

IN THE NATIONAL CONSUMER TRIBUNAL HELD IN CENTURION

Case number: **NCT/233738/2022/75(1)(b)**

In the matter between:

JACOBUS JOHANNES STEPHANUS DU PLOOY **APPLICANT**

And

**PRETORIA BOSCH SERVICE CITTON SERVICE
CENTRE (PTY) LTD** **RESPONDENT**

Coram:

Adv C Sassman - Presiding Tribunal Member
Ms P Manzi-Ntshingila - Tribunal Member
Mr C Ntsoane - Tribunal Member

Date of Hearing: 23 February 2023

Date of Judgment: 24 February 2023

JUDGMENT AND REASONS

THE PARTIES

1. The Applicant in this matter is Jacobus Johannes Stephanus Du Plooy (“the Applicant”). The Applicant is a consumer, as defined in section 1 of the Consumer

Protection Act 68 of 2008 (“the CPA” or “the Act”). At the hearing, the Applicant represented himself.

2. The Respondent is Pretoria Bosch Service Cutton Service Centre (Pty) Ltd (“the Respondent”). The Respondent is a supplier, as defined in section 1 of the CPA. The Respondent did not file an answering affidavit within the prescribed time. However, at the hearing, the Respondent’s representative, Danie Van Zyl, an attorney with Danie Van Zyl Attorneys, appeared and requested an indulgence to be heard.

TERMINOLOGY

3. A reference to a section in this judgment refers to a section of the CPA.

4. A reference to a rule in this judgment refers to the Rules of the Tribunal¹.

APPLICATION TYPE

5. This is an application in terms of section 75(1)(b). In this application, the Applicant, with leave granted by the Tribunal, seeks redress against the Respondent.

6. The Applicant alleges that the Respondent contravened section 54(1) by failing to repair a vehicle as required in terms of the Act.

PROCEEDING ON A DEFAULT BASIS

7. On 20 June 2022, the Applicant filed the application with the Tribunal and served a copy of the application on the Respondent in person. The Tribunal’s Registrar (“the Registrar”) issued a notice of filing to all the parties on 15 August 2022.

8. In terms of Rule 13(2), the Respondent had 15 business days to serve an answering affidavit and file it with the Registrar. However, the Respondent failed to do so in the prescribed time.

9. The Applicant did not file an application for a default order in terms of Rule 25(2).

¹ GN 789 of 28 August 2007: Regulations for matters relating to the functions of the Tribunal and Rules for the conduct of matters before the National Consumer Tribunal, 2007 (Government Gazette No. 30225).

10. Due to the pleadings being closed, the Registrar issued a notice of set down to all parties on 15 December 2022, setting the matter down for 23 February 2023.

11. At the hearing, the Respondent's representative requested an indulgence to be heard by the Tribunal. Mr Van Zyl indicated that he had filed a condonation application for the late filing of the Respondent's answering affidavit with the Registrar a day before the hearing. He served a copy on the Applicant by email. He requested that the hearing be postponed to a later date to allow the Respondent to reply to the allegations.

12. The Respondent vehemently objected to any postponement and indicated that he had gone to considerable lengths to arrange for two expert witnesses to testify and that Mr Van Zyl had been the attorney on record for the Respondent since August 2021. He also stated that he had never given any consent for documents to be served on him by email and that there was no valid reason for the Respondent not to file an answering affidavit within the prescribed time.

13. The Tribunal considered the Respondent's request and the objections raised by the Applicant. The Tribunal was satisfied that the application was adequately served on the Respondent. The Respondent provided no reason for failing to file its answering affidavit within the prescribed time, and the Applicant did not consent to service by email. The Tribunal decided that a postponement would not be in the interest of justice. The Respondent's request for a postponement was refused, and the matter proceeded on a default basis.

14. Rule 13(5) provides that any fact or allegation made by the Applicant, which is not specifically denied or admitted by the Respondent, will be deemed to have been admitted by the Respondent.

15. Therefore, in the absence of an answering affidavit before the Tribunal, the Applicant's application and all of the allegations contained therein are deemed to be admitted by the Respondent.

BACKGROUND

16. In March of 2021, the Applicant took a vehicle belonging to Mr and Mrs Van Niekerk (“the Van Niekerks”) to the Respondent for repairs. The Applicant did so as a favour to the Van Niekerks since Mr Van Niekerk works abroad and was not in the country at the time. The vehicle is described as a Corsa Utility 1.7D, with registration number [...] . The vehicle had difficulty starting and was booked for a diagnostic assessment and repair.

17. Approximately two days later, the Applicant received a telephone call from Andre Botha, an employee of the Respondent. Mr Botha indicated that the diagnostic assessment had been done and that the vehicle had a fuel-related problem. He said that he would have the vehicle’s fuel injectors independently tested to confirm that it was indeed the cause of the problem. He later contacted the Applicant and confirmed that the fuel injectors were in standard condition and within the required specifications. He said they would remove the fuel pump to assess and repair it. The repairs were quoted at R30 134.69, which amount the Applicant accepted.

18. When the Applicant arrived at the Respondent’s premises to collect the vehicle, it would not start. The Applicant noticed the Respondent’s employees using a product called Quickstart, which is an aerosol spray used in assisting to start engines quickly. The vehicle eventually started and was smoking excessively. Mr Botha informed the Applicant that he suspected the vehicle had a more severe problem since the engine had very little compression. He said they would need to open the engine to perform a new diagnostic assessment. When the Applicant enquired about the cost of doing so, he was told that the new cost of repairs could only be determined once the diagnostic assessment was completed.

19. Dissatisfied with the service of the Respondent, the Applicant then lodged complaints with Bosch South Africa, the Motor Industry Ombudsman of South Africa, and the National Consumer Commission (“the NCC”). None of his attempts to resolve the matter have been successful. On 28 April 2022, the NCC issued a notice of nonreferral.

THE APPLICANT’S SUBMISSIONS

20. At the hearing and in his papers, the Applicant submitted that the vehicle is in a worse condition than it was before, as there is a knocking noise coming from the engine and that the vehicle is smoking excessively. He submitted that the diagnostic test was

done incorrectly by first assessing the fuel injectors, instead of the engine's compression. He further submitted that he observed too much Quickstart being used to start the engine.

21. The Respondent claims in its advertising to have state-of-the-art diagnostic equipment, which was part of the reason why the vehicle was taken to them. The Applicant provided a video clip as part of his evidence. The video clip was filmed on the day the vehicle was supposed to be collected and showed a compression test being performed on the vehicle. He indicated that the test was not being done incorrectly. Other influencing factors should have been taken into account, which would likely affect the test result. These factors include a run-down battery or a worn starter. The Respondent is, therefore, incorrect in saying that the engine lacks compression and must be opened and diagnosed.

22. The Applicant requested a report from the Respondent to indicate what work has been done on the vehicle, but none was received. In August 2021, he received a letter from the Respondent's attorney requesting that the vehicle be removed from the premises and that he pays for storage costs. The Applicant has made no payment to the Respondent to date and seeks to have the vehicle released so that it can be properly diagnosed and repaired elsewhere. The vehicle is still in the Respondent's possession and is inoperable.

THE WITNESSES' TESTIMONY

23. The Applicant called the following two witnesses to testify: Mr Pieter Cornelius Van Niekerk and Mr Paul Joubert. Both witnesses are qualified mechanics with experience in working with diesel engines. It must be noted that Mr Van Niekerk is the owner of the vehicle in question. The Applicant submitted that Mr Van Niekerk travelled from the United States of America to testify in this matter and would be returning in March of this year.

24. Both witnesses testified that using too much Quickstart to start an engine can damage a vehicle's engine. They also confirmed that the correct sequence for performing a diagnostic test would be to check the engine's compression on each cylinder first and then check the fueling system and electronics. To reach an accurate result when testing an engine's compression, the engine needs to be cranked for 5 – 8 seconds, and there should be no other influencing factors that could lead to an inaccurate result.

25. Both witnesses watched the video clip presented by the Applicant and confirmed that the way the Respondent's employee performed the compression test was inconsistent with basic mechanical training as the engine was only cranked for short periods each time and not the required 5 – 8 seconds.

APPLICABLE SECTIONS OF THE ACT

26. Section 75(1)(b) states that if the NCC issues a notice of non-referral in response to a complaint, other than on grounds contemplated in section 116, the complainant concerned may refer the matter directly to the Tribunal, with leave of the Tribunal.

27. Section 54(1) (a-d) states that when a supplier undertakes to perform any services for a consumer, the consumer has the right to the timely performance and completion of those services, in a manner and quality that persons are generally entitled to expect. In addition, the goods used by the supplier must be free of defects and of a quality that persons are generally entitled to expect. It further states that the consumer's property must be returned in at least as good a condition as it was when the consumer made it available to the supplier.

28. Section 54(2) (a-b) states that if a supplier fails to perform a service to the standards contemplated in subsection (1), the consumer may require the supplier to remedy the defect in quality or refund the consumer a reasonable portion of the price paid for the services performed.

CONSIDERATION OF THE EVIDENCE

29. Both witnesses appeared knowledgeable and credible, but their testimony only confirmed general mechanical processes and procedures. Neither had examined the vehicle in question or performed any diagnostic assessment on it. They were unable to confirm whether the vehicle is in a worse condition now, as alleged by the Applicant. Without a recent diagnostic report, the Tribunal is unable to determine the current condition of the vehicle or whether any attempted repairs made by the Respondent have worsened the condition of the vehicle.

30. Since the matter was heard on an unopposed basis, the reasons why the Respondent chose to follow an unusual sequence for performing the diagnostic test remain unknown.

31. The Applicant failed to prove that too much Quickstart was used on the engine and that this caused the alleged knocking noise coming from the engine.

32. Although it is unclear what the specific fault of the vehicle is, it is apparent that the repairs were not carried out as requested by the Applicant. The vehicle remains inoperable some two years later. The vehicle is still unable to start instantly and emits excessive smoke when the engine runs.

33. Since the Applicant has not paid any money to the Respondent, he is not requesting a refund but simply for the vehicle to be released and to be absolved of any claim for repairs from the Respondent since they were not performed correctly.

CONCLUSION

34. The Tribunal is convinced that the Respondent failed to carry out the repairs to the vehicle in a timely manner and with the level of quality that persons are generally entitled to expect.

35. On this basis, the Respondent is found to have failed in its statutory duty in terms of section 54(1).

ORDER

36. Accordingly, the Tribunal makes the following order:

36.1 The Respondent contravened section 54(1) of the CPA;

36.2 The Respondent must release the vehicle in question, with registration number [...], to the Applicant immediately;

36.3 The Applicant is not liable to pay the Respondent any fees for the repair, storage, or release of the vehicle; and

36.4 There is no cost order.

DATED ON THIS 24TH DAY OF FEBRUARY 2023.

[SIGNED]

Adv C Sassman

Presiding Tribunal Member

Tribunal Members Ms P Manzi-Ntshingila and Mr C Ntsoane concur.