

**IN THE NATIONAL CONSUMER TRIBUNAL
HELD IN CAPE TOWN**

Case Number: **NCT/115078/2018/75(1) (b)**

In the matter between

THEODORUS VONK

APPLICANT

and

WILLOW CREST MOTORS CC

RESPONDENT

Coram:

Prof Bonke Dumisa – Presiding member

Prof Tanya Woker - Tribunal Member

Ms Maleho Nkomo - Tribunal Member

Date of hearing – 07 March 2019

JUDGMENT AND REASONS

THE PARTIES

1. The Applicant is **Theodorus Vonk** (hereinafter referred to as “the Applicant”), a consumer who lodged a complaint with the Motor Industry Ombudsman of South Africa (“the MIOSA”) and the National Consumer Commission (“the NCC”), in terms of Section 72(1) (a) of the Consumer Protection Act, 2008 (the CPA or the Act) At the hearing the Applicant represented himself.
2. The Respondent is **Willow Crest Motors CC**, a close corporation carrying on business of buying and selling used motor vehicles (hereinafter referred to as “the Respondent”). At the hearing the Respondent was represented by Mr Mark Phillips and Jean-Paul Percival from J Percival and Associates Attorneys.

APPLICATION TYPE

3. This is an application in terms of Section 75(1)(b) of the CPA, lodged by the Applicant at the Tribunal, after the Applicant was successfully granted leave to refer this matter directly to the Tribunal as per Prof Woker's Judgment dated 10 December 2018.

BACKGROUND

4. For ease of analysis, we will herein generously utilize, with permission, the background to this case as related by Prof Woker in her Judgment and Reasons for granting the leave to refer.
5. Applicant purchased a 2008 Nissan X Trail motor vehicle (the vehicle) from the Respondent for R139 000. 00 in terms of an offer to purchase dated 19 January 2016 which was signed by the Applicant as purchaser. The Applicant purchased this vehicle for his wife, Mrs Angela Vonk (Mrs Vonk).
6. The original sale agreement under special conditions of offer included a term that is commonly referred to as a **voetstoots** clause or a clause in terms of which the vehicle is sold "as is". The Applicant removed this clause from the sale agreement by adding the words "CPA shall prevail".¹
7. The Applicant alleges that vehicle was sold as being in "excellent all round condition", together with an up-to-date service record book showing that all services required had been attended to by Nissan Agents and sold at normal market value less a small discount for worn tyres.
8. The Applicant was however aware of an oil leak and some other minor problems with the vehicle before he purchased it. The Applicant alleges that the Respondent undertook to fix these problems before delivery.
9. Mrs Vonk took delivery of the vehicle on 23 January 2016. Within an hour of Mrs Vonk arriving home the Applicant alleges that he noticed that oil was leaking from the gearbox and that the several small items which the Respondent had undertaken to repair prior to delivery had not been done.

¹ See page 39 of the documents before the Tribunal. Unfortunately the document is very unclear but the Respondent did not dispute the version presented by the Applicant.

10. The Applicant sent a number of emails to the Respondent in an attempt to get the repairs done.
11. He also took the vehicle to Nissan Randburg and Mayfair Gearbox for inspection and they confirmed that the gearbox had been repaired, but probably not by an authorised agent of Nissan; the gearbox was leaking and filled with the wrong gearbox fluid. Applicant concluded that someone had done a “patch job” to repair the gearbox.
12. The Applicant finally sent a letter dated 12 February 2016 to the Respondent. The Respondent agreed to do the repairs on 15 February 2016. The vehicle was returned to the Applicant on 23 March 2016.
13. On 13 May 2016, less than three months after the gearbox had been repaired, the gearbox again began causing problems and required a major overhaul; this after the vehicle had been driven for a further 3,896kms. The Applicant sent a number of emails to the Respondent requesting a way forward. He did not receive a response from the Respondent but the Applicant alleges that on 24 May 2016 he spoke telephonically to Carl Florence (Mr Florence), an employee of the Respondent, who informed him that he was “welcome to go the legal route”. This telephone conversation was confirmed in an email to Mr Florence on 25 May 2016.²
14. The Applicant approached SA Consumer Complaints in Pretoria for assistance and this organisation wrote to the Respondent on 7 June 2016 requesting an amicable solution to the problem. The attempt to settle the matter failed and the Applicant had the gearbox repaired at his own cost by Mayfair Gearbox, in Pretoria, at a total cost of R46 489.20.
15. Taking all the factors into consideration including the cost of repairs and other related costs the Applicant estimates that his damages are in the region of R81 259.00.
16. The Applicant then submitted a request for assistance to the MIOSA. In his request he informed the MIOSA that the Respondent refused to assist him. In response, the Respondent informed the MIOSA that it had undertaken to repair the vehicle however, the Applicant had elected to have the vehicle repaired by a third party and therefore the Respondent could not be held liable for the repairs. The Respondent also argued that before the Applicant took delivery of the vehicle it had undergone a roadworthy test and no oil leaks were reported.

² See page 25 of the documents before the Tribunal.

17. The MIOSA considered sections 55 and 56 of the CPA and on 7 November 2017, the MIOSA sent a letter to the Respondent in which it set out the following finding:

The Motor Industry Ombudsman of South Africa finds that the respondent did not exercise good customer care when attending to this matter. The respondent must take ownership of this complaint and refund the complainant the money he spent on repairing the gearbox.
18. The MIOSA afforded the Respondent 21 days from receipt of the letter to respond.
19. The Respondent did not respond to the MIOSA's findings and the Applicant then referred the complaint to the NCC. The exact date of the referral is unknown.
20. On 24 September 2018, the NCC issued a notice of non-referral stating that the complaint does not allege any fact which, if true, would constitute grounds for a remedy under the Consumer Protection Act.
21. The Applicant successfully applied to the Tribunal for leave to refer this matter directly to the Tribunal. This leave to refer was granted on the 10th of December 2018.

THE APPLICANT'S CASE

22. At the hearing the Applicant confirmed many of the facts which led to this hearing. These facts have been set out under background above and so it is not necessary to repeat them again. We will now simply deal with the issues that the Applicant chose to concentrate on at the hearing.
23. The Applicant also informed the Tribunal that he had consulted the CPA and had attempted, without legal representation, to establish which sections of the CPA he believed applied to his complaint; these included Sections 4, 51, 55, 56, 69, and 112. These will be discussed in detail later.

THE RESPONDENT'S CASE

24. At the hearing, Mr Jean-Paul Percival, the legal representative for the Respondent, requested to make an early submission to the Tribunal before the Applicant could start with his submissions. The Respondent was withdrawing his opposition to the principal claim of R46 489.20 for the repairs done at Mayfair Gearbox, in Pretoria.

25. The Respondent stated that at the time the vehicle was sold to the Applicant the vehicle was in full running order. It also provided the Applicant with an inspection report from the Automobile Association (AA) dated 14 January 2016. This was done at the request of the Applicant.
26. The Respondent's submissions were that the AA inspection picked up no faults except for a small oil leak which they repaired.
27. On 13 May 2016 when the gearbox failed the Applicant refused to allow the Respondent an opportunity to inspect the vehicle to determine the cause of the break down. On 25 May 2016 Mr Florence advised the Applicant that without sight of the vehicle, the Respondent would not accept liability and attend to the repairs at its cost.
28. The Respondent declined to engage with the SA Consumer Complaints because it (SA Consumer Complaints) did not enjoy relevant standing to consider and provide a decision in terms of the CPA and could only engage in mediation.
29. The Respondent stated that each time it received a letter of demand from the Applicant, the Applicant refused to allow the Respondent an opportunity to check the vehicle.
30. After receiving the findings of the MIOSA, the Respondent responded by informing the MIOSA that the Applicant had had the vehicle repaired by a third party and therefore it (the Respondent) could not be held liable for the repairs.
31. The Respondent confirmed that the Applicant had removed the **voetstoots** clause from the sale agreement and argued that, in the circumstances, the sale was not subject to a prohibited clause.
32. At the hearing the Respondent re-iterated that as the Applicant had had the vehicle repaired by a third party the Respondent could not be held liable for the repairs.

THE APPLICANT'S RESPONSE

33. The Applicant denied that he refused to allow the Respondent to inspect the vehicle and referred to a number of emails and letters that he sent to the Respondent in which he had called upon the

Respondent to resolve the dispute.³

34. He alleged that he only had the vehicle repaired by a third party because the Respondent had refused to engage with him on the matter.

ISSUES TO BE DECIDED

35. The Tribunal needs to establish whether the Respondent did actually engage in prohibited conduct in its dealings with the Applicant.
36. The Tribunal will also need to determine the appropriate sanction applicable, should the Tribunal arrive at the decision that there was any engagement in prohibited conduct on the part of the Respondent.

THE LAW APPLICABLE TO THE APPLICATION

37. The preamble to the CPA states that this Act aims “*To promote a fair, accessible and sustainable marketplace for consumer products and services and for that purpose to establish national norms and standards relating to consumer protection, to provide for improved standards of consumer information, to prohibit certain unfair marketing behaviour, to promote a consistent legislative and enforcement framework relating to consumer transactions and agreements..*” This particular case has almost all the aspects mentioned on this preamble:

37.1 When the Applicant approached S.A Complaints, MIOSA, the NCC, and the Tribunal it is because he did not believe he was treated fairly by the Respondent;

37.2 He approached the Tribunal and these other structures because he knew the CPA has set certain norms and standards relating to consumer protection;

37.3 The Applicant had very strong views about the Respondent’s use of the “voetstoots” (as is) clause in the sales agreements; and

37.4 We will later deal with specific provisions of the CPA that the Applicant listed as being the CPA provisions that the Respondent specifically breached;

³ See email dated 16 May 2016, letter dated 23 May 2016 and letter dated 8 June 2016.

38. The Applicant, upon taking delivery of the vehicle, immediately noted that there were problems with the gearbox and that certain other issues, as discussed before the vehicle was purchased, had not been addressed. After a number of requests, the Respondent undertook to fix the problems and returned the vehicle to the Applicant on 23 March 2016. On 13 May 2016, which is within three months of these repairs having been done, the vehicle again exhibited problems. The Applicant stated that he again approached the Respondent and asked him to repair the vehicle, which the Respondent refused to do. Hence, the Applicant resorted to having the vehicle repaired by a third party; and
39. During the hearing the Applicant addressed the Tribunal on which sections of the CPA he believed were applicable to the matter and may have been contravened by the Respondent.
40. The Applicant believed that the Respondent failed to adhere to the provisions of the Act in that:
- 40.1 The whole dismissive attitude of the Respondent towards the Applicant, was tantamount to unconscionable conduct which was totally aimed at frustrating the purposes of the Act, especially as captured in Section 4 of the Act which deals with the realisation of consumer rights;
- 40.2 The Respondent's inclusion of "voetstoots" clause on its sales agreements was a clear breach of Section 51 of the Act, which clearly lists different types of prohibited transactions, agreements, terms and conditions, which are deemed to have the general purpose or effect of defeating the purposes and policy of this Act;
- 40.3 By selling to the Applicant a car that immediately had serious gearbox problems, the Respondent actually put the Applicant's safety and / or that of his wife at risk, which was a clear breach of Section 55 of the Act, which enshrines the consumer's right to safe, good quality goods;
- 40.4 The Applicant discovered that the car had an oil leak even before he could take delivery of the car, the Respondent undertook to sort out this problem, but either did not do this, or simply did "a patch job" as alleged by the Applicant. The car gave the Applicant endless problems within the very first six months after he purchased the car. These circumstances are in clear breach of Section 56 of the Act, which enshrines the consumer's right to an implied warranty of quality at least within the first six months of purchasing of the goods;

- 40.5 When the Respondent refused to attend to the gearbox problems, and effectively told the Applicant that he is “welcome to go the legal route”, that was the most rude and total disregard of the Applicant’s consumer rights. By telling the Applicant to go the legal route, the Respondent was deliberately trying to undermine the Applicant’s rights to enforce his consumer rights; knowing very well that it is very expensive to go the legal route. This is a clear breach of Section 69 of the Act which enshrines the enforcement of consumer rights;
- 40.6 The Applicant pleaded with the Tribunal to impose a heavy administrative penalty on the Respondent, in terms of Section 112 of the Act, on grounds that the Respondent was totally dismissive of consumer rights:
- 40.6.1 It had taken the Respondent over three years, since the year 2016, for them to make an offer to cover some of the gearbox repair costs, as they had just offered not to contest the R46 489.20 principal claim only now at the commencement of this hearing;
 - 40.6.2 The Applicant had suffered serious losses and inconvenience due to this Respondent’s dismissive attitude;
 - 40.6.3 The Respondent was just not empathetic with the Applicant’s plight due to these gearbox problems;
 - 40.6.4 There is a serious problem with many businesses that don’t respect consumer rights, hence the Applicant felt that he had a moral duty to see to it that the Tribunal does make a finding of engaging on prohibited conduct against the Respondent;
 - 40.6.5 The Applicant was of the opinion that the Respondent does unduly benefit financially unfairly by cutting corners in the manner he does business with unsuspecting consumers; and
 - 40.6.6 The Respondent was just not co-operative enough with the MIOSA, to the extent that the Applicant alleges that the Respondent falsely claimed that the Applicant voluntarily opted to have the car’s gearbox repaired by a third party, Mayfair Gearbox, instead of allowing the Respondent to appoint their own service provider to do the job. The Applicant alleged that he was effectively forced to resort to the third party because of lack of cooperation by the Respondent.

41. The MIOSA made a finding that the Respondent should pay for the repairs to the gearbox. The MIOSA is the accredited industry ombudsman appointed in terms of section 82 (6) of the CPA that is responsible for the resolution of consumer disputes in the motor vehicle industry. Its code of conduct applies to all those in the industry including the Respondent.⁴ The Respondent simply ignored them, hiding behind the excuse that the Applicant had voluntarily used a third party, thus leaving the Respondent not liable in terms of the Act.
42. In the case of *Joroy 4440 CC t/a Ubuntu Procurement v Potgieter N.O. and Another*⁵ the court held that consumers are obliged to follow the procedures set out in section 69 of the CPA before approaching the civil courts for relief. This means that before the Applicant can approach the civil courts for any damages he must exhaust his remedies under the CPA;⁶ this includes approaching the Tribunal for a hearing. It was therefore important for the Applicant to ensure that this matter was thoroughly dealt with here at the Tribunal, so that the Applicant could get A Certificate of Prohibited Conduct against the Respondent, should it happen that the Tribunal were to make a finding of prohibited conduct against the Respondent.
43. The mere fact that the Respondent decided to withdraw their opposition from contesting the principal claim of R46 489.20 for gearbox repairs at Mayfair Gearbox is because the Respondent realized that there is overwhelming evidence that the Applicant did not necessarily voluntarily opt to go to a third party for gearbox repairs. The same may be inferred or said about some of the other direct costs that the Applicant listed on how he arrived at the total amount of R81 295,63 which the Respondent is still vigorously opposed to, despite having withdrawn their opposition to the principal amount of R46 489,20.

CONCLUSION

44. The Respondent did engage in prohibited conduct, and in breach of the Act, in:

44.1 Trying to illegally use the “voetstoots” clause when selling cars to consumers, as a way of circumventing the provisions of the Act. The use of a voetstoots clause by a supplier in a contract of sale constitutes prohibited conduct under the Act even though the clause was removed by the Applicant before the contract was signed;

⁴ See Government Gazette No 38107 17 October 2014. In accordance with this notice, MIOSA became the accredited industry ombud three months after publication which would have been on 15 January 2015,

⁵ 2016 (3) SA 465 (FB).

⁶ See in particular section 69 (d) of the CPA.

- 44.2 Acting with total disregard of the consumer's rights when he totally ignored the Applicant's correspondence when the Applicant reported the gearbox problems; and
- 44.3 Choosing not to attend to and repair the gearbox when asked to do so.

ORDER

45. Accordingly, the Tribunal makes the following order:

- 45.1 The Respondent has engaged in prohibited conduct;
- 45.2 The Respondent is liable, within 90 days of the date of this judgment, to refund the Applicant R46 489.20 for the total costs of gearbox repairs incurred at Mayfair Gearbox in June 2016;
- 45.3 The Respondent is further liable, within 90 days of the date of this judgment, to refund the Applicant for any other additional reasonable direct costs, to the value of R35 000, the Applicant incurred in attending to the problems associated with the gearbox breakdown and the processes the Applicant undertook in trying to get the cooperation of the Respondent;
- 45.4 If the Respondent fails to comply with the monetary sanctions listed above within 90 days of the date of this judgment, the Respondent is to pay an administrative fine of R150 000.00 (one hundred and Fifty Thousand Rand) into the National Revenue Fund referred to in Section 213 of the Constitution within 120 days of the date of this judgment. The Banking Account details for the National Revenue fund are:
- | | |
|-----------------|---|
| Bank Name: | STANDARD BANK, |
| Account Holder: | Department of Trade and Industry |
| Branch Name: | Sunnyside |
| Branch Code: | 05100 |
| Account Number: | [...] |
| Reference: | NCT Case Number & Name of Person or Business making payment |
- 45.5 The payment of an administrative fine of R150 000 will be suspended for five years, from the date of this judgement, provided that the Applicant pays both stipulated amounts of money within the stipulated time frames; and
- 45.6 No order is made as to costs.

DATED ON THIS 6th DAY OF APRIL 2019.

signed]

Prof Bonke Dumisa
Presiding Member

Prof Tanya Woker (Member) and Ms Maleho Nkomo (Member) concurring