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IN THE NATIONAL CONSUMER TRIBUNAL

HELD AT CENTURION

Case number: NCT/100164/2018/148(1)

In the matter between:

MOUNTVILLE MKHALEMBA LUBISI

APPELLANT

and

**IMPERIAL SELECT MULTIFRANCHISE (PTY) LTD
trading as
EAST RAND MULTIFRANCHISE**

RESPONDENT

Coram:

Dr M Peenze – Presiding member

Dr L Best – Tribunal member

Mr T Bailey – Tribunal member

Date of hearing – 30 October 2018

JUDGEMENT AND REASONS

PARTIES AND REPRESENTATION

Appellant

1. The appellant is Mountville Mkhalemba Lubisi (the appellant), an adult male, who resides at [...], Y Street, Daveyton, Ekurhuleni, Gauteng. The appellant is the applicant in the main matter.

2. Mr Nkosana Kumalo, who is employed as a paralegal consultant at Segala Seshibe Attorneys, represented the appellant at the hearing of this appeal.

Respondent

3. The respondent is Imperial Select Multifranchise (Pty) Ltd trading as East Rand Multifranchise (the respondent), which is duly registered and incorporated in terms of the company laws of the Republic of South Africa. The respondent is the respondent in the main matter.
4. The respondent did not oppose the appeal, which proceeded in the respondent's absence.

APPLICATION TYPE

5. This is an appeal in terms of section 148 of the National Credit Act, 2005 (the NCA) against the ruling of a single member of the Tribunal refusing the appellant's application to condone the appellant's failure to refer his complaint directly to the Tribunal in terms of subsection 75 (1) (b) of the Consumer Protection Act, 2008 (the CPA) within 20 business days of the National Consumer Commission (the commission) having issued a notice of non-referral in terms of section 72 (1) (a) (ii) of the CPA.

WIDE APPEAL

6. This appeal is a wide appeal because the appeal panel is in terms of rule 27 of the Tribunal rules (the rules)¹ not restricted to the record of the proceedings before the single member.

BACKGROUND

7. This judgement does not determine the merits of the appellant's complaint against the respondent. Nevertheless, it is appropriate to set out a brief background to this appeal. It will become apparent in this judgement that the chronology of events is particularly important.

¹ Regulations for matters relating to the functions of the Tribunal and Rules for the conduct of matters before the National Consumer Tribunal, 2007 published under GN 789 in Government Gazette 302252 on 28 August 2007

8. On or about 23 December 2011 the appellant purchased a new Kia Rio 1.4 Auto motor vehicle with a sunroof (the vehicle) from the respondent for R197 613.98. The Motor Finance Corporation

financed the purchase of the vehicle.

9. The respondent's salesperson, Brandon, subsequently informed the appellant that the respondent was unable to supply the vehicle with a sunroof because it would affect the vehicle's warranty and undertook to refund R10 000.00 of the purchase price to the applicant. The appellant reluctantly accepted Brandon's explanation and took possession of the vehicle without a sunroof during January 2012.
10. Sometime between 29 February and 19 March 2012 the appellant took the vehicle to Dial-Direct Insurance Ltd (Dial-Direct) in Boksburg to be assessed for an insurance claim. The assessor, Bennie Ferreira, informed the appellant that the vehicle's suspension had a factory fault (the suspension fault). The appellant immediately informed Brandon about the suspension fault. The respondent ultimately offered to take the vehicle back at a depreciated value of R125,000.00 and give the appellant another vehicle equal in value (the trade-in transaction). However, the respondent did not implement the trade-in transaction.
11. On 27 September 2012 the appellant took the vehicle to Hi-Q Tyres in Pretoria to be assessed. The Hi-Q Vehicle Alignment Report refers to a suspension fault.
12. On 19 November 2012 the respondent serviced the vehicle in terms of the vehicle's maintenance plan and warranty. On 20 November 2012 the appellant discovered that the vehicle's rear window had cracked. The respondent informed the appellant that it would not replace the cracked window. The appellant therefore replaced the cracked window at his own cost.
13. On 6 December 2012 the vehicle broke down in Hazyview, Mpumalanga. The vehicle was towed to the respondent's branch in Nelspruit and the respondent informed the appellant that it would take three weeks to repair the vehicle.
14. On 28 December 2012 the respondent eventually deposited R11,400.00 into the appellant's bank account as compensation for not supplying the vehicle with a sunroof.
15. On 2 January 2013 the respondent sent the appellant an email that the respondent would not repair the vehicle because it had been driven without water and the vehicle's water bottle had been

damaged in an accident. The appellant raised the matter with John Robert, who is a manager at the respondent's head office. Mr Robert undertook to investigate the matter, but nothing came of it.

16. On 13 March 2013 the appellant lodged a complaint with the Motor Industry Ombudsman of South Africa (the ombud). On 27 July 2016 the ombud eventually issued a final letter that it could not support the appellant's expectations and therefore could not hold the respondent liable for the vehicle's repairs or for the cancellation of the sales agreement.
17. On 24 August 2016 the appellant lodged a complaint with the commission. The commission considered the complaint and on 25 April 2017 issued a notice of non-referral in terms of section 72 (1) (a) (ii) of the CPA (the notice of non-referral) because the defects were outside of the implied warranty.
18. On 4 July 2017 the appellant applied to the Tribunal in terms of section 75 (1) (b) of the CPA for an order granting him leave to refer the main application in this matter (the main application) directly to the Tribunal.
19. Since the appellant did not comply with item 32 of the rules, which requires the appellant to refer a complaint to the Tribunal within 20 business days of the date of the notice of non-referral, the appellant filed an application with the Tribunal to condone the late referral of the main application to the Tribunal (the condonation application). The respondent did not oppose the condonation application.
20. On 13 September 2017 a single member of the Tribunal refused the condonation application because there was no reasonable prospect of the applicant's claim succeeding in the main application.
21. On 17 May 2018 another single member of the Tribunal granted an order that condoned the appellant's late filing of an application to appeal against the single member's refusal to grant the condonation application.
22. The single member's refusal to grant the condonation application is the subject of this appeal.

APPELLANT'S SUBMISSIONS

Degree of lateness

23. The appellant submitted that he made the application to refer the complaint to the Tribunal late because he was not informed of the time period within which he was required to make the application.

Prospects of success

24. According to the appellant, the individual member erred on four grounds when he rejected the appellant's clear and unambiguous version of events.
25. First, the single member erred when he concluded that there was no evidence to show that the vehicle was defective within six months of the appellant having purchased the vehicle. The contrary is true because between 29 February and 19 March 2012 the appellant had taken the vehicle to Dial-Direct when the assessor informed the appellant about the suspension fault and the appellant had immediately brought the suspension fault to the respondent's attention.
26. Second, the single member erred when he concluded that the appellant's complaint was based on the respondent having breached the contract when the facts show that the appellant's complaint is predicated on sections 55 and 56 of the CPA. The appellant sought both the ombud's and the commission's assistance because he correctly understood that that these two forums are empowered to adjudicate the appellant's complaint. The appellant would have approached a court for relief if he was relying on a contractual breach.
27. Third, the single member erred when he relied on the ombud's decision because the ombud had relied on photographs that the respondent had sent to the ombud that the suspension fault was caused by an accident in the absence of establishing that an accident had in fact occurred.
28. Finally, the single member erred when he failed to appreciate that the referral had not prescribed because appellant had not caused this matter to take more than three years to be resolved.

Prejudice

29. The appellant has been severely prejudiced because he has paid some instalments to the Motor Finance Corporation despite not having been able to use the vehicle since the vehicle broke down in December 2012.

LEGAL PRINCIPLES

30. It is convenient to set out the relevant statutory and regulatory provisions as well as the case law governing this appeal.
31. Rule 34 (1) (a) of the rules provides that a "party may apply to the Tribunal in Form TI r.34 for an order to condone the late filing of a document or application". Similarly, rule 34 (1) (b) empowers the Tribunal to "extend or reduce the time allowed for filing or serving". Rule 34 (2) provides that the Tribunal may grant the order on good cause shown.
32. Rule 13 requires a person who wishes to oppose an application of this nature to serve an answering affidavit on the applicant concerned and any other persons on whom the application was served within 15 days of the date of the application.
33. To condone means to "accept or forgive an offence or wrongdoing". The word stems from the Latin term *condonare*, which means to "refrain from punishing".² It can also be defined to mean "overlook or forgive (wrongdoing)".³
34. The standard for determining an application of this nature is the interests of justice.⁴ Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. It requires the exercise of a discretion on an objective conspectus of all the facts. Factors that are relevant include but are not limited to the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal;

²Oxford English Dictionary, Second Edition at page 151.

³Collins English Dictionary and Thesaurus, Fourth Edition 2011 at page 170.

⁴ *Head of Department, Department of Education, Limpopo Province v Settlers Agricultural High School and others* 2003 (11) BCLR 1212 (CC) at para [11].

and the prospects of success.⁵ Ordinarily these factors are interrelated and should not be considered separately.⁶

CONSIDERATION OF THE MERITS OF THE APPEAL

35. The Tribunal now turns to the merits of this appeal. The Tribunal has a discretion, which it must exercise judiciously, when deciding whether it is in the interests of justice to condone the appellant's failure to timeously refer this complaint to the Tribunal.

Lateness

36. The date of the notice of non-referral is 25 April 2017. The appellant did not comply with item 32 of the rules by filing the leave application within 20 business days of the notice of non-referral because the appellant only filed the leave application on 4 July 2017. The appellant was therefore 29 business days outside the 20-business day period.

37. The Tribunal is satisfied in the circumstances of this matter that the delay is not excessive. Moreover, the appellant's explanation that he was not informed of the time period within which he was required refer the complaint to the Tribunal is reasonable.

Prospects of success

38. The Tribunal now turns to the appellant's prospects of success in the main application, which the appellant would only be entitled to have determined once the appellant succeeds in this appeal and consequently obtains the leave of the Tribunal.⁷

Has the complaint prescribed?

39. The first issue the Tribunal is required to decide is whether the main application has prescribed. The Tribunal is a creature of statute. This means that it may only act in accordance with the powers

⁵*Van Wyk v Unitas Hospital and Others* 2008(4) BCLR 442 (CC) at para 20 as applied in *Camagu v Lupondwana* Case No 328/2008 HC Bisho.

⁶ *Melane v Santam Insurance Company Limited* 1962 (4) SA 531 (A) at 532C-E.

⁷ See section 141 (1) (b) of the NCA

given to it. The NCA established the Tribunal and the CPA extended the Tribunal's functions and powers. The Tribunal therefore derives its jurisdiction from these two statutes and other applicable law.

40. The information before the Tribunal is that the appellant purchased the vehicle on or about 23 December 2011; took possession of it during January 2012; and informed the respondent of the suspension fault sometime between 29 February and March 2012. Subsequently a series of developments occurred, which included the vehicle breaking down on 6 December 2012 and led to the appellant lodging a complaint with the ombud on 13 March 2013. That complaint lay with the ombud for about three years and four months before the ombud eventually issued a final letter to the appellant on 27 July 2016 that it would not be taking the matter any further.
41. The appellant did not sit on his hands and on 24 August 2016 lodged a complaint with the commission. The complaint lay with the commission for eight months before the commission issued the notice of non-referral on 25 April 2017. The appellant then, as he was bound to do, sought the leave of the Tribunal on 4 July 2018 to refer his complaint to the Tribunal. However, he was 29 days late in doing so and therefore made the condonation application.
42. Section 116 of the CPA deals with prescription. It specifically limits a complainant from referring a complaint to the Tribunal more than three years after the act or omission that is the cause of the complaint.
43. On the face of it, since the appellant at the very least brought the suspension fault to the respondent's attention sometime between 29 February and March 2012 the complaint would ordinarily have prescribed sometime during that period three years later in 2015. However, section 116 of the CPA must be read together with section 69 of the CPA. Section 69 deals with the consumer's right to enforce his or her rights as a consumer in terms of the CPA, a transaction agreement, or a dispute with a supplier. The consumer may do so by referring the matter directly to the Tribunal, or an applicable ombud with jurisdiction if the supplier is subject to the jurisdiction of the applicable ombud. The respondent is a supplier who is subject to the ombud's jurisdiction.

44. The Constitutional Court has held that where a specialised framework has been created for the resolution of disputes, parties must pursue their claims primarily through such mechanisms.⁸ Our courts have more recently clarified that the wording of section 69 is clear and unambiguous and that a consumer must exhaust his or her remedies in terms of section 69 before approaching a court for redress.⁹ Consequently, the Tribunal is satisfied that the appellant was correct to approach the ombud and the commission to resolve the dispute before seeking the leave of the Tribunal to refer the complaint to the Tribunal.
45. The Tribunal has previously found that referring a matter to the commission or a consumer court¹⁰ or the ombud¹¹ interrupts prescription. It follows that prescription in this matter was interrupted between 13 March 2013 and 27 July 2016 and again between 24 August 2016 and 25 April 2017 when the complaint respectively lay with the ombud and the commission. Consequently, the Tribunal is satisfied that the appellant was well within the three-year period prescribed by section 116 of the CPA when he made the condonation application on 4 July 2017.

Does the complaint fall within the CPA?

46. The second question the Tribunal must decide is whether the appellant's claim falls within the ambit of sections 55 and 56 of the CPA. Section 55 deals with a consumer's right to good quality goods. More specifically, subsections 52 (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 "of good quality, in good working order and free of any defects".
47. Section 56 deals with implied warranty of quality. 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

⁸ See *Chirwa v Transnet Ltd v and Others* 2008 (4) SA 367 (CC)

⁹ See *Joroy 444cc t/a Ubuntu Procurement v Potgieter NO and Another* 2016 (3) SA 465 (FB)

¹⁰ See *Lazarus and Another v RDB Project Management CC t/a Solid and Another* (NCT/36112/2016/75(1)(b) [2016] ZANCT 15 (9 June 2016) and *Van Heerden v Bryanston Executive Cars* NCT/69249/2016/73(3) & 75(1)(b) (25 May 2017).

¹¹ See *Ngoza v Roque Quality Cars* NCT/79905/2017/73(3) & (75)(1)(b) [2017] ZANCT 104 (28 September 2017)

“repair or replace the defective goods” or “refund the consumer the price the consumer paid for the goods”.

48. The appellant has placed information before the Tribunal that sometime between 29 February and March 2012 he drew the suspension fault to the attention of the respondent, who offered the trade-in transaction but failed to implement it. This information concerning the suspension fault appears to be supported by the Dial-Direct Assessment Report dated 29 February 2012.
49. If the appellant can show at a hearing in the main application that he provided an opportunity to the respondent within the first six months of having purchased the vehicle to rectify an alleged defect, then he would have met the jurisdictional prerequisites to proceed with his claim against the respondent.
50. Consequently, the Tribunal is satisfied that the appellant has laid a foundation for a complaint in terms of the CPA to which the respondent must answer. There are matters of fact that are in dispute. For example, whether the ombud was correct to rely on photographs that the vehicle had been involved in an accident. These factual disputes can only be dealt with through a full hearing before the Tribunal into the merits of the matter.

Prejudice

51. The Tribunal is satisfied that the complaint is important to the appellant, who has not been able to use the vehicle since 2012. It follows that the appellant will be severely prejudiced should he not have an opportunity to present his case at a full hearing before the Tribunal.

CONCLUSION

52. For these reasons the Tribunal is persuaded that the appellant has shown good cause and it is in the interests of justice to condone the appellant's failure to refer his complaint directly to the Tribunal in terms of section 75 (1) (b) of the CPA within 20 business days of the commission having issued the notice of non-referral in terms of section 72 (1) (a) (ii) of the CPA.

ORDER

53. Accordingly, the Tribunal makes the following order:

53.1. The appeal is upheld; and

53.2. There is no order as to costs.

DATED AT CENTURION ON THIS 20TH DAY OF NOVEMBER 2018



TREVOR BAILEY

Tribunal member

With members Peenze and Best concurring.

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