

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

Case number: **NCT/82942/ 2017/75(1)(b)**

In the matter between:

BRIDGET LYN EDWARDS

APPLICANT

and

ACCORDIAN INVESTMENTS (PTY) LTD

RESPONDENT

Coram:

Prof T Woker –Presiding Member

Date of hearing: 22 MARCH 2018

Judgment and Reasons

THE PARTIES

1. The Applicant is Bridget Lyn Edwards an adult female residing in Plumstead, Cape Town who filed a complaint against the Respondent with the National Consumer Commission (“Commission”) in terms of the Consumer Protection Act, No 68 of 2008 (CPA) (the Applicant).

2. The Respondent is Accordian Investments (Pty) Ltd a private company with limited liability incorporated in terms of the company laws of the Republic of South Africa and engaged in the business of selling motor vehicles (the Respondent).

THE HEARING

3. A hearing was held on 22 March 2018 in Cape Town. The Applicant represented herself and the Respondent was represented by Ms Foster, a legal advisor of Motus Corporation (Pty) Ltd, a majority shareholder of the Respondent.

THE APPLICATION

4. This is an application by the Applicant for leave to refer her complaint, which was non-referred by the Commission, directly to the National Consumer Tribunal (the “Tribunal”) in terms of section 75(1)(b) of the CPA. The Respondent opposed the application.

5. Section 75 (1) of the Act states as follows:

Referral to Tribunal

“(1) 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) ...;or

(b) the Tribunal, with leave of the Tribunal.

(2)...

(3) A referral to the Tribunal, whether by the Commission or by a complainant in terms of subsection (1), must

be in the prescribed form.

(4) The Tribunal—

(a) must conduct a hearing into any matter referred to it under this Chapter, in accordance with the requirements of this Act, and the applicable provisions of the National Credit Act pertaining to the proceedings of the Tribunal; and

(b) may make any applicable order contemplated in this Act or in section 150 or 151 of the National Credit

Act, read with the changes required by the context. (5)...”

6. The Commission issued a notice of non-referral, dated 5 May 2017 and signed by the Commissioner on 19 May 2017, in which it stated that the Commission was unable to refer the complaint to the Tribunal because the complaint:

“does not allege any facts which, if true, would constitute grounds for a remedy under the Consumer Protection Act, 2008”.

7. The Tribunal must in accordance with s75 (1) (b) first determine whether to grant the Applicant leave to refer the matter to the Tribunal. The purpose of the hearing held on 22 March 2018 was to determine this issue and this judgment relates only to the issue of whether to grant leave to refer and does not deal with the merits of the matter, save only as far as the merits may relate to the issue of leave to refer.

CONTEXT

8. Despite the fact that this judgment does not deal with the merits of the complaint that the Applicant has against the Respondent, it is appropriate to set out a brief background and the context of the issues in dispute between the parties.
9. The Applicant purchased a new motor vehicle, a 2013 Tata Xenon 2.2 DLE D/C P/U with vehicle identification number MAT 464056DSRO2348 from the Respondent t/a Tata Milnerton on or about 13 September 2013. The vehicle is financed through Motor Finance Corporation, a division of Nedbank Ltd.
10. The Applicant alleges that from the outset the vehicle exhibited problems and that she on numerous occasions drew the Respondent and/or its employees' attention to the fact that there were problems with the vehicle. Some issues were addressed by the Respondent under the Manufacturer's warranty. However, there was a major concern regarding a “knocking” noise that the Respondent did not deal with despite this issue being referred to the Respondent on numerous occasions. In addition, serious problems regarding the brakes and the steering mechanism were reported. The Applicant has supplied a detailed list of the complaints that she raised with the Respondent as well as documents to indicate the Respondent's response. For the purposes of this judgment, it is not necessary to deal with each of these in detail. These are issues that will be interrogated when the merits of the matter are dealt with.
11. The Applicant alleges that the Respondent and/or its employees were dismissive of her complaints and continued to maintain that there was nothing wrong with the vehicle. Problems persisted until 3 May 2016 when the Regional Service Manager of the Respondent, Jose Rosario (Rosario), recommended that the Applicant refrain from driving the vehicle. This followed a serious incident when the steering mechanism seemed to fail altogether. An email sent by Rosario to the Applicant reads as follows:

“I was not able to trace any warranty claim for repairs relating to the steering system on your vehicle. I would strongly advise that the vehicle is inspected by an independent test centre such as the AA, if you cannot afford to pay for the test then the vehicle should be taken to the dealership. The vehicle can then go to a test centre and inspected.

Once we have a report we can finalise any repairs that need to be made.

- 12.** The Applicant reports that the fact that Rosorio could not trace a warranty claim for repairs to the steering system of her vehicle is very concerning because the Respondent was supposed to have replaced the steering mechanism in February 2016 whilst the vehicle was still under the Manufacturer’s warranty. By May 2016, the Manufacturer’s warranty had expired.
- 13.** The Applicant lodged a complaint with the Motor Industry Ombudsman of South Africa (MIOSA) on 18 May 2016. In a letter dated 17 November 2016 MIOSA recommended that the Respondent should collect the vehicle at its own risk and expense within fifteen (15) days and inspect the braking and steering systems in order to determine the root cause of the fault. MIOSA stated that the Respondent must forward the final report to their office so that they could “determine the next course of action”.
- 14.** The Applicant states that she has lost complete faith in the ability of the Respondent to repair the vehicle and that she wants to be refunded what she has paid for the vehicle or the vehicle replaced. She is of the view that the modus operandi of the Respondent is to “stall and delay” or to do minimal repairs until the manufacturer’s warranty expires and then to expect the consumer to cover the repairs herself. She explained that she does not have the funds to replace the vehicle and needs the vehicle for business purposes. She is still driving the vehicle although in her view it is not safe to do so.
- 15.** The Respondent states that the vehicle has always been repaired in accordance with the Manufacturer’s warranty and that it is prepared to assess and repair the vehicle but it is not prepared to refund the Applicant or replace the vehicle.

CONSIDERATION OF THE MERITS OF THE APPLICATION FOR LEAVE

- 16.** 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:
- (1) The Applicant's reasonable prospects of success with the referral; and
 - (2) Whether the matter is of substantial importance to the Applicant or the Respondent.
- 17.** It is firstly very clear that the matter is of substantial importance to the Applicant. She has gone 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. Her level of anxiety and frustration at having to drive a vehicle that she believes is unsafe, is plain to see. She explained that she does not have the funds to replace or repair the vehicle, she does not have faith in the Respondent any longer and she needs a reliable vehicle to earn a living to support herself and her children. She still owes approximately R120 000 on the vehicle. When she had the vehicle assessed by the Respondent for the purposes of perhaps trading it in, she was informed that the vehicle is worth about R30 000 because of all the repairs that are needed.
- 18.** The Applicant has identified a number of sections in the CPA which she argues are relevant to her matter. These are section 54, section 55 and 56 (3).
- 19.** Section 54 provides that a consumer is entitled to demand quality service. The Applicant alleges that throughout her dealings with the Respondent she has been treated poorly and therefore the Respondent has acted in contravention of this section. In terms of section 54 (2) when a supplier fails to perform a service to the standards contemplated in the section, the consumer may require the supplier to remedy any defect in the quality of the services performed or goods supplied; or refund the consumer a reasonable portion of the price paid for the services performed and goods supplied, having regard to the extent of the failure.
- 20.** Section 55 of the Act deals with the consumer's rights to safe, good quality goods. Applying this section to the Applicant's matter, she had the right to receive a motor vehicle that was reasonably suitable for the purpose for which it was generally intended. The vehicle must be of good quality, in good working order and free of any defects and must be usable and durable for a reasonable period of time, having regard to the use to which vehicles of this nature would normally be put. The Applicant has argued that her vehicle

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)).

was defective from the time that she purchased it and that her attempts to have this addressed by the Respondent were unsuccessful. She still owes a substantial amount of money on the vehicle and yet it is only worth R30 000 according to the Respondent because of all the repairs that are needed.

- 21.** The Applicant also argues that section 56 (3) applies to this matter. In terms of this section, if a supplier repairs any particular goods or any component of any such goods, and within three months after that repair, the failure, defect or unsafe feature has not been remedied, or a further failure, defect or unsafe feature is discovered, the supplier must replace the goods; or refund the consumer the price paid by the consumer for the goods.
- 22.** The Applicant alleges that she purchased a defective vehicle and attempts to have the Respondent repair the vehicle have failed to the point where the Applicant has lost faith in the Respondent. This matter therefore clearly falls within the ambit of the CPA. The parties have attempted to reach an amicable solution to the matter. MIOSA proposed that the Respondent assess the problem and that it will then decide how to proceed. The Applicant however is not prepared to accept this solution because she has lost faith in the Respondent.
- 23.** In considering the reasonable prospects of success the Tribunal is satisfied that the Applicant has laid a foundation for a complaint in terms of the CPA which the Respondent must answer to. There are matters of fact as well as interpretation of the relevant sections of the CPA that are in dispute and such matters can only be dealt with through a full hearing before the Tribunal into the merits of the matter. Should the Tribunal find that the Respondent has contravened the Act and has engaged in prohibited conduct the Tribunal will have to decide on an appropriate remedy, including whether or not it would be appropriate in these circumstances to impose an administrative penalty. This can only be done once all the issues are fully ventilated before the Tribunal.
- 24.** The Tribunal therefore grants leave for the matter to be heard.

DATED at Centurion on this 24th Day of March 2018.

Prof. T A Woker
Presiding Member