

IN THE NATIONAL CONSUMER TRIBUNAL

SITUATED AT CENTURION

Case number: NCT/226533/2022/75(1)(b)

In the matter between:

NKATEKO MAHLATSE NDABENG

APPLICANT

and

MCCARTHY (PTY) LTD T/A AUDI CENTRE MENLYN

RESPONDENT

Coram:

Dr A Potwana - Presiding Tribunal Member

Ms Z Ntuli - Tribunal Member

Mr S Hockey - Tribunal Member

Date of Hearing - 7 February 2023

JUDGMENT AND REASONS

PARTIES

1. The applicant is Mr Nkateko Mahlatse Ndabeng, a consumer as defined in section 1 of the Consumer Protection Act 68 of 2008 (“the CPA”). At the hearing of this matter, the applicant was represented by an attorney, Ms Debby Smit.

2. The respondent is McCarthy (Pty) Ltd, trading as Audi Centre, Menlyn, a franchise holder of Volkswagen and Audi (South Africa) (Pty) Ltd. The respondent was represented at the hearing by an attorney, Ms Monique Thessner.
3. Where necessary or convenient, the applicant and respondent are jointly referred to as “the parties”.

THE APPLICATION TYPE

4. This is an application in terms of section 75(1)(b) of the CPA. The matter was considered on the papers filed, with oral submissions by the parties’ legal representatives at the hearing. The hearing was conducted via a virtual platform.
5. The applicant previously lodged a complaint against the respondent with the National Consumer Commission (“the NCC”). The NCC issued a notice of non-referral on 31 March 2022 and held that the cause for complaint had prescribed. The applicant consequently lodged an application for leave for the referral of this matter to the National Consumer Tribunal (“the Tribunal”) and was granted such leave on 12 July 2022. It was held that in relation to any claim that arose after August 2019, the applicant’s claim had, in fact, not lapsed.

BACKGROUND FACTS

6. During the first quarter of 2017, the applicant presented his vehicle, an Audi A3 Sportsback 1.8TF 2010 model (“the vehicle”) to the respondent for repairs. On diagnostic testing and inspection of the vehicle, the applicant was advised that the cylinder heads were bent and required replacement. The applicant accepted the advice and the repair estimate. He authorised the respondent to proceed with the repairs (“the first repairs”).

7. The respondent duly repaired the vehicle, tested same as repaired and tendered the return of the vehicle to the applicant on payment of its invoice in the amount of R45 162.40.
8. The applicant eventually settled the invoice and collected the vehicle from the respondent during the third quarter of 2017. A few days after the vehicle was collected from the respondent's premises, the applicant returned the vehicle with a complaint of excessive oil consumption by the vehicle. The vehicle has been stationary for the greater part of 2017 at the respondent's premises.
9. I pause to mention that this matter does not relate to the repairs to the vehicle during 2017 (which is mentioned for background purposes only), but rather to repairs effected during 2019, which I shall deal with hereunder. Any claim under the CPA in respect of the 2017 repairs is time-barred in terms of section 116 of the CPA. This section provides that no complaint in terms of the CPA may be referred to the Tribunal more than three years after the act or omission that is the cause of the complaint. This matter was referred to the Tribunal more than three years after the 2017 repairs but within the three years of the repairs in 2019 which the applicant complains of.
10. It was agreed between the parties that the respondent would again diagnostically inspect and test the vehicle and advise the applicant of the findings.
11. As the first repairs were in respect of the top part of the engine, the respondent concluded that the block of the engine required inspection to ascertain the cause of the new complaint. After the engine block was removed, an external service provider was engaged to examine the block. The findings were that an overhaul of the engine was necessary to remedy the excessive oil consumption.
12. What followed was a lengthy period during which there was no communication between the parties. According to the respondent, the applicant was

unreachable and the respondent could therefore not communicate the findings and repair advice to the applicant.

13. The applicant eventually contacted the respondent early in 2019, more than a year after the vehicle was left with the respondent.
14. After a discussion between the parties, the applicant accepted liability for the repairs. He paid a deposit of R40 000.00 towards the costs of the repairs on or about 27 August 2019.
15. The respondent proceeded to have the vehicle repaired by its service provider whereafter the vehicle was tested and found to be in good order.
16. The applicant collected the vehicle from the respondent's premises in early January 2020 after it was agreed that the applicant would pay no more than the deposit of R40 000.00 already paid. An invoice of R50 000.00 had been prepared, but the respondent agreed to contribute the balance of R10 000.00. No labour charges were invoiced for.
17. Less than an hour after the applicant collected the vehicle for the respondent, he called the respondent to advise that the vehicle had broken down again. The vehicle was towed back to the respondent's premises where diagnostic testing was done on it, with an outcome that the engine had seized to function. Data retrieved from the vehicle's computer showed that the vehicle had been driven at a top speed of 175 kilometers per hour ("km/h") and the engine had been revved to 5720 revs per minute ("rpm").
18. The applicant refused to accept the vehicle's diagnostic findings. The respondent subsequently suggested that he collect the vehicle on payment of the diagnostic costs of R10 000.00.

19. The applicant engaged Clientèle Legal who corresponded with the respondent, advising that the applicant denied that he drove the vehicle at a speed of 175 km/h.
20. On 5 November 2021 Clientèle Legal requested, on behalf of the applicant, to be allowed to send an independent assessor/mechanic to inspect the vehicle and opined that a report from such an independent person can assist in bringing the matter to a finality.
21. The attorneys for the respondent replied to Clientèle Legal's letter on 9 November confirming that the vehicle was available for inspection by the applicant's nominated expert subject to prior arrangements being made and specific safety requirements being met. No arrangements were however made for the inspection of the vehicle as agreed.

SUBMISSIONS BY THE APPLICANT

22. The applicant argues that the respondent should be held responsible for the breakdown of the vehicle as repairs before the breakdown were not properly carried out.
23. The applicant denies the respondent's averments that he was told that the engine had to be "run in" and that the vehicle should not be driven at a speed above 120 km/h or to cause the engine revolutions to be excessively high (not to exceed 5 000 rpm) for a reasonable period and for approximately 500 kilometers, depending on the use of the vehicle.
24. Clientèle Legal, on behalf of the applicant, denied that their client drove the vehicle at 175 km/h or that the engine revolutions reached 5 720 rpm as alleged by the respondent.

SUBMISSIONS BY THE RESPONDENT

25. In essence, the respondent's case is that the applicant is the cause of his own loss, as he drove the vehicle at an excessive speed of up to 175km/h and with the engine reaching 5 720 rpm despite having been forewarned not to do so when he collected the vehicle from the respondent's premises. How the applicant drove the vehicle was obtained from data extracted from the vehicle's computer.

THE RELEVANT LAW AND EVALUATION

26. The applicant seeks relief in terms of section 54(2) of the CPA. This section provides that if a supplier fails to perform a service to the standards contemplated in section 54(1), the consumer may require the supplier to remedy any defect in the quality of services performed or goods supplied, or a refund of a reasonable portion of the price paid for the services performed and goods supplied having regard to the extent of the failure¹.

27. The standards referred to in section 54(2) is set out in section 54(1) as follows:

- “(a) the timely performance and completion of those services, and timely notice of any unavoidable delay in the performance of the services;
- (b) the performance of the services in a manner and quality that persons are generally entitled to expect;
- (c) the use, delivery or installation of goods that are free of defects and of a quality that persons are generally entitled to expect, if any such goods are required for performance of the services; and

¹ A “failure” is defined in section 53 as “the inability of the goods to perform in the intended manner or to the intended effect”.

(d) the return of any property or control over any property of the consumer in at least as good a condition as it was when the consumer made it available to the supplier for the purpose of performing such services.”

28. The applicant’s contention that the repairs to the vehicle did not meet the required standards of section 54(1) is based on the fact that the vehicle broke down merely an hour after it was collected from the respondent’s premises.

29. The respondent, on the other hand, contends that the repairs were attended to in a good workmanship manner as required. The vehicle was tested for 102 kilometers and found to be in good order before it was handed to the applicant. It is further contended that the seizure of the vehicle’s engine was not because of inadequate repairs, but because of the excessive speed that the vehicle was driven and the high revolutions reached. The warranty on repaired goods implied in section 57(1)² of the CPA is therefore negated in terms of section 57(2)(b) which renders the warranty void if the consumer has subjected the part, or the goods or property in which it was installed, to misuse or abuse.

30. This matter calls for the determination of dispute of facts raised by the parties, in particular whether the applicant forewarned the respondent that the vehicle is not to be driven at an excessive speed and that the engine revolutions should not reach higher than 5 000 rpm. The second critical dispute is whether the applicant indeed drove the vehicle up to 175 km/h and allowed the engine to reach 5 720 rpm.

31. Over the years, our courts have developed principles as to how to deal with disputes of facts, which culminated in the so-called Plascon-Evans rule.³ In terms of this rule, when factual disputes arise in motion proceedings, relief may

² In terms of section 57(1), a service provider “warrants every new or reconditioned part installed during any repair or maintenance work, and the labour required to install it, for a period of three months after the date of installation or such longer period as the supplier may specify in writing.”

³ See **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A) at 634H-635C

be granted only if those facts averred by the applicant which have been admitted by the respondent, together with the facts alleged by the respondent justify the order. The Plascon-Evans rule implies that where there is a genuine factual dispute between parties in motion proceedings, the courts will generally accept the version of the respondent.

32. There are exceptions to the Plascon-Evans rule. In **Wightman t/a JW Constructions v Headfour (Pty) Ltd & Another**⁴, the court held:

“ Recognising that the truth almost always lies beyond mere linguistic determination, the courts have said that an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter’s allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers ...”

33. In the present matter, the applicant knew of the dispute of facts before he launched this matter with the Tribunal. He knew of the information which was retrieved from the vehicle’s computer. In fact, Clientèle Legal, on his behalf, requested to have the vehicle inspected by an independent expert to which the respondent agreed. It is dubious as to why he did not make use of this opportunity. The applicant nevertheless took the risk of launching these proceedings with full knowledge of the diagnostic outcome of the vehicle and its computer and the factual dispute concerning this.

34. In **Cullen v Haupt**⁵, Conradie J dealt with disputes of fact in motion proceedings and had this to say:

⁴ 2008 (3) SA 371 (SCA) paras 11-13

⁵ 1988 (4) SA 39 (C) at 40F-H

“I have consulted some of the better known decisions concerning the referral of applications to evidence or to trial. The leading decision in this regard is, of course, Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at 1162, where Murray AJP said that if a dispute cannot properly be determined it may either be referred to evidence or to trial, or it may be dismissed with costs, particularly when the applicant should have realised when launching his application that a serious dispute of fact was bound to develop’. The next of better known cases on this topic is that of Conradie v Kleingeld 1950 (2) SA 594 (O) at 597, where Horwitz J said that a petition may be refused where the applicant at the commencement of the application should have realised that a serious dispute of fact would develop.” (My underlining for emphasis).

35. As for the dispute of fact as to whether the applicant was forewarned not to drive the vehicle at an excessive speed, and not to allow its engine to reach more than 5 000rpm, the Plascon-Evans rule dictates that the respondent’s version should be accepted. The same applies to the question as to whether the applicant drove the vehicle at a speed reaching 175 km/h and causing the engine to reach 5 720 rpm.

36. For the reasons aforesaid, the order sought by the applicant cannot be granted.

ORDER

37. In the result, the application is dismissed, with no order as to costs.

DATED ON THIS 13TH DAY OF FEBRUARY 2023.

Mr S Hockey
Tribunal Member

Tribunal Members Dr A Potwana and MS Z Ntuli concur.

Authorised for issue by The National Consumer Tribunal

National Consumer Tribunal

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