

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

Case number: **NCT/128501/2019/75(1)(b)**

In the matter between:

ANKIA JORDAAN

APPLICANT

And

ERGOFLEX 57 CC T/A ARNOLD MOTORS

RESPONDENT

Coram

Dr L. Best - Presiding Tribunal member

Prof K. Moodaliyar - Tribunal member

Adv J. Simpson - Tribunal member

Date of Hearing - 10 June 2021

JUDGMENT AND REASONS

THE PARTIES

1. The Applicant is Ankia Jordaan, an adult female, residing in Potchefstroom, in the North West province (hereinafter referred to as “the Applicant” or “Ms Jordaan”). At the hearing, the Applicant was represented by Mr Motsepe, a candidate attorney from Neil Esterhuysen and Associates Incorporated.
2. The Respondent is Ergoflex 57 CC, trading as Arnold Motors, a Close Corporation that is duly registered in terms of the Close Corporations Act No. 69 of 1984 of the Republic of South Africa, under registration number 2008/225468/23 (hereinafter

referred to as “the Respondent” or “Arnold Motors”). At the hearing, the Respondent was represented by Mr Blake from JC Blake Attorneys.

3. Due to the Covid 19 pandemic and the resultant social distancing protocols, the hearing took place via a Microsoft Teams video and audio link.

APPLICATION TYPE

4. The Applicant filed an application with the National Consumer Tribunal (“the Tribunal”) for leave to refer a complaint to the Tribunal after the National Consumer Commission (“the NCC”) issued a notice of non-referral to a complaint.
5. The application is in terms of Section 75(1)(b) of the Consumer Protection Act, Act 68 of 2008, (“the CPA”).
6. Section 75(1) of the CPA states the following –

“If the Commission issues a notice of non-referral in response to a complaint, other than on the grounds contemplated in section 116, the complainant concerned may refer the matter directly to –

(a) ...

(b) *the Tribunal, with the leave of the Tribunal.”*

7. The Tribunal granted leave to refer the matter and issued a Ruling accordingly in October 2019.

JURISDICTION

8. In terms of section 27 of the of the National Credit Act 34 of 2005 (“the NCA”), the Tribunal has jurisdiction.¹

¹ Section 27(a)(i) of the NCA provides that: ‘*The Tribunal or a member of the Tribunal acting alone in accordance with this Act or the Consumer Protection Act, 2008 may adjudicate in relation to any application that may be made to it in terms of this Act in respect of such an application.*’

BACKGROUND

9. Ms Jordaan's initial application to the Tribunal reflected a simple issue of purchasing a defective vehicle from the Respondent. On 6 April 2018, Ms Jordaan purchased a pre-owned 2008 Chevrolet Captiva, 2.0D from Arnold Motors. The purchase price of the vehicle was R117 362.00.
10. On 11 May 2018 Ms Jordaan took possession of the vehicle. Within a week, she experienced numerous problems with the vehicle. The problems experienced with the vehicle related to amongst others; the clutch, shocks were worn out, the steering wheel controls were not in good working condition, the engine misfired and smoked excessively; and there were problems with the turbo.
11. Ms Jordaan alleged that these defects were not disclosed to her, except for the problems experienced with the turbo. According to Ms Jordaan, the Respondent undertook to repair the turbo before she took possession of the vehicle.
12. On 18 May 2018, due to the various problems encountered with the vehicle, Ms Jordaan returned the vehicle to the Respondent. The Applicant indicated in her founding papers that the Respondent made a partial payment of what purported to be a refund of a portion of the purchase price, but she wanted the balance of R33 000 refunded to her.
13. Only after the Respondent filed its answering affidavit, further transactions and detail regarding the transaction emerged.
14. On 22 August 2018; Ms Jordaan lodged a complaint with the Motor Industry Ombudsman of South Africa (MIOSA). MIOSA issued a response dated 27 August 2018. MIOSA informed Ms Jordaan that it did not have a mandate to solicit refunds for consumers.
15. On 11 September 2018; Ms Jordaan lodged a complaint with the NCC. The NCC issued a Notice of non-referral dated 25 February 2019. The letter accompanying the Notice essentially stated that the amounts deducted from the purchase price are an industry standard that the consumer must be held liable. This cost relates to the cost of usage that the Respondent is allowed to deduct. As a result, the NCC could not support Ms Jordaan's expectation of a full refund of the purchase price.

16. On 25 March 2019 Ms Jordaan lodged the application with the Tribunal for leave to refer the dispute to the Tribunal, which was duly granted in October 2019. Thereafter, a hearing was convened on 10 June 2021 to consider the merits of the matter.
17. At the hearing both parties made oral submissions and called witnesses.

THE APPLICANT'S SUBMISSIONS

18. The Applicant purchased the Chevrolet Captiva vehicle from the Respondent for a purchase price of R117 362.00. She traded in a Renault Megane for R20 000 and took vehicle financing from Wesbank for balance of the purchase price. She waited for more than a month to receive the vehicle as the Respondent needed to first fix the turbo, which she was aware of.
19. The Applicant avers that the Chevrolet Captiva was defective from the outset, as she experienced performance problems with the vehicle from the moment she took possession of it on 11 May 2018. As a result, she had no option but to ask the Respondent to find a solution as she had a daily need for a good vehicle to transport her four children and travel to and from work. She returned the vehicle on 18 May 2018.
20. The Applicant confirmed that the Respondent provided her with another vehicle, a Ford Territory. Although the Applicant signed papers for the vehicle, she did so in a rush and on her own as her husband was out of town at the time. The price of the Ford Territory was R116 127.00. Included in the price was R10 602.00 for a tow bar; and R4545.00 for "on the road costs".
21. The Applicant's husband's uncle had sold the Ford to the Respondent for R90 000.00. The Applicant was surprised to be charged the money for the towbar, as she knew that this was affixed to the vehicle at the time that it was sold to the Respondent.
22. The Applicant confirmed that in order to be able to pay for the Ford Territory, she agreed that the Respondent would settle the outstanding balance with Wesbank owed on the Chevrolet Captiva. The Applicant then took out financing with ABSA for the Ford Territory.

23. The Applicant avers that when she returned the Chevrolet Captiva to the Respondent because of its poor performance, this cancelled that sales agreement between her and the Respondent.

24. The Applicant avers that there is no trade-in agreement between her and the Respondent with regard to the Chevrolet Captiva.

WITNESSES FOR THE APPLICANT

25. Mr Jaco Jordaan, the Applicant's husband, was called as a witness and placed under oath. He testified as follows:

25.1. That he was the main party regarding the negotiations and purchase of the two vehicles from the Respondent. His wife signed the documents and applied for the finance as he was unable to do so due to having been sequestered previously;

25.2. He had a working knowledge of how the engine of a car needs to function and perform;

25.3. When the Respondent first showed him the Chevrolet Captiva, the Respondent indicated that there was a problem with the turbo but that it would be fixed before being delivered to the Applicant and himself;

25.4. He became concerned when it took the Respondent 42 days to deliver the vehicle, when the Respondent had said this would take 14 days;

25.5. That the Respondent assured him that if, after having repaired the turbo, it gave any problems which the Respondent could not fix, the Respondent would find another vehicle for the Applicant;

25.6. He did not test drive the car before agreeing to purchase it, because this was not possible as the turbo was being repaired at the time. But that he trusted the Respondent as he had known him a long time;

- 25.7. Immediately after taking delivery, when he drove the vehicle, it lost power, had no clutch, the shocks were worn, was smoking and the steering controls didn't work;
- 25.8. Because of his concerns about the performance of the vehicle, he took it to SupaQik who said that the rear shocks were worn. He did not get any written report as confirmation;
- 25.9. He informed the Respondent by WhatsApp that he did not have confidence in the car; and asked if it would be possible to make a plan with another vehicle;
- 25.10. That he told the Respondent that his uncle had a Ford Territory that the uncle was prepared to sell to the Respondent, so that the Applicant could then purchase this vehicle through the Respondent. This arrangement would enable the Applicant to obtain financing to purchase the vehicle; He did not inquire regarding the price of the vehicle and how the transaction would be structured; and
- 25.11. That he was not present when the Respondent delivered the Ford to the Applicant. As such, he did not have the opportunity to peruse the detail of the agreement of sale between the Applicant and the Respondent. Had he done so, he would have raised questions about certain aspects of the pricing.
26. During cross examination, Mr Jordaan submitted that if the clutch of the vehicle had been broken and if the engine had seized, as he alleged, it would not have been possible for the Respondent to have driven the vehicle the approximately 40-50km from Klerksdorp to Potchefstroom to deliver the vehicle to the Applicant; and neither would Mr Jordaan have been able to drive the vehicle back to Klerksdorp to return it to the Respondent, as in fact he did do one week later.
27. Mr Jordaan further confirmed that he did not specifically inform the Respondent that he was going to cancel the deal on the Captiva and ask for a refund. Rather, his priority was to get another vehicle for the daily transport needs of his family.

28. Ms Ankia Jordaan, the Applicant, was called as a witness and placed under oath. She testified as follows:

28.1. She only drove the Chevrolet briefly;

28.2. The vehicle didn't run properly and didn't serve the purpose of providing a safe family car for her to transport her children;

28.3. When the vehicle was returned to the Respondent, there were two separate transactions. The first transaction was the return of the Chevrolet Captiva to the Respondent in Klerksdorp. The second transaction was the purchase of the Ford Territory. As part of the first transaction, she was expecting to receive back the R20 000.00 deposit that she had paid to the Respondent as part of the purchase price for the Chevrolet. At no point did she regard the R20 000.00 as part of the transaction to purchase the Ford;

28.4. When the Respondent delivered the Ford to her, there was also documentation that she was asked to sign. She was under time pressure as her children were waiting to be fetched from school. She was also nervous about signing the documentation without the presence of her husband, as she was not sure that she fully understood all the detail, but her understanding was that this was a new transaction and not a trade-in agreement. She signed the documentation because she trusted her husband and the Respondent;

28.5. It was her signature on an offer to purchase a Chevrolet Captiva from Arnold Motors for a gross purchase price of R117362.00, less a deposit of R20 000.00, giving a purchase price of R97 362.00;

28.6. that it was her signature on an offer to purchase a Ford Territory for R116 127.00, including an additional R3000.00 cash payment; and with the words Wesbank and Trade-in written on the offer to purchase document;

28.7. that it was her signature on a vehicle purchase agreement for Arnold Motors for a Chevrolet Captiva, at a price of R100 506.07; and

28.8. that she noted the proof of payment by the Respondent to Wesbank for the amount of R100 540.90, which was the same amount that Wesbank had provided

as the settlement amount due by Ms Jordaan on the instalment sale for the Chevrolet Captiva.

29. The Applicant's concluding submission is that the Respondent breached section 55(1) of the CPA because the Chevrolet vehicle was not suitable for the generally intended purpose; and was not of good quality or in good working order, and had defects.
30. The Applicant submits that because she returned the Chevrolet Captiva to the Respondent, in terms of section 56(2)(b) of the CPA, she should have received a refund of the gross purchase price, inclusive of the R20 000.00 deposit that she paid.
31. The Applicant submits that she returned the Chevrolet Captiva to the Respondent within 5 working days of the date of purchase. As a result, in terms of section 16 (3) and(4)(a)(ii) of the CPA, the Respondent is obliged to return the payments received from her.
32. According to the Applicant's calculations, the Respondent owes her R33 602.00 calculated as follows: R20 000.00 for the deposit paid on the Chevrolet Captiva; R10 602.00 for the towbar on the Ford Territory which was already attached to the vehicle when the Respondent bought it; and R3000.00 that the Applicant paid as a cash deposit on the Ford Territory.
33. The Applicant submits in conclusion that the Respondent's breaches of the CPA should be declared prohibited conduct.

THE RESPONDENT'S SUBMISSIONS

34. The Respondent confirms selling the Applicant a Chevrolet Captiva vehicle for a gross purchase price of R117 362.00.
35. The Respondent avers that the Applicant's husband informed him that they were not happy with the vehicle. However, Mr Jordaan did not report any problems with the vehicle. The Applicant's husband enquired via a WhatsApp message if the Respondent could "make a plan" and look for options for the Applicant to purchase another vehicle.

36. The Respondent avers that the parties entered into a partial written and partial oral agreement that the Chevrolet would be returned to the Respondent and traded in on another vehicle.
37. The Respondent submits that Chevrolet was not returned by the Applicant for the purpose of cancelling the sales agreement, but rather the vehicle was a trade-in at the Applicant's request on a Ford Territory. Accordingly, the parties proceeded to sign a trade-in agreement, wherein the Applicant would trade-in the Chevrolet for R100 506.07. The Respondent would pay the money directly to Wesbank, which had financed the original purchase of the vehicle and was owed R100 540.95 as a settlement figure by the Applicant.
38. The Respondent provided proof of payment of R100 540.95 to Wesbank.
39. The Respondent submits that the parties then entered into a second sales agreement whereby the Applicant purchased the Ford for a gross purchase price of R116 127.00, which was financed by ABSA, with a R3000.00 cash pay-in from the Applicant.

WITNESS FOR THE RESPONDENT

40. Mr Johan Oosthuizen, a salesperson at Arnold Motors in Klerksdorp, and a member of Ergoflex 57 CC, was called as a witness and placed under oath. He testified as follows:
- 40.1. That when the Applicant and her husband had approached the Respondent because they were interested in purchasing a vehicle, he had shown them the Chevrolet Captiva in the Respondent's workshop. He had indicated that there was a problem with the turbo, which would be fixed by the Respondent;
- 40.2. That the turbo was duly fixed and any possible defect thus cured before the vehicle was delivered to the Applicant;
- 40.3. That he personally drove the Chevrolet from Klerksdorp to Potchefstroom to deliver it to the Applicant. This is a distance of about 40-50km. It would not have been possible to drive the vehicle this distance with all the problems alleged by the Applicant;

- 40.4. That the Applicant's husband informed the Respondent that they were not happy with the Chevrolet and had found a different vehicle that they wanted. It was a Ford, which belonged to a family member;
- 40.5. That the Respondent bought the Ford from the family member for R100 000.00;
- 40.6. That the Applicant traded in the Chevrolet and as per the trade-in agreement, the Respondent settled the Applicant's outstanding balance with Wesbank;
- 40.7. That the Applicant and the Respondent entered into a new transaction whereby the Applicant purchased the Ford from the Respondent for the agreed purchase price of R116 127.00, as stated on the Offer to Purchase signed by the Applicant;
- 40.8. That when he delivered the Ford to the Applicant, he explained all the contract documents to the Applicant before she signed these; and that she indicated she was happy and satisfied; and
- 40.9. That there was no direct marketing related to the sale of the Chevrolet. The Applicant's husband had approached the Respondent looking for a vehicle to purchase.

41. The Respondent's concluding submission is that:

- 41.1. the Chevrolet was not defective and the Applicant has failed to provide any proof to the contrary;
- 41.2. the Applicant does not have grounds for the relief sought as the sales agreement for the Chevrolet was not cancelled;
- 41.3. that the Chevrolet was traded in by agreement, and should the Applicant not have been in agreement with the terms of the trade-in agreement, she should not have entered into same; and
- 41.4. the purchase of the Ford is a different, separate agreement entered into between the parties.

THE LAW

Section 16 of the CPA states that....

(3) A consumer may rescind a transaction resulting from any direct marketing without reason or a penalty, by notice to the supplier in writing, or any other recorded manner and form, within five business days after the later date on which -...

(b) the goods that were the subject of the transaction were delivered to the consumer.

(4) A supplier must –

(a) return any payment received from the consumer in terms of the transaction....

Direct marketing means to approach a person, either in person or by mail or electronic communication, for the direct or indirect purpose of –

(a) promoting or offering to supply, in the ordinary course of business, any goods or services to the person; or

(b) requesting the person to make a donation of any kind for any reason.

Section 55 of the CPA states that

(2)... every consumer has a right to receive goods that –

(a) are reasonably suitable for the purposes for which they are generally intended;

(b) are of good quality, in good working order and free of any defects;...

Section 56 of the CPA states that

(2) 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.....

(b) refund to the consumer the price paid by the consumer for the goods.

CONSIDERATION OF THE FACTS AND EVIDENCE

42. The Tribunal must firstly consider the facts before it can apply the law. There is no dispute between the parties that the Chevrolet was returned to the Respondent and the Applicant purchased another vehicle. The parties agree that the Applicant signed agreements relating to the purchase of the Ford. Essentially, the only aspect in

dispute is whether the Chevrolet was returned to the Respondent due to it being defective and whether the Respondent should have refunded the entire purchase price to the Applicant. The onus rests on the Applicant to prove that her version is the most probable.

43. In order for the Applicant to succeed in its claim that the Respondent breached section 55 of the CPA, the Applicant must provide evidence to prove that the Chevrolet was defective. The Applicant failed to provide any records or written statements from persons with the requisite technical knowledge able to confirm this. Although the Applicant's husband said that he took the vehicle to Supa-Quik for the shocks to be checked, there is no evidence before the Tribunal regarding the outcome of Supa-Quik's assessment. The problem with the shocks is also only one of a range of defects with the vehicle alleged by the Applicant. No evidence of these other defects was provided by the Applicant. Mr Jordaan confirmed that he never informed the Respondent that the vehicle was being returned due to defects and he wanted to be refunded.
44. The Applicant alleged various serious defects that appeared to relate to the functioning of the vehicle's engine. Yet the Applicant and her husband were able to drive the vehicle a distance of 40 – 50km from Potchefstroom to Klerksdorp to return the vehicle to the Respondent. It is unlikely that this would have been possible if the vehicle was as defective as claimed by the Applicant.
45. The Respondent indicated that it had disclosed a problem with the turbo when the Applicant's husband had viewed the vehicle in the workshop, prior to the purchase of the vehicle. The Respondent had fixed the turbo of the vehicle prior to delivery. As proof that the vehicle was well repaired and functional, the Respondent confirmed that its salesperson drove the vehicle himself for the 40 – 50km from Klerksdorp to Potchestroom in order to deliver it to the Applicant.
46. There was also no evidence of the Chevrolet being returned by the Applicant in order to be refunded. The evidence points to the fact that the Chevrolet was returned to the Respondent in terms of a trade-in agreement between the parties.
47. When considering the totality of the evidence, the Applicant is unable to prove that the vehicle was defective or that it was returned on the basis of these defects.

48. Evidence was provided that the parties signed a clear sequence of agreements of sale. Specifically, the Applicant confirmed her signature on an offer to purchase the Chevrolet Captiva; a vehicle purchase agreement and appraisal for the trade-in of the Chevrolet; and an offer to purchase the Ford Territory.
49. These agreements are binding on the parties. Any dispute in this regard would have to be pursued in a court of law.
50. In the case of direct marketing, a person has to be approached by a supplier in person, by post or electronically for the purpose to advertise his/her goods for sale or services. The Applicant's husband approached the Respondent and indicated to the Respondent that he was looking for a vehicle to buy. The purchase of the Chevrolet thus clearly did not result from any direct marketing, as the Applicant pro-actively sought out a vehicle. Section 16 of the CPA thus has no applicability.

CONCLUSION

51. The Applicant was unable to prove on the balance of probabilities that the vehicle was defective or that the vehicle was returned to the Respondent due to the defects.
52. As a result, the Applicant is not entitled to a refund in terms of section 56 of the CPA.

ORDER

53. Accordingly, the Tribunal makes the following order –
- 53.1. The Applicant's application is dismissed; and
- 53.2. There is no order as to costs.

THUS DONE IN CENTURION ON THIS 13TH DAY OF JUNE 2021

[signed]
Dr L. Best

Presiding Tribunal Member

Prof K. Moodaliyar (Tribunal member) and Adv J. Simpson (Tribunal member) concurring.

Authorised for issue by The National Consumer Tribunal

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national consumer tribunal