IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case Number: **NCT/122211/2018/75(1)(b)**

In the matter between:

PIERRE JACQUES CLAUDE MARTIN **APPLICANT**

And

STRAUSS & REYNARD CC t/a MOTORLAND EAST LONDON **RESPONDENT**

Coram:

Ms N Maseti - Presiding Tribunal Member

Adv J Simpson – Member

Mr A Potwana - Member

Date of Hearing: 20 November 2019

Judgment and Reasons

PARTIES

1. The Applicant is **Pierre Jacques Claude Martin,** a consumer as defined in section 1 of the Consumer Protection Act, 68 of 2008 (**"the Act"**); who resides in Aloe Place, Witthaus, Gonubies, East London, in the Eastern Cape Province, and will hereafter be referred to as ("the Applicant").

2. The Applicant represented himself at the hearing.

3. The Respondent is Strauss & Reynders CC trading as The Motorland Group East London, with its registered principal place of business at 45 Cambridge Street, East London; and will hereafter be referred to as the ("Respondent").

4. At the hearing, the Respondent was represented by its attorney on record, Mr Gary Stirk, from Stirk Yazbek Attorneys.

NATURE OF THE APPLICATION

5. This is an application made in terms of section 75(1) of the Act, wherein the Applicant, directly referred his complaint to the National Consumer Tribunal ("the Tribunal"), seeking an order of the Tribunal, to nullify the award proposed by the Motor Industry Ombudsman of South Africa, ("MIOSA") against the Respondent for alleged violation of sections 55 and 56 of the Act. Essentially, the Applicant implores the Tribunal to declare that the Respondent engaged in a prohibited conduct as contemplated in section 56 of the Act.

6. This application is pursuant to the issuance, by the National Consumer Commission ("the NCC") of a Notice of referral of the Applicant's complaint, on 6 September 2018. In terms of section 75(1)(b) of the Act, the Applicant sought and was granted leave to refer his complaint to the Tribunal.

BACKGROUND

7. The Applicant stated that on 23 December 2015, he purchased a pre-owned Ssang Yong Rexton 2.7D 4x4, 2013 model, from the Respondent for the price of R318,688.10; against which he paid a cash deposit of R200,000.00. The balance of the purchase price, being R119,828.09 was financed through the Motor Finance Corporation ("MFC"), a division of Nedbank Limited.

8. The Applicant asserts that at the time of purchase, the vehicle was still under the manufacturer's warranty and service plan. It is the Applicant's assertion that he encountered recurring problems with the vehicle within a month from the date of purchase, resulting in the vehicle being un-drivable for a period of over four (4) months since purchase.

9. A timeline of the nature of problems encountered was provided and summarised below:

   9.1 an air-conditioner compressor broke down on 1 February 2016, and the vehicle was kept at the Respondent's workshop for two weeks;

   9.2 a fan belt was shredded around 23 February 2016; and as a result, the vehicle spent two weeks at the Respondent's workshop;

9.3 the fan belt problem occurred again on 30 March 2016;

9.4 a few days after the vehicle was returned from the workshop, the Applicant noticed a colour difference on the bonnet, and requested re-spray;

9.5 the fan belt was replaced due to abnormal wear on 19 May 2016 after its replacement in March 2016;

9.6 the fan belt shredding problem recurred on 20 June 2016 and 9 September 2016 and in both instances grounded the vehicle;

9.7 on 19 October 2016 the vehicle was diagnosed with a faulty gearbox and speedometer;

9.8 the vehicle was taken back to the workshop for repairs again on 1 December 2016; and

9.9 on 21 February 2017, the vehicle experienced a problem with the air intake pipe, and the speedometer ceased functioning again.

10. The Applicant claims that around July 2016, he requested the Respondent to replace the vehicle but his request was refused, stating that the fan belt problem was not a sufficient reason to replace the vehicle. The Applicant asserts further that he required the cancellation of the sales agreement in order to be reimbursed his money, however, the Respondent declined, and insisted on repairing the vehicle.

11. In April 2017, the Applicant lodged a dispute with the MIOSA, which made its finding in favour of the Applicant on 6 December 2017. In particular, MIOSA found that the vehicle in question, failed to meet the requirements of section 55 and section 66 of the Act, in that it is not suitable for the purpose for which it was intended. Furthermore, MIOSA directed the Respondent to refund the Applicant the amount incurred for the purchase of the vehicle; and included in its finding, the calculation of the refund.

12. The Applicant was not satisfied with MIOSA's finding, especially the method of calculation of the refund amount, and lodged a complaint with the NCC on 11 June 2018, which issued a Notice of Non-referral on 6 September 2018.

13. The Applicant then filed its complaint directly with the Tribunal seeking an order for appropriate refund should the Tribunal find a contravention of section 55 and section 56 of the Act.

AT THE HEARING

Applicant's Submissions

14. At the hearing, on 20 November 2019, the Applicant testified under oath about all the problems he encountered within a month of purchase of the vehicle. The Applicant testified that, he encountered three (3) major problems that resulted in the malfunctioning of the vehicle, namely: (a) malfunctioning of the air conditioner compressor on 1 February 2016; (b) the fan belt shredded on several occasions between February 2016 to September 2016; and (c) intermittent faults with the speedometer. The Applicant testified that all the other problems were fixed by the Respondent, except for the recurrence of the shredding of the fan belt, which occurred at least five (5) times within an eight months' period. According to the Applicant, the problem with the fan belt occurred on several occasions during the period between February 2016 and September 2016.

15. The Applicant asserts that in June 2016, he expressed his dissatisfaction with the principal dealer, Mr Steve Chandler over the recurrence of the problem with the fan belt. He raised a concern with the performance quality of the vehicle, and in his discussion with Mr Chandler, the Applicant mentioned the possibility of cancelling the deal and return the vehicle so that he could obtain a refund of the deposit paid as it was within six months from the date of purchase.

16. In substantiation of this assertion, the Applicant referred to an email dated 30 November 2016 which he wrote to Mr Chandler, confirming that he requested a replacement of the vehicle. It is imperative to point out that the email referred to above is not part of the record of pleadings before the Tribunal.

17. The Applicant, further, testified that in July 2016, he did not know his rights in terms of the Consumer Protection Act of 2008, and that he was rather "of the frame of mind that he was dealing with a reputable company". He stated that he was advised by the Salesperson of the Respondent to approach MIOSA to intercede in the matter of ongoing problems with the vehicle. Only at that point was he aware of his consumer rights entailed in the Act.

18. In view of the above arguments, the Applicant seeks an order of the Tribunal to cancel the vehicle sales agreement, and order further that the vehicle be returned to the Respondent in order for the Applicant to get a refund of R160 000.00. The Applicant asserts that this figure was calculated by an independent valuator, and was verified and accepted by his insurance.

Respondent's Submissions

19. The Respondent's legal representative, Mr Gary Stirk, apprised the Tribunal's panel that there is no need for his client, Mr Dean Sanders, to testify. He proceeded to cross-examine the Applicant.

20. Some uncontested points that arose from the cross-examination by Mr Stirk were that the air compressor problem was permanently fixed by the Respondent at no cost to the Applicant. Mr Stirk also confirmed that the fan belt problem occurred on several occasions, at least five times to be precise, and the last (fifth) incident was in September 2016. The Respondent contended further that the problem of shredding of the fan belt was permanently fixed in September 2016.

21. Mr Stirk then put to the Applicant that he did not give any instruction or ask for the refund or replacement of the vehicle within six months as prescribed in section 56 of the Act. Notwithstanding this, the Respondent argued that the defects encountered with the vehicle were not material to warrant any replacement of the vehicle, and the defects were fixed at the Respondent's expense.

22. The Respondent has, in paragraph 9 of its Answering Affidavit, admitted that, indeed the Applicant purchased the vehicle from it on 23 December 2015, and that a portion of the purchase price was financed by the MFC. The Respondent further admitted that the MIOSA made an adverse finding against it when the MIOSA found that the vehicle was not suitable for the purpose for which it was intended, and that the Respondent was required to uplift the vehicle and refund the money paid by the Applicant, less the cost of usage. The Respondent apprised the panel that it was unable to comply with the MIOSA's finding because the Applicant has failed to return the motor vehicle and the parties did not agree on the method of calculation of the cost of usage.

23. In conclusion of its arguments, the Respondent apprised the panel that it could have raised a *point in limine* concerning the ownership of the vehicle in order to counter the relief sought against it by the Applicant, which is to cancel the sales agreement and replace the vehicle. According to the Respondent, the ownership of the vehicle resides with the MFC, the financier of the vehicle, until the final instalment is paid. In support of this contention, the Respondent relied on the case of *MFC (a division of Nebank Ltd) v Botha*[i] wherein Judge A.G Binns-Ward remarked:

> *"It is not plainly evident how a consumer in the position of the respondent would be able to avail of the protection offered to consumers in terms of s 56(2) of the CPA. He could not return the vehicle to the*

supplier against a refund of the purchase price because ownership of the car vested in the credit provider; and it was the credit provider, and not he, that had paid the purchase price. Counsel agreed in the circumstances that the only practical manner in which effect could be given to the evident legislative object would be either for the bank to cede its rights as 'consumer' against the supplier in terms of the CPA to the respondent, thus permitting the latter to return the vehicle to the dealer against a refund of the purchase price, or for the bank, at the instance and request of the respondent, to exercise its rights as 'consumer' directly against the supplier and to give the respondent the benefit of the refund of the purchase price in satisfaction or reduction of the latter's liability to it under the instalment sale agreement."

24. The Respondent informed the panel that it decided to abandon the above argument so as to avoid delays in hearing the merits of the case at hand.

25. The Respondent has not disputed any allegation contained in the Applicant's affidavit concerning the violation of section 56 of the Act. The panel put it to the legal representative of the Respondent that it did not place any evidence before the Tribunal denying any specific issue raised in the Applicant's affidavit. The Respondent seems to have relied on paragraph 5 of its affidavit wherein it stated that *"the contents of the affidavit filed by the Complainant in support of his application are to be taken as denied in their entirety as if specifically traversed and denied."* The panel, however, found this to be vague and not useful in assisting the Tribunal in arriving at a fair and rational determination.

26. Upon the panel's inquiry, the Respondent argued that the Applicant failed to prove any violation of section 56(2) of the Act, as he did not ask nor did he instruct, or demand a replacement or refund within the six months prescribed in that section. The Respondent also stated that the provisions of section 56(3) do not apply on the present case because the nature of the problems did not require replacement of the entire vehicle but only certain components, namely; the fan belt which was replaced within six months. Furthermore, the Respondent contended that the nature of the defect was not material enough to qualify for a refund or replacement.

27. To the extent that the Applicant was unable to drive or use the vehicle for the purpose it was intended for, the Respondent argued that the Applicant was given a courtesy car while the vehicle was being fixed. The Respondent accepted the list of problems alleged by the Applicant in its founding affidavit and accompanying documents.

ANALYSIS OF APPLICABLE LAW

28. The Applicant alleged in his documents annexed to the founding affidavit that the Respondent contravened the following sections of the Act:

28.1 Section 55

28.1.1 Section 55 deals with the consumer's rights to safe, good quality goods that are reasonably suitable for the purposes for which they are generally intended; and are in good working order and free of any defects; and

28.1.2 The Applicant provided information and testified before the Tribunal that he purchased the used vehicle from the Respondent, and within a month from the date of purchase (23 December 2015), he encountered numerous defects in the vehicle. These defects were reported to the Respondent, who fixed them at their own costs;

28.2 This section is applicable to the present case, and the evidence provided to the Tribunal will be considered in conjunction with the provisions of section 56 below;

28.3 Section 56(2) and 56(3)

28.3.1 This section deals with implied warranty of quality; wherein the producer or importer, distributor and the retailer each warrant that the goods comply with the requirements and standards contemplated in section 55, except to the extent that those goods have been altered contrary to the instructions, or after leaving the control, of the producer or importer, a distributor or the retailer, as the case may be.

28.3.2 Section 56(2) provides:

"Within six months after the delivery of any goods to a consumer, the consumer may return the goods to the supplier, without penalty and at the supplier's risk and expense, if the goods fail to satisfy the requirements and standards

contemplated in section 55, and the supplier must, at the direction of the consumer; either-

(a) Repair or replace the failed, unsafe or defective goods; or
(b) Refund to the consumer the price paid by the consumer, for the goods".

28.3.3 Section 56(3) provides:
"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 is discovered, the supplier must –

(a) Replace the goods; or
(b) Refund to the consumer the price paid by the consumer for the goods."

28.4 Based on the evidence before the Tribunal, this section will not apply. The details will be discussed more fully under the evidence analysis section.

ANALYSIS OF THE EVIDENCE

29. Based on the information placed before the Tribunal, the following evidence does not appear to be in dispute:

29.1 The Respondent fixed the aircon compressor problem in February 2016, at its own expense, and the problem did not arise again;

29.2 Car bonnet was re-sprayed at the Respondent's cost;

29.3 Both parties agreed that the problem of the fan belt occurred on five (5) different occasions, and the belt was replaced at each time, by the Respondent, at no cost to the Applicant. The last incident occurred in September 2016, which was over 6 months from the date of purchase of the vehicle. The problem with the recurring of shredding of the fan belt was caused by the fitment of the incorrect size of the fan belt on each occasion. Once the correct fan belt was fitted, the problem did not occur again.

30. The following aspects appear to be in dispute:

30.1 Whether, within six months from the delivery of the vehicle, the Applicant directed, requested or instructed the Respondent to replace the vehicle or to refund the purchase price; and

30.2 Whether the defects were of a material nature that rendered the vehicle unfit for purchase.

31. The Respondent did not dispute the nature of problems as alleged by the Applicant in his affidavit; however, it disputes that the Applicant is entitled to the relief sought based on the provisions of section 56(2). The Respondent's legal representative replied:

"Yes, but as you would accept today, we have not felt the need to lead any evidence because we are actually arguing on the evidence of the Applicant. We understand that evidence that he has given are the facts. In respect of the times when there were problems and what the problems were, we are not disputing that, we are just saying that in terms of the Act, that does not avail him the relief that he now seeks on his own version".

32. At the core of this dispute, is the contention by the Respondent that the Applicant failed to exercise his rights in terms of demanding a refund or replacement of the vehicle within the prescribed period of six months. As a result, the Applicant did not fulfil the requirements of section 56(2).

33. The evidence before the Tribunal supports this contention, as the Applicant could not furnish any proof that he insisted on a refund or replacement of the goods when he expressed his dissatisfaction and frustration with the recurrence of the fan belt problem. The only aspect mentioned by the Applicant is that he held several discussions with the Respondent's principal dealer wherein they focused on finding a solution.

34. He admits that he did not specifically demand and insist on a replacement or refund as he trusted that the Respondent will go out of its way to fix the problem. The Applicant testified at the hearing, as captured in paragraph 10 of the hearing transcript:

"Yes there was no email stating it, there was no demand made by myself; there was a discussion that I had with somebody who had sold me vehicle. I was expressing my unhappiness and my dissatisfaction with the 'shitty' service I had received and I was saying can we find a solution".

35. He allowed and opted for the Respondent to fix the components of the vehicle that caused problems, and the cost was borne by the Respondent.

36. The Applicant testified that such talks or discussions were held in or around July 2016, which is beyond the prescribed six month's period mentioned in section 56(2). The Applicant contended in paragraph 20 of the hearing transcript that every time there was an incident or a problem with the repaired or replaced good or component, that six month prescribed period is extended because the shredded fan belt problem recurred even after a new fan belt was fitted.

"So my view is that basically every time we have had an accident that six-month period is extended because every time after the first six months, again, it was the fan belt. After the last fan belt incident, again, the gearbox which is what I said here it is another problem, it is not the same...."

37. The Respondent objected to this approach, and cited the matter involving of ***Georgios Vousvoukis v Queen Ace CC t/a Ace Motors, (2016) JOL 35677 (ECG) High Court EC, Grahamstown*** wherein Judge Pickering stated in par 110:

"The Legislature, for whatever reason, has expressly decreed a limitation period of six months for the return of any goods in section 56(2). There is no question of section 56(2) being ambiguous in any way. In my view, it is not open to a court, under the guise of making an "innovative order", to extend this period. Any innovative order made under section 56(2) must be made within the constraints of the legislation and cannot afford consumers more rights than those specifically provided to them in terms of the Act."

38. The Tribunal accepts Judge Pickering's approach and interpretation of section 56(2), that the six month's period cannot be extended.

39. Furthermore, it is stated in ***Naude and Eiselen[1], at 56-6:***

"In summary, the position is that the remedies provided for in s 56(2) will only be available for the first six months after delivery of the goods. After the expiry of this period, the consumer will be able to rely on the residual common-law remedies and, should harm have arisen from the 'defect' in the goods, a claim for damages under either the common law or s61 of the Act (my emphasis)."

[1] Commentary on the Consumer Protection Act, Naude and Eiselen. Consumer Law [2016]

40. As stated above, the Applicant failed to produce evidence demonstrating that he insisted on refund or replacement of the vehicle before the expiry of the six month's period, which should have been on or prior to 23 June 2016. He also does not recall the specific date in July 2016 when he held discussions with the previous principal dealer insisting on finding a satisfactory solution to exterminate the problem.

41. Based on the above evidence, the Tribunal finds that the Applicant could not prove that he exercised his right to claim a replacement or refund within the six month period after purchasing the vehicle. He continually allowed the Respondent to repair the defects to the vehicle. He exercised his right under section 56 and cannot insist on a refund or replacement after the fact.

42. This approach was opposed to by the Respondent on the basis of the legal approach adopted in the above case of ***Georgis Vousvoukis v Ace Motors,*** which distinguished between the repaired component of the vehicle, namely; defective engine and the vehicle itself.

43. In the Tribunal's view it is not necessary to distinguish the relative aspects in this manner. The Applicant exercised his right to have the vehicle repaired in each occasion. Each repair did not cause a new extension of the six months warranty. Each repair would have constituted a repair under section 56(3) of the Act. The warranty would have been for a period of three months from the repair date. The overall warranty period would however remain at six months from date of purchase. There is nothing in the Act which prescribes that the overall six months will be extended under these circumstances.

CONCLUSION

44. The Applicant failed to prove that he exercised his right to a refund or replacement of the vehicle within six months after purchasing it.

45. Based on the evidence, he exercised his right to a repair of the vehicle. The vehicle was repaired by the Respondent on each of the five occasions at no cost to the Applicant.

46. The Applicant only demanded a refund or replacement of the vehicle after the six months period had already expired. Under these circumstances the Respondent's obligations under section 56(2) do not arise.

47. The repair of the vehicle under section 56(3) of the Act did not result in the overall six months warranty period being extended.

ORDER

48. Accordingly, for the reasons set out above, the Tribunal makes the following order:-

48.1 The Applicant's application for the relief in terms of the Act is denied;

48.2 There is no order as to costs.

DATED ON THIS 22nd day of January 2020

Ms N Maseti
Presiding Member

Adv. J Simpson and Mr A. Potwana concurring.

Authorised for issue by National Consumer Tribunal
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[1] Unreported Case no: 6987/13 (2013) ZAWCHL 107, (15 August 2013).