IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case number: NCT/133864/2019/75(1)(b)

In the matter between:

SIYABONGA NXUMALO **APPLICANT**

and

WESTEND MOTORS CC **RESPONDENT**

Coram:

Mr T Bailey – Presiding Tribunal member

Dr L Best – Tribunal member

Prof B Dumisa – Tribunal member

Date of hearing – 12 August 2021 via the Microsoft Teams digital platform

Date of judgment – 2 September 2021

JUDGMENT AND REASONS

APPLICANT

1. The Applicant is Siyabonga Nxumalo (the applicant). He is an adult male and a consumer who resides in Durban, KwaZulu-Natal.

2. The applicant represented himself at the hearing of this application.

RESPONDENT

3. The Respondent is Westend Motors CC (the respondent), duly registered and incorporated in terms of the company laws of the Republic of South Africa. The respondent's principal place of business is at 148/150 West Street, Durban, KwaZulu-Natal.

4. The respondent is a dealer and supplier of pre-owned motor vehicles to members of the public.

5. One of the respondent's members, Yashin Megnath (Yashin), represented the respondent in these proceedings.

APPLICATION TYPE AND RELIEF SOUGHT

6. The applicant makes this application in terms of section 75 (1) (b) of the Consumer Protection Act, 2008 (the CPA)[1]. He seeks an order that:

6.1. The respondent refunds the applicant R130 000.00 he paid to buy a white pre-owned BMW F 20 1 series motor vehicle; and

6.2. The chairperson of the National Consumer Tribunal (the Tribunal) issues him a notice in terms of section 115 (2) (b) of the CPA to institute a claim in a civil court to recover the damages he alleges he suffered arising out of the purchase of the vehicle.

BACKGROUND

7. Shortly after the applicant took possession of the vehicle, it broke down. The respondent did not assist the applicant. The applicant approached the Retail Motor Industry Ombudsman and Consumer Affairs Division in the KwaZulu-Natal Economic Development, Tourism and Environmental Affairs to assist him in obtaining recourse. However, their interventions did not bear fruit.

8. On 4 August 2018, the applicant complained to the National Consumer Commission (the NCC). On 27 May 2019, having assessed the complaint, the NCC issued a notice of non-referral under section 72 (1) (a) (ii) of the CPA because the complaint did not allege facts which, if true, would constitute grounds for a remedy under the CPA. The NCC elaborated in its covering letter that the transaction the applicant entered into with one A Magnath was defined as a private sale transaction and not covered by the CPA. It could, therefore, not pursue the matter.

[1]Section 75 (1) (b) provides that if the National Consumer Commission issues a notice of non-referral in response to a complaint, the complainant concerned may refer the matter directly to the Tribunal, with leave of the Tribunal.

9. On 16 September 2019, as required of him, the applicant obtained the leave of the Tribunal to refer this application directly to the Tribunal.

10. The Tribunal Registrar (the registrar) set the application down for hearing on 30 January 2020. The Tribunal postponed the hearing that day for the respondent to apply to the Tribunal to condone the late filing of its answering affidavit.

11. The Tribunal subsequently condoned the late filing of the answering affidavit. The applicant exercised his right to file a replying affidavit.

12. The registrar again set the matter down for hearing on 16 March 2021. On that day, the Tribunal elected to postpone the hearing again. On 26 March 2021, it handed down a postponement ruling. It directed the applicant to join Ashkelon Megnath (Ashkelon) as the second respondent in this matter. It ordered the applicant to serve the application and all pleadings on Ashkelon within 15 days from the date of the postponement ruling by registered post and with Ashkelon's consent by email, if available. It also ordered the registrar to set the application down for hearing against the first respondent only if the applicant failed to serve the application "as instructed".

13. The applicant did not serve the application "as instructed", and the registrar set this application down for hearing on 12 August 2021.

14. In the papers, Ashkelon Megnath is variously referred to as "Ashreen Magnath", "Ash", and "Ashkelon Megnath". In this judgement, he is referred to as "Ashkelon".

NON-JOINDER

15. The Tribunal dealt with the applicant's failure to join Ashkelon as the second respondent in this matter when the hearing commenced on 12 August 2021.

16. The applicant informed the Tribunal that he had experienced difficulty joining Ashkelon as the second respondent because he had to serve the joinder application on both the respondent and Ashkelon. He was not able to do so, and the registrar set the matter down for hearing. He believed he had sufficient evidence to proceed against the respondent only and was "happy" to do so.

17. Yashin informed the Tribunal that on 15 April 2021, he had sent an email requesting that all correspondence in this matter be addressed to him. He, too, consented to the Tribunal hearing the matter.

SUMMARY OF SUBMISSIONS

Applicant

Sale of the vehicle

18. On 26 April 2018, the applicant approached the respondent to purchase a pre-owned red BMW motor vehicle he had seen advertised on a website called car.com and telephonically enquired about it. The respondent's salesperson, Siphwe Mthembu (Mthembu), informed the applicant that the respondent had sold the red BMW. The applicant viewed other motor vehicles and confirmed his interest to purchase a white pre-owned BMW F 20 1 series motor vehicle (the vehicle). Mthembu introduced the applicant to Ashkelon as the sales manager or sales executive.

19. Ashkelon told the applicant that the vehicle was in demand and other potential customers were sorting out their finances with their respective banks. The motor vehicle would be sold on a "first-come, first-served" basis. Ashkelon would prefer to sell the vehicle to the applicant because the applicant was paying cash, and there was less paperwork. He advised the applicant to make payment before completing the paperwork.

20. Ashkelon drove the applicant to Standard Bank (the bank), where the applicant transferred the purchase price of R130 000.00 into the banking account that Ashkelon provided at the bank. They returned to the respondent's premises, where Ashkelon introduced Ceri Erasmus (Erasmus) to the applicant as the "Admin Officer". Erasmus initiated the paperwork. She presented a piece of paper (the sale agreement) to the applicant and described it as a confirmation of sale. The applicant signed the sale agreement. She added that the contract, transfer documents, logbook and other documents would be provided to the applicant later.

21. Erasmus told the applicant that it would take about three hours to service the vehicle and repair the brakes. She recorded the service and brake repairs before the handover on the sale agreement.

22. About three hours later, Ashkelon returned from the workshop with three pages bearing the SMG logo. He explained the papers proved the previous owner had serviced the vehicle before trading it in to their shop. There was, therefore, no need to service the vehicle. They had repaired the brakes, and the vehicle was ready to go.

23. The applicant entered the vehicle and pushed the ignition button. The vehicle's dashboard screen showed a message that the "brakes need attention, contact service." Ashkelon explained that it took time to remove the message. They could refer the applicant to someone to repair the dashboard message, or he could bring the vehicle back at any time. The applicant then drove off.

Defects

24. During the following four weeks, the vehicle showed signs of powerlessness unlikely for a serviced 2012 BMW model within an odometer reading of 155 000 kilometres. The applicant assumed it was normal because he was unfamiliar with the type of vehicle. However, on 24 May 2018, the applicant realised he had a problem when the vehicle broke down and started smoking. He waited in the vehicle until dawn. He called a breakdown service that took the vehicle to the respondent, which was closed. He, therefore, requested the breakdown service to drop the vehicle at DG Wheel Alignment Centre (DG Wheel) next door.

25. Later that morning, the applicant spoke to Mthembu and Ashkelon. They told the applicant they could do nothing because the applicant had purchased the vehicle for cash and signed a voetstoots clause. Since the applicant was in dispute with the respondent, he requested DG Wheel to perform a diagnostic test to determine the extent and cause of the damage.

26. DG Wheel informed the applicant that engine failure due to non-service had caused the vehicle to break down. In addition, the vehicle's brake pads and brake discs had seriously worn down, and the applicant put himself in "gross danger" by driving the vehicle.

27. The applicant did not have space to accommodate the vehicle. DG Wheel agreed to keep the vehicle and charge daily storage costs from the fourth day. The applicant communicated this information to the respondent and provided it with the quotation to repair the vehicle. The respondent denied involvement in the matter.

Additional documents

28. On 12 June 2018, Erasmus issued additional documentation to the applicant, including the vehicle's Registration Certificate (the registration certificate) and a Notification of Change of Ownership (the ownership notification) bearing the respondent's name as the previous owner and the applicant as the new owner.

29. On or about 18 June 2018, the applicant met with the respondent's dealership principal, Yashin. He told the applicant that the respondent did not employ Ashkelon, who ran a wholesale business from the respondent's premises. The applicant had no claim against the respondent because the vehicle belonged to Ashkelon as a private person.

30. Yashin also told the applicant that he and Ashkelon were brothers and the sons of the respondent's owner. Yasheen did not provide the applicant with documentary proof of Ashkelon's wholesale business conducted from the respondent's premises. Nor did he provide proof that the wholesale business owned the vehicle.

31. The applicant submitted that he had "all the reason" to believe he purchased the vehicle from the respondent. The ownership notification bears the respondent's stamp as the owner. Erasmus placed the stamp on the ownership notification in the applicant's presence on 12 June 2018. The registration certificate also reflects the respondent as the owner. It is dated 11 June 2018, despite the applicant having purchased the vehicle in April that year. They told the applicant to register the vehicle in his name.

32. In addition, the respondent's showroom window reflects the sales executive as "Ash" and lists his cellular number. The side door of a motor vehicle parked on the first floor of the respondent's showroom reflects the respondent's address and "Ash's" details. There was no indication or documentary proof that the vehicle ever belonged to Ashkelon, which is why the applicant never needed Ashkelon as a party in this matter.

33. The applicant's only mistake was to sign the sale agreement. He believed Ashkelon signed the sale agreement as the respondent's representative. Mthembu also told the applicant that Ashkelon was the respondent's sales manager.

34. Mthembu gave the details of the previous owner, Mnguni, to the applicant. The applicant asked Mnguni if he had serviced the vehicle. He told the applicant it was too expensive to service it. He had, therefore, traded the vehicle in with the respondent and purchased another vehicle. Mthembu also gave the applicant the trade-in papers confirming that Mnguni traded the vehicle in for R80 000.00 and purchased a Polo motor vehicle in its place.

35. These events occurred three years ago. The applicant did not collect the vehicle from DG Wheel and did not know whether it had disposed of the vehicle.

Respondent

Sale agreement

36. The respondent submitted that the applicant purchased the vehicle from Ashkelon, fully aware it was a private sale not involving the respondent. The respondent did not benefit from the transaction. Ashkelon and Yashin are brothers. Ashkelon does personal deals from the respondent's showroom and uses Erasmus when doing so.

37. The applicant knew that Ashkelon was selling the vehicle in his private capacity. The applicant signed the sale agreement with Ashkelon and accompanied him to the bank, where he paid the purchase price into Ashkelon's bank account. The applicant, therefore, completed the transaction well-knowing the conditions of sale and signed the sale agreement.

Defects

38. The respondent denied liability for the vehicle's defects because it was not a party to the sale agreement. It was common knowledge that a failure to maintain a vehicle's braking system could lead to serious injury and loss of life. Yet, with full knowledge of the required repairs, the applicant elected to drive the vehicle with possibly defective brakes after Ashkelon allowed him to bring the vehicle back.

39. When the vehicle broke down a month later, the applicant chose to leave the vehicle with DG Wheel, which is some distance from the respondent's premises and has no association with the

respondent or Ashkelon.

40. Of his own accord, the applicant agreed with DG Wheel to perform a diagnostic test involving stripping the engine without the respondent or Ashkelon's consent and to hold the respondent liable for the repair and high storage costs. The applicant knew that DG Wheel sold the vehicle to defray costs.

41. The respondent's owner met with the applicant, explained the nature of the sale and told the applicant to deal directly with Ashkelon.

Registration certificate

42. There was nothing untoward or devious concerning the registration certificate. Ashkelon personally buys and sells motor vehicles. He also personally buys vehicles traded into the respondent and resells them. The respondent had nothing to hide because Ashkelon knew he would receive the papers and insisted on receiving them as soon as possible. The National Traffic Information System shows the vehicle entered in the respondent's name on 11 June 2018, and the applicant received the registration certificate the following day.

Ownership notification

43. The respondent followed the correct procedure but gave the applicant the paperwork because he wanted the National Traffic Information System document. It also shortened the vehicle's transfer into the applicant's name.

ANALYSIS

Non-joinder

44. The applicant believed the respondent lured him to its premises after enquiring about a red BMW motor vehicle. Upon arriving at the showroom, it transpired the respondent had sold the red BMW. The respondent, therefore, agreed to sell him the vehicle. He agreed to buy the vehicle for cash, and Ashkelon took him to the bank, where he transferred the purchase price into what he believed was the respondent's bank account.

45. By contrast, the respondent insisted that it was not a party to the sale agreement and derived no benefit from it. The respondent attached a supporting affidavit from Ashkelon to its answering affidavit. He confirmed under oath that he concluded a private sale agreement to sell the vehicle to the applicant. The respondent was not a party to the sale agreement. The applicant should, therefore, have complained against him and not the respondent.

46. The actual parties to the sale agreement, therefore, runs to the heart of considering this dispute. A previous Tribunal panel was alive to the materiality of this consideration. It postponed the hearing and directed the applicant to join Ashkelon as the second respondent in this matter. The Tribunal's directive amounted to a loud clarion call to the applicant to ensure all the relevant parties and information were before the Tribunal in the interests of justice. The applicant did not do so. The registrar, therefore, complied with the Tribunal order and set the matter down for hearing against the respondent only.

47. In addition, this Tribunal panel only heard this application upon satisfying itself that the applicant wished to proceed without joining Ashkelon as the second respondent in these proceedings. The applicant did not place evidence before the Tribunal that he had earnestly endeavoured to join Ashkelon as the second respondent. Moreover, the applicant was so confident of his position that he later stated that he never needed to join Ashkelon as the second respondent. In the Tribunal's view, he erred in not doing so. That decision is just one of the hazards of litigation. It denied the applicant the opportunity to cross-question Ashkelon and give the Tribunal a complete picture of the events that unfolded in April and May 2018.

Signed sale agreement and transfer of the purchase price

48. In our law, a general principle is that a person who signs a contractual document signifies their consent to the document's contents unless proven otherwise. If the contents subsequently turn out not to their liking, they have no one but themselves to blame[2]. This principle is known as the *caveat subscriptor* ("let the signer beware") rule.

49. The applicant conceded that he made a mistake in signing the sale agreement. It reflects Ashkelon, and the applicant as the seller and purchaser, respectively. Therefore, it does not help the applicant

[2] *Burger v Central SAR* 1903 TS 571.

to suggest that he believed Ashkelon signed the sale agreement as the respondent's representative. The applicant also did not suggest that he did so under duress.

50. In the Tribunal's view, the applicant undermined his case further when he accompanied Ashkelon to the bank and transferred the purchase price into Ashkelon's account. The transaction record reflects the beneficiary name as "A Megnath", and the transaction is reflected in the applicant's bank statement. Once again, the applicant did not suggest that he made the transfer under duress.

Applicant's reliance on branding, the registration certificate and other documents

51. In the face of having signed the sale agreement and transferred the purchase price into Ashkelon's account, the applicant relied on Ashkelon's branding on the showroom window and side door of a vehicle in the showroom to support his claim that the family had blindsided and conspired against him. The Tribunal is unpersuaded that the branding in itself translates into Ashkelon acting as the respondent's representative when he concluded the sale agreement and accompanied the applicant to the bank.

52. Nor in the face of the respondent's answer that Ashkelon buys and resells vehicles traded into the respondent and its explanation why the registration certificate and other documents were in the respondent's name does it follow that those documents translate into a sale agreement with the respondent.

CONCLUSION

53. Consequently, the applicant has not discharged the onus that the respondent sold the vehicle to him. It is unnecessary to deal with vehicle's defects and related storage costs. The applicant is not entitled to the relief he seeks from the respondent in this matter.

ORDER

54. Accordingly, the Tribunal makes the following order:

54.1. The application is refused; and

54.2. There is no costs order.

TREVOR BAILEY

PRESIDING MEMBER

Tribunal members Dr L Best and Prof B Dumisa concur with this judgment.

Authorised for issue by The National Consumer Tribunal

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