IN THE NATIONAL CONSUMER TRIBUNAL

SITUATED IN CENTURION

Case Number: NCT/264593/2023/75(1)(b)

In the matter between:

MICHELLE LE ROUX **APPLICANT**

and

SCARLET IBIS INVESTMENTS 46 (PTY) LTD **RESPONDENT**
TRADING AS MAHINDRA NELSPRUIT

Coram:

Ms N Maseti - Presiding Tribunal member
Dr A Potwana - Tribunal member
Ms P Manzi-Ntshingila - Tribunal member

Date of hearing: 5 April 2024

JUDGEMENT AND REASONS

THE PARTIES

1. The applicant is Michelle Le Roux, an adult female (Ms Le Roux). She is a consumer as defined in section 1 of the Consumer Protection Act 68 of 2008 (CPA). During the hearing, the applicant represented herself.

2. The respondent is Scarlet Ibis Investments 46 (Pty) Ltd, a private company trading as Mahindra Nelspruit. The respondent is a supplier, as defined in section 1 of the CPA. During the hearing, the respondent was represented by its dealer principal, Mr Johan Casimir Kolbé (Mr Kolbé).

TYPE OF APPLICATION AND JURISDICTION

3. The applicant was granted leave to refer her complaint to the Tribunal as envisaged in section 75(1)(b) of the CPA. In terms of section 27(a) of the National Credit Act 34 of 2005 (NCA), the Tribunal has jurisdiction to hear this application.

INTRODUCTION AND BACKGROUND

4. The applicant alleges that the respondent sold her a defective motor vehicle. She wants the respondent to repair the motor vehicle or refund her the purchase price. The respondent opposes this application.

FACTS

The applicant's case

5. In her founding affidavit, the applicant averred that in June 2021, she purchased a motor vehicle (the vehicle) from the respondent. Five months later, while the applicant was driving the vehicle, it lost power and came to a complete standstill. On the advice of the respondent, the applicant took the vehicle to Motus Ford in George. A mechanic advised her that the water pipe burst or came loose, and the vehicle overheated. As a consequence of losing most of its water in the cooling system, the thermometer was unable to indicate that the system was overheating. That was why there was no warning that the vehicle was overheating. The applicant submitted that the vehicle did only 13 352 km after the date of purchase and was not due for service. She alleged that the vehicle was not useable and durable for a reasonable period of time, as provided under section 55(2)(c) of the CPA.

6. In December 2021, Motus Ford informed her that the respondent had towed the vehicle away. Later, the respondent informed her that the vehicle broke down due to her negligence and that she would be liable for all the costs of repairs. The applicant then lodged a complaint with the Motor Industry Ombudsman of South Africa (MIOSA). The MIOSA ruled in favour of the respondent.

The respondent's case

7. The respondent filed an answering affidavit. According to the deponent to the respondent's affidavit, Mr Kolbé, the applicant was informed by the respondent's Sales Executive, Philip Coetzee (Mr Coetzee), that the vehicle had to be serviced at 170 000 km and thereafter every 10 000 km or at twelve months intervals. He stated, "there can be absolutely no reasonable doubt that the applicant's failure to perform two important services at 170 000 km and 180 000 km caused the oil cooler to leak and the Heater Core Pipe to burst. Furthermore, overheating could have been avoided if the applicant had noticed the dashboard warning lights, such as the heat gauge and other signs. The respondent attached a report from Marx Auto Mechanics (Pty) Ltd stating that "Due to a heater core pipe bursting and a leak in the oil cooler pipe the vehicle lost water. The vehicle was driven to a point of failure. Parts of the engine melted due to excessive heating. "and" it is our opinion that major damage could have been avoided if dashboard warning lights were adhered to." (*sic in toto*).

8. Concerning the engine overhaul, Mr Kolbé stated that the applicant was informed that the vehicle's engine was overhauled prior to the applicant purchasing the vehicle. Furthermore, he questioned how the applicant

knew whether a warning sign appeared if she was not the driver of the vehicle when it broke down. He argued that the respondent sold a vehicle to the applicant that was useable and durable for a reasonable period after the date of purchase as required under the CPA.

The applicant's reply

9. The salient aspects of the applicant's replying affidavit are that she was not informed that the vehicle was overhauled, the heat gauge did not light up, and there were no warning signs before the vehicle broke down. According to the dealership expert, the engine overheated because of an immediate loss of water, and there was no time for warning as the thermostat needed water to indicate if the vehicle was overheating and there was no water left in the system. The respondent must show how a core heater pipe can disintegrate after only six months of replacement. She was not given a service book but was advised to find service intervals from Ford dealers, where she was advised that the service intervals were 15 000 km apart. She was, therefore, under the impression that the vehicle required service at 15 000 km.

THE LAW APPLICABLE TO THE APPLICATION

10. Section 55(2)(c) of the CPA states-

> "Except to the extent contemplated in subsection (6), every consumer has a right to receive goods that will be useable and durable for a reasonable period of time, having regard to the use to which they would normally be put and to all the surrounding circumstances of their supply."

11. Section 56(2) states-

> "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 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."

ASSESSMENT OF THE MATTER

12. Section 55(2)(c) of the CPA guarantees consumers the right to receive goods that "will be useable and durable for a reasonable period of time, having regard to the use to which they would normally be put and to all the surrounding circumstances of their supply." In this matter, it is common cause that the motor vehicle overheated and broke down within six months of purchase. Ordinarily, a consumer would be entitled

to either a repair, a replacement, or a refund as envisaged under section 56(2) of the CPA if goods failed to meet the standards prescribed under section 55 within six months of purchase.

13. In this matter, however, we must assess whether the vehicle failed to meet the prescribed standards or whether the applicant's alleged negligence to service the vehicle at 170 000 km and at 180 000 km caused the vehicle to overheat and break down. The applicant claimed that she was not given a service book and was not advised to service the vehicle at 170 000 km. She stated that when she purchased the vehicle, Mr Coetzee could not tell her whether the service intervals were 10 000 km or 15 000 km apart and advised her to enquire from Ford dealers. She did and was informed that the vehicle could be serviced after 15 000 km.

14. In rebuttal, the respondent presented evidence that proves that the applicant signed a written declaration that states that "I understand that this vehicle's first service is at 170 000 kms or 18/12/21 thereafter 10 000 km or 12 months, whichever occurs first and that if I over run those kilos my warranty will be cancelled." (sic in toto). During the hearing, Mr Kolbé argued that the vehicle broke down because the applicant failed to service the vehicle at 170 000 km and at 180 000 km. He submitted that the applicant's failure to service the vehicle could have caused several defects, such as overheating and breaking down of the vehicle.

15. Where there is a dispute of facts with no further evidence from both parties, save what is contained in their written submissions, the Tribunal will rely on the "Plascon Evans Rule", which is used by our courts in various cases to resolve disputes of fact. In *Zuma v National Director of Public Prosecutions*,[1] the Supreme Court of Appeal explained that:

> "Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special, they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings, disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers. The court below did not have regard to these propositions and instead decided the case on probabilities without rejecting the NDPP's version."

[1] (573/08) [2009] ZASCA 1 (12 Jan 2009).

16. In our view, the respondent's version does not consist of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched, or so clearly untenable that we would be justified in rejecting it. It is general knowledge that motor vehicles must be serviced at prescribed intervals. If they are not serviced, they or parts thereof can break down. In this matter, it is common cause that the applicant failed to service the vehicle at 170 000 km and at 180 000 km. The applicant does not deny that she failed to do so even though she signed the declaration. The words 170 000, the date of 18 December 2021, and the figures of 10 000 (km) and 12 (months) with respect to service intervals are legibly hand-written a few lines amid typed words just a few lines above the applicant's signature. Thus, whether Mr Coetzee informed her to enquire about service from a Ford dealer, by signing the declaration, the applicant acknowledged that she was informed that she had to service the vehicle at 170 000 km or by 18 December 2021 and thereafter at 10 000 km or 12 months, whichever occurred first. Since the applicant signed the declaration, she did not need to ask Mr Coetzee or a Ford dealer about service intervals. Moreover, there is no evidence that the applicant was not given an adequate opportunity to comprehend the declaration she signed as required under section 49(5) of the CPA. The declaration satisfies the plain language requirements described in section 22(2) of the CPA.

17. Although the applicant alleges that the vehicle's failure is linked to the engine overhaul conducted by M-Tek before she purchased the vehicle, the fact that she drove the vehicle for 13 352 km without servicing it during two specified intervals indicates, on a balance of probabilities, that the cause for the vehicle's breakdown was not the engine overhaul performed in January 2021 or any defects the vehicle might have had on the date of sale.

CONCLUSION

18. The applicant has failed to prove, on a balance of probabilities, that the respondent sold her a defective vehicle.

ORDER

19. The Tribunal makes the following order:
    19.1. The application is dismissed.
    19.2. There is no order as to costs.

Thus, done and dated 11 July 2024.

[signed]

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Dr A Potwana - Presiding Tribunal Member

Ms N Maseti and Ms Manzi (Tribunal members) concur.

Authorised for issue by The National Consumer Tribunal

National Consumer Tribunal

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