granted a full opportunity to submit contrary argument.

CONCLUSION

53. I find that the Applicant has satisfied the requirements for the granting of leave in terms of Section 75(1)(b) of the CPA.

ORDER

54. Accordingly, I make the following order:

(1) The application for leave from the Tribunal is granted; and

(2) No order is made as to costs.

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[6] Orders of the Tribunal are set out in section 150 of the National Credit Act of 2005 (NCA) and the status and enforcement of those orders are set in in section 152.

[7] Section 150 of the NCA provides that the Tribunal may impose an administrative fine in respect of prohibited or required conduct.

DATED 25 June 2019

(signed)

Prof T Woker

Presiding Member

Authorised for issue by National Consumer Tribunal

Case Number: NCT/128553/2019175

Date: 2019-07-01

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