

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

Case number: NCT/136594/2019/75(1)(b)

In the matter between:

PHILA THEOPHULUS DLEKEDLA

APPLICANT

and

JASON WHEELS (PTY) LTD
trading as
UMNGENI AUTO HAUS

RESPONDENT

Coram:

Ms M Nkomo – Presiding member

Dr M Peenze – Tribunal member

Ms H Alwar – Tribunal member

Date of hearing – 1 June 2021

Date of judgment – 4 June 2021

JUDGMENT AND REASONS

APPLICANT

1. The Applicant is **Phila Theophulus Dlekedla**, an adult male and consumer as defined in the Consumer Protection Act, No. 68 of 2008 ("the Act" or "the CPA"), with his place of residence in Libode, Mthatha, in the Eastern Cape. At the hearing, the Applicant represented himself.

RESPONDENT

2. The Respondent is **Jason Wheels (Pty) Ltd, trading as Umgeni Auto Haus**. This private company is duly registered and incorporated in terms of the company laws of the Republic of South Africa.

3. The Respondent is a car dealership and supplier of pre-owned motor vehicles to members of the public, operating at 485 Umngeni Road, Durban Kwazulu-Natal; under the registration number CR2012/176636/07.
4. The Respondent opposed the application and filed an answering affidavit.
5. Ms Alicia Nagiah from Nagiah Attorneys, based in Durban, represented the Respondent in these proceedings.

APPLICATION TYPE AND RELIEF SOUGHT

6. On 18 August 2020, a single member of the National Consumer Tribunal ("the Tribunal") granted the Applicant leave to refer this matter to the Tribunal in terms of section 75 (1) (b) of the Act.
7. In this application, the Applicant seeks an order in terms of section 75 (1) (b) that the Respondent refunds R100,000.00 (hundred thousand rands) of the purchase price of R110,000.00 (one hundred and ten thousand rands) to the Applicant:
8. A reference to a section in this judgment refers to a section in the CPA.

SUMMARY OF EVIDENCE

The Applicant's case

9. The Applicant testified that he purchased a white 2014 VW Polo, 1.2 Tdi Blue Motion, with engine number CFW452246 ("the vehicle") from the Respondent on 21 July 2017 for a purchase price of R110,000.00 (one hundred and ten thousand rands) ("the purchase price"). The parties agreed that R100,000.00 (one hundred thousand rands) would be paid on the 21st of July 2017, when the Applicant took possession of the vehicle, and that the balance of R10,000.00 (ten thousand rands) was payable in 5 (five) equal instalments, commencing on 15 August 2017.

10. According to the Applicant, he purchased the vehicle for personal purposes after negotiation with the Respondent's authorized sales agent ("the agent"). According to the official email correspondence submitted as part of the Applicant's application to the Tribunal, the agent was Mr Cassim.¹ The agent marketed the vehicle to the Applicant as a high-performance vehicle in a good state.

Defects, failure and faults

11. According to the Applicant, on the day of purchase, 21 July 2017, the Respondent's agent started the vehicle to warm up the vehicle's engine. The Applicant then noticed that the vehicle's temperature was remarkably high and informed the Respondent accordingly. The Respondent indicated that the temperature had risen because the dealer had not driven the the vehicle for a long time. However, the Respondent confirmed that there was nothing wrong with the vehicle. The Respondent then refilled the engine coolant with water and informed the Applicant that he could travel back to Mthatha. Hereafter, the Applicant took possession of the vehicle on the same day and proceeded to drive back to Mthatha.
12. During his drive back to Mthatha from the Respondent's premises, whilst in the vicinity of Port Shepstone, the temperature gauge rose again. The Applicant realized that the engine was overheating again and stopped. The Applicant called the Respondent and advised the latter of the persisting overheating problem and his subsequent challenge to use the vehicle. The Respondent instructed him to refill the engine coolant with water and take the vehicle to a mechanic or workshop. According to the Applicant's testimony, the Respondent then telephonically undertook to pay for the repairs if the invoice was presented. This discussion occurred around 16:00 on the day of purchase. As it was a Friday and the Applicant did not know anyone in the KwaZulu-Natal province, the Applicant decided to proceed with his journey back home to Mthatha by refilling with water to regulate the overheating problem. The Applicant also asserts that he expected the Respondent to organize breakdown services, which the Respondent declined to do.
13. In the following week, on or around 25 July 2017, the Applicant took the vehicle to the **Mthatha VW & Audi Clinic Centre ("the workshop")**. The workshop's diagnosis revealed that the vehicle

¹ See page 40 of the Tribunal Bundle.

had been leaking water for a long time. The Respondent did not disclose this fact to the Applicant at the time of purchase.

14. After consulting with the Respondent, the workshop replaced the thermostat and coolant (also referred to as “**the repairs**”), amounting to an expense of **R3,731.03 (three thousand, seven hundred and thirty one rands and three cents)**.
15. Unfortunately, the faulty thermostat had caused other problems to the vehicle’s engine. According to the workshop, more time and money were required to repair the vehicle further. The fault report issued by the workshop revealed the following flaws in the vehicle:
 - 15.1. Cylinder Head is leaking water;
 - 15.2. Cylinder No. 3 (dealer informed); and
 - 15.3. Cylinder head Gasket Blown.²
16. The workshop presented the diagnostic report to the Respondent. At this point, the Respondent indicated that, although it undertook to pay for the repairs, it was no longer willing and able to do so. As a result, the Respondent never paid the R3,731.03 (three thousand seven hundred and thirty one rands and three cents), in spite of its former undertaking.
17. At this stage, the Applicant realized that the Respondent also did not intend to transfer ownership to the Applicant. The Respondent insisted that the Applicant first pay him the balance of R10,000.00 (ten thousand rands) before the Respondent would pay for the mentioned repairs or provide the Applicant with the vehicle registration certificate (“the vehicle logbook”). As the Respondent failed to complete the necessary vehicle transfer documentation for registration with the required Transport Authorities in South Africa, it follows that the Applicant was at no stage the vehicle's legal owner in terms of the Road Traffic Laws of South Africa.
18. As he detected serious faults and defects in the vehicle, the Applicant demanded that he be refunded the amount paid to the Respondent. Further, as the Respondent failed to advise him of the engine defects, the Applicant demanded that the vehicle is returned to the Respondent.

² Tax Invoice No 4907 on page 44 of the Tribunal Bundle.

19. After the Applicant requested a refund, the Respondent failed to answer the Applicant's calls and refused to pay for the workshop's repairs. As a result, the workshop refused to release the vehicle before receiving payment. The workshop also threatened to auction the vehicle if the Respondent failed to make payment.

20. On or around August 2017, the Applicant approached the South African Consumer Complaints ("SACC") to mediate the dispute with the Respondent. According to the documentary evidence before the Tribunal, the Respondent advised the SACC mediator that:

"On the date of delivery the client called me whilst enroute to Transkei stating that the vehicle has a water leak...I called him a little later and he stated he had filled the water and is going to have it checked...I was rather surprised when he called in 5 days later telling me that he is at a VW Dealership in Umthatha...It was brought to my attention that the thermostat housing has a leak...I instructed them to replace it and invoice me."³

21. The Respondent did not cooperate fully in the SACC mediation process and failed to provide adequate responses to the enquiries from the SACC mediator. Accordingly, the dispute remained unresolved, and the SACC closed their file.

22. In October 2017, the Applicant filed a dispute against the Respondent with the Motor Industry Ombudsman of South Africa ("MIOSA"), who did not receive cooperation from the Respondent either. On 14 May 2018, MIOSA closed its inquiry and advised the Applicant to file a complaint with the National Consumer Commission ("the Commission" or "the NCC").

23. The Applicant escalated its complaint to the Commission, who, on 14 June 2019, issued a notice of non-referral.

Attempts to return the vehicle and claim a refund of the purchase price

³ See page 40 of the Tribunal bundle.

24. Due to the defects, the Applicant attempted to cancel the sale agreement and return the vehicle. To this end, the Applicant outlined that he went to collect the vehicle at the workshop's premises, only to be chased away by the workshop, who again threatened to auction the vehicle to recover storage costs. According to the Applicant, he last saw the vehicle at the premises of the workshop. As the workshop prevented him from removing the vehicle until the dealer made the payment, he is unsure what happened to the vehicle or whether the workshop indeed auctioned off the vehicle.
25. According to the Applicant's testimony, he is not responsible for the storage costs, as he was following the Respondent's instructions when he took the vehicle to the workshop. Further, as the Respondent undertook to pay for the costs of repairs, the Applicant believes that the Respondent should honour its undertaking, pay for the repairs and collect the vehicle from the workshop as the legal owner thereof.
26. The Applicant had less than a week's usage from the vehicle since the date of purchase. The Applicant has not driven the vehicle since he has left it with the workshop.

The Respondent's case

27. Kribentheran Govender (Govender) testified that he is the Respondent's manager at its Bellville branch. He could not recall the name of the sales agent who assisted the Applicant in purchasing the vehicle in 2017 but confirmed that it most probably was a former employee who had since left the Respondent's employment.

Defects, failure and faults

28. Govender was not involved in the negotiations that led to the conclusion of the sale. He also did not discuss anything with the Applicant on the day of the purchase. However, he confirmed that his Secretary, Ms M Deoraj, informed him that the Applicant called the Respondent on the day of the purchase to complain about a problem experienced by the Applicant with the vehicle. He further confirmed the correctness of the Respondent's email address, as reflected on the letter dated 20 September 2017, sent by Cassim on behalf of the Respondent, to the SACC mediator.

29. Govender confirmed that the logbook was not provided to the Applicant and that the Respondent would only release it to the Applicant once the final payment of the outstanding R10,000.00 (ten thousand rands) was received. According to Govender, the Applicant has failed to pay the balance of R10,000.00 (ten thousand rands).

Attempts to return the vehicle and claim a refund of the purchase price

30. Govender failed to respond to the Applicant's claim that he, as a consumer, should be refunded with the purchase price. Govender also failed to respond to the Applicant's claim that the Respondent was expected to recover the vehicle from the workshop.
31. Instead, Govender offered to write off the R10,000.00 (ten thousand rands) as a settlement gesture, which he believed would empower the Applicant to pay for the repairs done by the workshop (the owed amount of R3,731.03 (three thousand seven hundred and thirty one rands and three cents). Govender submitted that this gesture would then ensure that the workshop can release the vehicle to the Applicant.
32. The Applicant did not accept the settlement proposal, as:
- 32.1. He was not sure if the vehicle was still in possession of the workshop;
 - 32.2. The workshop insisted on the payment of storage fees for the period stored;
 - 32.3. He was not the legal owner in terms of the registration documents of the vehicle;
 - 32.4. He took the vehicle to the workshop on instruction by the Respondent;
 - 32.5. The workshop completed the work after confirming with the Respondent that the latter would pay the invoice; and
 - 32.6. He had good reason to cancel the purchase and request a refund of payments made in the amount of R100,000.00 (one hundred thousand rands).
33. Govender confirmed that the Respondent is not a registered credit provider, but insisted that it was lawful to withhold the registration certificate from a consumer until the consumer has fully paid the purchase price. The Respondent's witness also testified that the vehicle was still reflected on the Respondent's list of pool vehicles and covered by the Respondent's insurance.

34. Mr Govender's testimony regarding the Respondent's undertaking to pay the workshop contradicted the documentary evidence before the Tribunal. Also, whilst Govender denied that the Applicant complained about overheating, he admitted that his Secretary advised him of the Applicant's call regarding problems experienced on the way to Mthatha.
35. Govender's testimony was also inconsistent regarding knowledge of the complaint in general. He testified that he first heard about the overheating issue from the MIOSA. However, various email correspondence confirmed the efforts made by the SACC to facilitate the matter, indicating that the Respondent was aware of this matter before the referral to the MIOSA.

RELEVANT STATUTORY PROVISIONS AND ANALYSIS

Marketing and Representations

The CPA

Definition of prohibited conduct

36. The CPA defines prohibited conduct to mean an act or omission that contravenes the CPA.

Section 29: General standards for the marketing of goods or services

37. Section 29 precludes a retailer from marketing goods in a manner that is likely to imply a false or misleading representation concerning those goods as contemplated in section 41.

Section 41: False misleading or deceptive representations

38. Section 41 (1) precludes a supplier or permitting another person on behalf of the supplier, by words or conduct when marketing goods from expressing a false, misleading or deceptive representation concerning a material fact to a consumer.

Analysis

39. It became common cause that the vehicle was sold without its full service history and without the required registration documentation completed to effect the transfer of ownership to the Applicant.
40. The Applicant testified that the Respondent represented to him that the vehicle was of good quality and confirmed at the time of sale that the water leak and heated engine were only a result of the vehicle being stationed for an extended period. This representation is found to be false, misleading and deceptive, as the vehicle overheated again during the Applicant's ride home from the Respondent's premises on the day of purchase.
41. The Respondent's failure to provide the Applicant with the logbook, under the premise that it was lawful to retain the registration certificate until payment of the balance of R10,000.00 (ten thousand rands), was a further deceptive representation. The dealership is responsible for ensuring that all the registration transfer documents are completed and submitted to the consumer before delivering the vehicle to the consumer.
42. The Respondent could not sway the Applicant's version of events that transpired on the day of the purchase of the vehicle. The Applicant was a party to the negotiations that led to the sale agreement, and the Respondent chose not to call the sales agent as a witness to the proceedings. The Applicant's evidence of what the Respondent's agent represented to him is therefore not dependent on the credibility of any other person and is therefore not hearsay evidence.⁴ Nor was the Applicant's evidence tendered as evidence of the truth of what the Respondent's agent represented to him, but of the fact of the representation itself.⁵
43. Therefore, the Tribunal is persuaded that the Respondent sold the vehicle to the Applicant based on a prior misrepresentation that the vehicle was a high-performance vehicle of good quality, without any defect.

Claim based on the vehicle's defects

The CPA

⁴ Section 3 (4) of the *Law of Evidence Amendment Act* 45 of 1998.

⁵ *Estate De Wet v De Wet* 1924 CPD 341.

Section 55: Consumer's right to safe, good quality goods

44. Section 55 (2) (a), (b) and (c) respectively give a consumer the right to receive goods that are reasonably suitable for their intended purpose and are of good quality, in good working order and free of defects; and was 'plainly' not useable and durable for a reasonable time.

Section 56: Implied warranty of quality

45. Section 56 (1) provides that where there is an agreement concerning the supply of goods, there is an implied provision that the retailer warrants that the goods comply with the requirements and standards contemplated in section 55. 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. If the supplier does not meet the requirements and standards contemplated in section 55, then the supplier must, without imposing a penalty and at the supplier's risk, either repair or replace the defective goods under section 56 (2) (a) or refund the consumer the price the consumer paid for the goods under section 56 (2) (b).
46. Section 56 (3) goes further. It provides that if the supplier repairs goods, and within three months after that repair has not remedied the defect, or a further defect is discovered, then the supplier must either replace the goods or refund the consumer the price the consumer paid for the goods.
47. Section 55 (6) provides an exception to section 55 (2) (a) and (b). It stipulates that section 55 (2) (a) and (b) does not apply to a transaction if the supplier has informed the consumer that the supplier has offered the particular goods in a specific condition. The consumer has agreed to accept the goods in that condition or acted reasonably with accepting goods in that condition.

Analysis

48. Our courts have held that it would seem uncontentious that a complex product is defective where its defectiveness is attributable only to a fault in one of the components. For example, a car is defective where only its brakes fail.⁶ The same principle will apply in this instance where the vehicle is defective due to a constant water leak or overheating.

⁶ *Vousvoukis v Queen Ace CC t/a Ace Motors* 2016 (3) SA 188 (ECG), paragraph 100.

49. It was common cause that all the defects, failures or faults manifested within six months of the Applicant taking delivery of the vehicle. As accepted by the Tribunal, the testimony of the Applicant is that the overheating and water leak manifested on the day of purchase.
50. In the Tribunal's view, the vehicle did not satisfy the requirements of section 55 (2) because the vehicle was not suitable for its intended purpose; was neither of good quality, nor in good working order and free of defects; and 'plainly' not usable and durable for a reasonable time. Therefore, the Applicant was entitled in terms of section 56 (2) to return the vehicle to the Respondent within six months of taking delivery of the vehicle without incurring a penalty. In that event, the Respondent was obliged to refund the Applicant the amount paid for the vehicle.
51. The evidence reveals that the Respondent had not remedied the engine failure and failed to pay the workshop that replaced the thermostat and coolant on instruction from the Respondent. The workshop is not a third party repairer that repaired the vehicle without the Respondent's consent. According to the testimony and other documentary evidence provided to the Tribunal, the workshop operated with the Respondent's consent. Therefore, the Respondent must accept liability for payment of the repairs and the vehicle's status while in possession of the workshop.

Applicant's attempts to return the vehicle and claim back the purchase price

52. The Tribunal is satisfied that the Applicant attempted to return the vehicle to the Respondent. After the Respondent failed to pay the workshop, the Applicant also attempted to remove the vehicle from the workshop. Due to no fault of the Applicant, the workshop prevented the Applicant from removing the vehicle, and the accountability remained with the Respondent whilst the vehicle stayed in possession of the workshop.
53. It was common cause that the Respondent refused to take back the vehicle, whether the Applicant would pay the workshop out of his own pocket or not. It refused to do so because it believed the Applicant acted unreasonably by seeking to cancel the sale agreement on his terms only, without having paid the total purchase amount.
54. In the Tribunal's view, the Applicant's action of taking the vehicle to the workshop does not mean that the Applicant has forfeited his right to return the vehicle and reclaim the purchase price in

terms of his established right to do so under the CPA. The Respondent indirectly supported this view, by directing the Applicant to take the vehicle to a workshop and by undertaking to pay for the thermostat housing replacement.

55. The Applicant's tender to return the vehicle and claim a refund of the purchase price does not lie on a contractual warranty but a statutory remedy available to the Applicant under the CPA. A limitation to the Applicant's rights must, therefore, lie in the CPA. The Applicant relies on sections 56 (2) and (3), which do not limit the Applicant's rights to return the vehicle and reclaim the purchase price. If the legislature had intended to limit a consumer's rights under sections 56 (2) and (3), then it would have inserted a similar provision to that contained in section 20 (6).⁷ This latter section requires a consumer to account for the use, depletion or deterioration of the returned goods.
56. Consequently, the Applicant does not have to account for the use, depletion or deterioration of the vehicle or the vehicle's condition not having deteriorated when exercising his rights under sections 56 (2) and (3) to return the vehicle and claim a refund of the purchase price.
57. The Tribunal found that the Respondent was obliged to pay the workshop for the repairs, as was agreed to in advance. After that, the Respondent should have taken possession of the vehicle and refunded the Applicant the purchase price. The Respondent failed to do so. Therefore, the vehicle's risk shifted to the Respondent while stationed at the workshop.

CONCLUSION

58. The Respondent did not provide the Applicant with the vehicle's service history or registration documentation when he took possession of the vehicle. The Respondent also failed to disclose to the Applicant that the vehicle has an existing overheating problem and water leakage on cylinder no 3. When the vehicle overheated at the Respondent's premises on the day of collection, the Respondent's employee gave the Applicant an assurance that the vehicle was perfect and stated that the high temperature was due to the vehicle being parked for a long time. The subsequent events had proven this explanation by the Respondent to be false and misleading.

⁷ Section 20 deals with a consumer's right to return goods and does not substitute the right to return unsafe or defective goods in section 56.

59. The parties did not sign a purchase agreement. However, invoice no 572, issued by the Respondent on 21 July 2017, reveals that the Respondent sold the vehicle without a warranty or duty to repair it. This exclusion of all liability is inconsistent with the provisions of the Act. Further, the Respondent did not specify which workshop the Applicant should take the vehicle for repair but indicated that the Applicant should take the vehicle to any workshop, whereafter it would pay the repair costs. Indirectly, the Respondent, therefore, acknowledged the legislative warranty and its responsibility to pay for repairs within the inherent warranty period as outlined in the Act.
60. According to the Applicant, the vehicle was not of good quality as expected by the consumer. It encountered water leakage and overheating problems from the date of purchase, which problems made it unfit for purpose. Further, the Respondent was not helpful. It did not provide proper guidance to the Applicant regarding the names of repair workshops where the Applicant could take the vehicle for assessment and repair. While the Respondent informed the SACC that it authorized Mthatha VW & Audit Clinic Centre to fix the thermostat housing and coolant, it failed to pay the workshop for such repairs. Subsequently, the vehicle has still not been released by the workshop, and huge storage costs were incurred.
61. Due to the Respondent's failure to pay the workshop, the Applicant had subsequently lost possession of the vehicle. As the Respondent also allowed the Applicant to take possession of a vehicle without having ensured the proper licensing of the vehicle and transfer of ownership onto the Applicant's name, the Applicant was left with little recourse in law.
62. The Tribunal wishes to express its utter disappointment in how the Respondent treated the Applicant as a consumer. The Tribunal noted with concern the Respondent's total disregard for the rights of consumers to receive honest and transparent dealings, proper service and good quality goods. The Respondent's insistence that the goods are sold with the exclusion of any accountability or responsibility for repairs, is unlawful and unjust. Therefore, the Respondent's conduct is a clear example of prohibited conduct in terms of the Act.

FINDING

63. Consequently, the Tribunal finds that the Respondent contravened sections 41 (1), 55 (2), and 56 (2), which constitutes prohibited conduct.

64. The Applicant is entitled to a refund of the amount that he has paid towards the purchase price. The Respondent, in turn, is entitled to recover the vehicle from the workshop.

ORDER

65. Accordingly, the Tribunal makes the following order:

65.1. The Respondent is to refund the Applicant an amount of R100,000.00 (one hundred thousand rands), being the amount paid towards the purchase price of the vehicle, within 20 business days after issuing of this judgment; and

65.2. There is no order as to costs.

signed

DR MARIA PEENZE

TRIBUNAL MEMBER

Tribunal members Ms M Nkomo and Ms H Alwar concur with this judgment.

Authorised for issue by The National Consumer Tribunal

National Consumer Tribunal

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