

**PROCEEDINGS BEFORE THE CONSUMER AFFAIRS COURT FOR THE
NORTH WEST PROVINCE HELD AT RUSTENBURG**

CASE NO: NW09/2021

In the matter between: -

MR KGOSANA SAMUEL MONOGENG

PLAINTIFF

And

MR Johan Oppreman t/a JOHAN Oppreman Motors

DEFENDANT

Delivered on 28th February 2023

Corum: K.J.P Kgomonngwe; J. Rakoloka and M.C Kortjas

Summary: Allegations or failure to deliver goods that are free from defects
special plea on jurisdiction been dismissed.

Result: Settlement was reached by the parties on the matter for
cancellation of the agreement and Plaintiff to be refunded.

<p>JUDGMENT</p>

The Parties

1. The Plaintiff is Mr. Kgosana Samuel Monageng an adult male person residing a 12339 Mocoseng Village, Mafikeng, North West.
2. The Defendant is Mr. Johan Opperman Trading as Johan Opperman Motors conducting his business at 109 Scholtz Street, Lichtenburg, North West.

Background

3. The matter concerns the purchase and delivery of a motor vehicle Chevrolet Aveo purchased by the Plaintiff from the Defendant on 09th December 2020 at the purchase price of R75 000.00 from the Defendant.
4. The Plaintiff took delivery of the motor vehicle and on 15th December 2020 the vehicle manifested itself with defects and was returned to the Defendant.
5. After the summons were served on the Defendant, the Defendant filed a special plea based on jurisdiction that the Consumer Affairs Court lacked jurisdiction to preside over the matter and further filed a plea over on the merits with a counterclaim.
6. Accordingly, the court heard submissions and arguments inclusive of pleadings on the special plea raised by the Defendant and their counsel and to the opposition thereto by the Consumer Protector.
7. Judgment on the special plea was handed down on 04th August 2022 and the special plea was dismissed and the matter was set down for hearing of the main trial and pleadings by the parties for 03rd February 2023.
8. On 03rd February 2023 both parties appeared before Court the Plaintiff represented by Consumer Protector Mr. S.E Letsogo and the Defendant represented by Mr. George Loock of George Loock Attorneys, Rustenburg.
9. Both parties addressed the court on application for postponement to file the expert reports and hearing which application was granted and matter was postponed to 28th February 2023 for trial.
10. On 28th February 2023 the parties presented to court a settlement agreement signed by both parties which forms the basis upon which court order is made.

Order

11. Having considered submission made by both the Plaintiff and the Defendant as well as having read the papers filed on record the following order is made.

11.1 The settlement agreement is accepted and marked exhibit "A".

11.2 Both parties hereto agree to the cancellation of the agreement and accordingly the agreement is ordered cancelled.

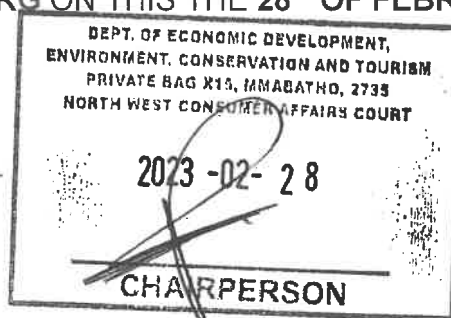
11.3 The Plaintiff will deliver original registration certificate as well as signed change of ownership forms to the consumer protector for delivery to the Defendants.

11.4 The defendant is ordered to refund the Plaintiff an amount of R53 000,00 (fifty three thousand rands) payable to the Plaintiff's account, Capitec Account on date 28th February 2023.

12 No order to costs.

DATED at RUSTENBURG ON THIS THE 28th OF FEBRUARY 2023

KJP KGOMONGWE
CHAIRPERSON



**IN THE CONSUMER AFFAIRS COURT FOR THE NORTH WEST
PROVINCE**

CASE NO: NW14/2017

In the matter between: -

MR KGOSANA SAMUEL MONOGENG

PLAINTIFF

And

**MR Johan Oppreman t/a
JOHAN Oppreman Motors**

DEFENDANT

JUDGMENT

**CORAM: KJP KGOMONGWE (TJ RAKOLOKA AND ML KORJAS
CONCURRING)**

A The Parties

1. The Plaintiff is Kgosana Samuel Monageng an adult male person residing a 12339 Mocoseng Village, Mafikeng, North West herein after referred to as the consumer.
2. The Defendant is Mr Johan Opperman Trading as Johan Opperman Motors conducting their business at 109 Scholtz Street, Lichtenburg, North West.
3. For the sake of simplicity and records the Plaintiff shall herein after be referred to as the Consumer and the Defendant shall be referred to as the supplier.

B BACKGROUND

4. The consumer lodged a complaint that was investigated by the North West Consumer Affairs Office and which matter was unresolved and the supplier was summoned for proceedings before the North West Provincial Consumer Affairs Court.
5. The consumer's complaint arises out of a contract that was concluded with the Supplier to purchase a Chevrolet Aveo Motor Vehicle on 09th December 2020 and the purchase price was R75 000,00 (Seventy-Five Thousand rands).
6. The consumer took delivery of the motor vehicle on 09th December 2020 and it is alleged by the consumer that on 15th December 2020 the vehicle manifested itself with defects not engaging gears which complaint was referred to the supplier and was not remedied.

C Special plea

7. The supplier raised a special plea against the consumer's particulars of claim and pleading that: Consumer Affairs Court of the North West Province is not clothed with the necessary jurisdiction to entertain the matter in that the parties entered into a written offer to purchase wherein the parties agreed and consented to the jurisdiction of the magistrates court in terms of section 45 of the Magistrates court Act 32 of 1944

D Plea on merits

8. The supplier further filed a plea over on the Plaintiff's particulars of claim and further pleaded that the consumer had purchased the Chevrolet Aveo as a used motor vehicle with first registration being 2021. further that the plaintiff accepted the vehicle on that quality and in working order and on condition of a used vehicle that was already subjected to, the wear and tear,

age and usage of the vehicle which components may fail after delivery of vehicle.

9. The supplier further pleaded and alleged that the consumer was offered a mechanical insurance which he declined.
- 10 Supplier further pleaded and alleged that the consumer brought the vehicle back in February 2021 after two (2) separate unknown mechanics worked on the vehicle.
- 11 The supplier filed a provisional counter-claim that he effected repairs to the motor vehicle in the amount of R10 075,00 and claims for payment of same from the consumer.

E The Hearing and dispute

- 12 The matter is currently before this court for consideration of the special plea raised and consequently the court will first have to deal with the special plea and determine whether the court is clothed with the necessary jurisdiction to entertain the matter or not.

13. Submissions on behalf of supplier

13.1 It was submitted on behalf of the supplier that the special plea should be upheld, and the claim be dismissed as the Consumer Affairs Court for the North West Province is not clothed with the necessary jurisdiction to preside and entertain the matter by virtue of the offer to purchase agreement entered into by the parties election of the jurisdiction by the magistrates court.

13.2 The supplier further submitted that in terms of the same offer to purchase agreement by the parties the consumer had to follow dispute resolution processes of Independent Dealers Association (IDA) of which the supplier is a member, and or lodged a complaint with the motor industry ombud

(MIOSA) which complains could be lodged via their respective websites.

14. Submissions on behalf of consumer

14.1. It was on the contrary submitted on behalf of the consumer that this court is indeed vested with the necessary jurisdiction to hear the matter and that the agreement and offer to purchase signed by the parties offends the prescripts and intention of the legislature as intended in the Consumer Affairs (Unfair Business Practice) Act 4 of 1996.

14.2. It was further submitted that the contract entered into the offer to purchase was in contravention of Section 3(1) of the Consumer Protection Act as it defeats the purpose as intended in the enabling act in that the consumer had not had a fair opportunity to read and understand the meaning and implications of the contract they were entering into as the ability to read and comprehend same was subject to virtual impairment as the contract is not readable.

14.3. Further submission made on behalf of the consumer was that the consumer had an unreserved right to proceed to lodge his complaint with the Consumer Affairs Office and to enforce his rights as contained and provided for in terms of Consumer Protection Act 68 of 2008.

F Consideration of the Merits/Plea

15. Upon evaluation of the issue raised and the special plea as regards to whether the North West consumer Affairs court has the necessary jurisdiction to adjudicate over this matter the following was taken into consideration and seems to be common cause between the parties.

It is not in dispute that there is a transaction entered into between the consumer and the supplier to purchase a Chevrolet Aveo motor vehicle.

16. In terms of Section (1)(b) of the consumer protection Act;

16.1.1 A **Consumer** is defined as “a person who has entered into a transaction with a supplier in the ordinary course of the supplier’s business, unless the transaction is exempt from the application of this Act by Section 5 (2) or in terms of Act 5(3)”

16.1.2 **Supplier** is defined in Section (1) (g) as
“a person who markets any goods or services”.

16.1.3 **Consumer agreement**

“means an agreement between a Supplier and a Consumer other than a franchise agreement”.

16.1.4 **Consumer court**

“means a body of that name, or a consumer tribunal that has been established in terms of applicable provincial consumer legislation”

17. In the light of the above definitions it cannot be disputed that the transaction herein falls within the ambit of the provisions of the Consumer Protection Act 68 of 2008.

CONSTITUTIONAL PROVISIONS

18 The constitution of the Republic of South Africa Act 108 of 1996 provides as follows;

18.1 Section 9 **Equality**

9(1) Everyone is equal before the law and has the right to equal protection and benefit of the law 9(2) Equality

includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect and advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

18.2 Section 34 **Access to courts**

Sec (34) Everyone has the right to have any dispute that can be resolved by the application of the law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum

19 The Consumer protection Act is thus one of the legislations intended to achieve this equality and imbalance between the supplier and the consumer.

20 Section 69 of the consumer protection Act provides that;
“A person contemplated in Section 4 (1) may seek to enforce any right in terms of this Act or in terms of a transaction or agreement, or otherwise resolve any dispute with a supplier, by-

(a)Referring the matter directly to the tribunal, if such direct referral is permitted by this Act in case of a particular dispute.

(b)Referring the matter to a particular ombud with jurisdiction if the supplier is subject to the jurisdiction of any such ombud,

(c)If the matter does not concern a supplier contemplated in paragraph (b)-

- (i) Referring the matter to the applicable industry ombud, accredited in terms of section 82(6) if the supplier is subject to any such ombud; or
- (ii) Applying to the consumer court of the province with jurisdiction over the matter, if there is such a consumer court, subject to the law governing that Consumer Court.

21 In **Makhaya V University of Zululand** 2010(1) SA 62 at paragraph 34 it was stated that:

NUGENT JA said: “some surprise was expressed at the notion that a Plaintiff might formulate his or her claim in a different way and thereby bring it before a forum of his or her choice, but that surprise seems to be misplaced. A Plaintiff might indeed formulate a claim in whatever way he or she chooses, though it might end up that the claim is bad. But if a claim as formulated by the claimant, is enforceable in a particular court, then the plaintiff is entitled to bring it before that court. And if there are two courts before which it might be brought then that should not evoke surprise, because that is the nature of concurrent jurisdiction. It might be that the claim, as formulated is bad claim, and it will be dismissed for that reason, but that is another matter”.

22 Consideration has to be taken into account of the intention of the legislature in acting several legislations and acts that relate to contracts and enforcements of same, rights and prejudice suffered by ordinary or consumer rights. The intention is to balance and bring equality between the suppliers and consumers.

23 The **National Credit Act 34 of 2005** stipulates that a credit agreement must not contain unlawful provisions. In terms of section 90(1) (u) the credit agreement is unlawful if it expresses, on behalf of the consumer

- (i) a consent to the jurisdiction of the high court, if the magistrate court has a concurrent jurisdiction.

- 24 In **Absa bank limited v Myburg 2009** (3) SA 340 (T); 2008 JOL 2110 (T), also dealing with a provision which consented to litigation in the High Court, Bertelsmann J expressed a vastly different opinion than that of the full bench after. After taking all the purposes of the National Credit Act into consideration, he was of the opinion that it was undoubtedly the aim of the Act to try and avoid expensive litigation in High Courts in situations where the magistrates' courts had concurrent jurisdiction. Bertelsmann J found that the practice of instituting action in the High Court while a magistrate's court had jurisdiction court not be tolerated, and was an unlawful practice in terms of s 90 (see also Absa Bank Ltd v Pretorius 2008 JOL 21209 (T), where Bertelsmann J reached the same conclusion). Although it is not specifically mentioned in S 3 of the Act, setting out the purposes of the Act, it was definitely the intention of the drafters of the Act, to try and reduce legal costs for consumers and to encourage the use of the lower courts where the legal costs are generally lower than in the High Courts, and that is why the Act contains various references to the magistrates' courts (sometimes even trying to give a magistrate's court the exclusive authority to deal with a matter). If this was not the intention, it would not have been necessary for the Act to have mentioned a specific and the Act would simply have stated "the court" or "a court" without mentioning which one. This is also one of the main reasons why the jurisdiction of magistrates' courts was expanded (see s 172(2) read with schedule 2 to the Act). Whether the drafters achieve their aim of providing for this in the Act is, of course, a different matter. It is suggested that the judgment by Bertelsmann J probably reflects the true intention of the legislature, particularly if one looks at the purposes of the Act and the many references specifically to a magistrates' court in the Act.

25. In imperial group Pty Ltd t/a Auto Niche Bloemfontein v/s MEC: Economic Development, environment Affair and Tourism, Free State Government and others [2016] (3) All SA 794 (FB) it was held that:

“Unfair Business Practice Act 04 of 1996 and the Consumer Protection Act 68 of 2008 were cardinal to the present dispute. Section 83 of the Consumer Protection Act provided for the co-operative exercise of concurrent jurisdiction between national and provincial consumer authorities, and section 84 gave some practical effect to the provisions of section 83. It is the duty of the court in construing statutes to seek an interpretation that promotes the objects of the Bill of Rights and to avoid an interpretation that clashes therewith. The Consumer Protection Act was concerned primarily with the social and economic welfare of the consumers in the market-based society. The applicant’s submission that the Free State Consumer Affair Court did not have jurisdiction to entertain the dispute was without substance. The whole purpose of the Consumer Protection Act was to promote and advance the social and economic welfare of South Africa. When the Act was considered, any ambiguous probation had to be interpreted in favour of the consumer. The Act was aimed at a speedy, fair and in expensive procedure.

- 26 In The Standard bank of SA LTD and others v Thobejane and others (38/2019 & 47/2019) and The Stadard bank of SA LTD v Gqirana N O and Another (999/2019) [2021] ZASCA 92(25 June 2021).

It was held that “A court is obliged by law to hear any matter that falls within its jurisdiction and has no power to exercise a discretion to decline to hear a matter on ground that another court has concurrent jurisdiction.”

G CONCLUSION

27. In the circumstances the suppliers special plea that the North west Provincial Consumer Court is not clothed with the necessary jurisdiction to preside over this matter and

that the complaint falls outside the Consumer Protection Act is unfounded.

H ORDER

Accordingly the following order is made:-

1. The special plea is dismissed and the Court finds that the North West Provincial Consumer Court is vested with the necessary jurisdiction to preside over this matter

DATED at **KLERKSDORP** ON THIS THE **04th** OF **AUGUST 2022**

KENNEDY KGOMONGWE

TO:

AND TO:

Received on this theday of
....., 2022.