

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

Case number: **NCT/85401/2017/75(1)(b)**

In the matter between:

MOUNTVILLE MKHALEMBA LUBISI

APPLICANT

and

**IMPERIAL SELECT MULTIFRANCHISE (PTY) LTD
T/A EAST RAND MULTIFRANCHISE**

RESPONDENT

Coram:

Ms H Devraj - Presiding Member

Date of hearing: 1 March 2019

Date of judgment: 18 March 2019

JUDGMENT AND REASONS

THE PARTIES

1. The Applicant is Mountville Mkhalemba Lubisi, an adult male (“the Applicant”). At the hearing; the Applicant was represented by Mr Nkosana Khumalo from Segala Seshibe Attorneys.
2. The Respondent is Imperial Select Multifranchise (Pty) Ltd t/a East Rand Multifranchise, a company that is duly registered in terms of the company laws of the Republic of South Africa (“the Respondent”).

THE APPLICATION

3. This is an application by the Applicant for leave to refer his complaint, which was non-referred by the National Consumer Commission (the “NCC” or “Commission”), directly to the National Consumer Tribunal (the “Tribunal”) in terms of section 75(1)(b) of the Consumer Protection Act, 2008 (the “CPA”).
4. In an application of this nature, the Tribunal must first consider whether it will grant the Applicant leave to hear the matter. If the leave is granted, then the Tribunal will consider the merits of the Application.
5. The Respondent did not oppose this matter; nor did it appear at the hearing. The Tribunal was satisfied that the service requirements in terms of Rule 30(1)(a) were met. The Applicant served the application on the Respondent via personal service. On the date of the hearing; the Presiding Tribunal member was satisfied that the notice of set down was adequately served on the Respondent and the matter proceeded on a default basis.

BACKGROUND

6. On 23 December 2011, the Applicant purchased a new 2012 Kia Rio 1.4 Auto motor vehicle from the Respondent. According to the specifications of the vehicle, it was supposed to have a sunroof. The Respondent informed the Applicant, that he must come back in a weeks’ time to have the sunroof fitted. During January 2012, the Applicant took the vehicle to the Respondent’s premises to have the sunroof fitted. The Respondent’s salesperson Brandon; subsequently informed the Applicant that he was unable to fit the sunroof as it would affect the vehicle’s warranty and undertook to refund R10 000.00 (ten thousand rand) of the purchase price to the Applicant. After numerous follow-ups with the Respondent, the amount of R11 400.00 (eleven thousand, four hundred rand) was deposited into the Applicant’s bank account on 28 December 2012.
7. During March 2012; the Applicant noticed scratch marks at front and rear end of the vehicle. The Applicant took the vehicle to an insurance company to conduct

an assessment; and he was informed that the vehicle's suspension had a factory fault. The Applicant immediately informed the Respondent of the defect. Brandon offered the Applicant to keep the current vehicle as a courtesy vehicle; while he arranged with head office and his manager for a new contract. Brandon informed the Applicant that as this process takes time; the vehicle will only be replaced after 6 (six) months. When the Applicant followed-up on the replacement of his vehicle; he realised that Brandon no longer worked for the Respondent. He subsequently escalated the matter to Grant who is the Respondent's manager.

8. On 6 December 2012; the Applicant's vehicle broke down in Mpumalanga. The vehicle was towed to the Respondent's branch in Nelspruit; and the Respondent informed the Applicant that the vehicle will be repaired within 3 weeks. On 2 January; the Respondent informed the Applicant that it would not repair the vehicle; as the vehicle had been driven without water and that the water bottle had been damaged in an accident.
9. The Applicant tried to have the matter resolved with the Respondent. After not receiving any satisfaction from the Respondent. On 13 March 2013; the Applicant filed a complaint with the Motor Industry Ombudsman of South Africa ("MIOSA").
10. On 27 July 2017; MIOSA issued a finding that it could not hold the Respondent liable for repairs of the vehicle or for the cancellation of the sales agreement. The Applicant thereafter; referred his complaint to the National Consumer Commission.
11. The Applicant approached the Tribunal after receiving a notice of non-referral from the NCC. Subsequently, the matter was set down for the hearing of an Application in terms of Section 75(1)(b) of the Act.

THE HEARING

12. A hearing was convened for and held on 1 March 2019 in Centurion.
13. The Applicant explained his case and detailed his reasons for the allegations of alleged contraventions of the Consumer Protection Act. In particular, he submitted

that the matter was of grave importance to him as he given a vehicle without the specified sunroof and that the vehicle's suspension was defective. He further submitted that the Respondent failed to repair his vehicle when it broke down in December 2012 and that he has been negatively impacted by the actions of the Respondent. The redress process has taken years for the matter to eventually reach the Tribunal. He therefore wants to be refunded with a brand new vehicle.

CONSIDERATION OF THE MERITS OF THE APPLICATION FOR LEAVE

14. 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.

15. It is firstly very clear that the matter is of substantial importance to the Applicant. He had gone to a great deal of effort to attempt to resolve the matter with the Respondent; to lodge the complaint with the MIOSA; the Commission; and to pursue it further with the Tribunal. His level of anxiety and frustration at not having the use of a brand new vehicle that he purchased; is plain to see.

16. The Applicant had identified a number of sections in the Consumer Protection Act which he argued are relevant to his matter. However, the relevant sections identified were section 55 and 56.

17. Section 55 and 56 provide that a consumer is entitled to safe and good quality goods. Furthermore; if the defect was brought to the attention of the Respondent within 6 months of the delivery of the goods; the Respondent must repair, replace

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)).

or refund the consumer the goods; if the goods fail to satisfy the requirements and standards contemplated in section 55. The Applicant submitted that he informed the Respondent that the suspension was defective within 3 months of purchasing the vehicle. He was promised that he would receive a new vehicle after 6 months; but this did not transpire.

18. The Applicant alleged that when his vehicle broke down in December 2012; the Respondent informed him that the vehicle would be repaired within 3 weeks. However, the Respondent did not repair the vehicle; and alleged that the vehicle had been driven without water and that the water bottle was damaged due to the vehicle being in an accident. The Applicant submitted that he had not been in an accident. Based on the submissions made by the Applicant; this matter therefore clearly falls within the ambit of section 55 and 56 of the CPA.
19. 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. 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. This can only be done once all the issues are fully ventilated before the Tribunal.

ORDER

20. Accordingly, the Tribunal makes the following order:
 - 20.1. The Applicant's application for leave to refer the matter directly to the Tribunal is granted; and
 - 20.2. No order is made as to costs.

Dated at Centurion on this 18th day of March 2019

[Signed]

MS H DEVRAJ
PRESIDING MEMBER