

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: A58/22

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED.

DATE: **06/05/2024**

SIGNATURE: **N V KHUMALO J**

In the matter between:

LAZARUS MOTOR COMPANY

APPLICANT

and

WILLIAMS GREGORY ROBERT

1ST RESPONDENT

THE NATIONAL CONSUMER TRIBUNAL

2ND RESPONDENT

This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time of hand-down is deemed to be 6 May 2024

JUDGEMENT

Khumalo N V J (with Lenyai J concurring)

Introduction

[1] The Consumer Protection Act 68 of 2008 (CPA) establishes a broad and comprehensive scope for consumer protection. Its purview includes developing and

maintaining a consumer market in such a way as to ensure fairness, accessibility, effectiveness, sustainability and responsibility for the benefit of consumers.

[2] This is an appeal against the decision handed down on 26 January 2022 by the National Consumer Tribunal (“the Tribunal”) granting an award in favour of the 1st Respondent, Mr G Robert Williams against the Appellant, that is Lazarus Motor Company. The decision came about as a result of the 1st Respondent referring a complaint regarding a disagreement with the Appellant under section 75(1)(b) of the CPA, in terms of which the following order was granted.

[2.1] The Applicant’s application is granted;

[2.2] The Respondent s ordered to remove the rust in the Respondent’s car;

[2.3] There is no order to costs

[3] The Appellant is appealing the decision on the following grounds:

[3.1] “the Tribunal did not apply the requirements of section 55 of the CPA;

[3.2] the Tribunal misunderstood the case before it, the defence raised and the onus of proof on the respective parties;

[3.3] the Tribunal ignored pertinent portions of the evidence which have a material bearing on the decision which it was charged to make;

[3.4] the Tribunal disregarded the applicable law, despite it having been set out in the heads of Argument filed by Lazarus Motors;

[3.5] the Tribunal arbitrarily rejected pertinent evidence without cogent reason; and

[3.6] the Tribunal ignored Mr Williams' evidence-that he suppressed evidence as it did not support his case.

Parties

[4] The Appellant, Lazarus Motor Company Proprietary Limited trading as Lazarus Ford Centurion ("Lazarus Ford") is a dealer in motor vehicles. The 1st Respondent, Mr Gregory Robert Williams, is a major male residing in Gauteng. The 2nd Respondent is the National Consumer Tribunal ("the Tribunal") established in terms of section 26 of the National Credit Act 34 of 2005 (NCA) as amended.

Issues

[5] Based on the grounds of appeal, the issues before this court are:

1. Whether the National Consumer Tribunal correctly applied section 55 of the CPA.
2. Whether the Tribunal award neglected the evidence presented before the Tribunal.
3. Whether the repair remedy awarded by the Tribunal is appropriate.

Factual background

[6] The 1st Respondent bought a new Ford Everest 2.2 TDCI XLT from the Appellant in November 2017, assisted by a Mr Wolmarans. On 28 January 2018, he observed corrosion on the bolts of the vehicle's rear loading compartment under the carpet cover. The 1st Respondent informed Mr Wolmarans of the defect, and was asked to bring the vehicle for evaluation. On the same day it was returned with the

Appellant denying any liability on the basis that the rust was a result of a spillage of pool acid by the 1st Respondent. The 1st Respondent then sent photos to the Appellant as proof of further rusting and corrosion on other vehicle parts including the undercarriage. He was requested to bring back the vehicle to the dealership so that a further investigation and evaluation can be done by a representative from Ford South Africa.

[7] The claim was subsequently rejected by Ford South Africa after 1st Respondent refused an offer that they repair the vehicle on condition he pays for the costs of repair whilst they supply the labour. His referral of the matter to the Motor Ombudsman did not yield any result due to the Appellant not cooperating with the Ombudsman's investigation. A formal complaint he lodged with the National Consumer Commission was rejected on the basis that the complaint does not constitute a ground for a remedy under the CPA. The National Consumer Tribunal granted leave for referral to consider the complaint.

Whether the National Consumer Tribunal correctly applied section 55 of the CPA.

Legal framework

[8] Section 55 addresses and ensures that consumers have a right to safe and high-quality goods. The section reads as follows:

“Consumer’s rights to safe, good quality goods— (1) This section does not apply to goods bought at an auction, as contemplated in section 45.

(2) Except to the extent contemplated in subsection (6), 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;

(c) will be useable and durable for a reasonable period of time, having regard to the use to which they would normally be put and to all the surrounding circumstances of their supply; and

(d) comply with any applicable standards set under the Standards Act, 1993 (Act No. 29 of 1993), or any other public regulation.”

[9] Whether or not it is contractually necessary, a right conferred on the consumer in accordance with section 55(2) remains. It exists by operation of law and is protected by section 56 of the CPA. In the event of a breach by the supplier, the consumer may enforce the provisions of the Act or the agreement.

[10] Section 53(1)(a) that defines a defect must first be considered for the purposes of determining whether a case has been established on the basis of sub-provisions of section 55(2). Defect is defined in section 53(1)(a) of the CPA together with the concepts of “failure”, “hazard” and “unsafe”. According to s 53 (1) when referring to any product, part of a product, or service, the term "defect" denotes:

1. “any material imperfection in the manufacture of goods or component, or in performance of the services, that renders the goods or results of the service less acceptable than persons generally would be reasonably entitled to expect in the circumstances; or

11. any characteristic of the goods or components that renders the goods or components less useful, practicable or safe than persons generally would be reasonably entitled to expect in the circumstances.”

[11] With regard to defining a defect, one should keep in mind that the defect may be patent or latent. In this case, latent defects relate to the fact that there was no

visible defect at the time of purchase of goods. In *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd*, the court stated that:

“...Broadly speaking in this context, a defect may be described as an abnormal quality or attribute which destroys or substantially impairs the utility or effectiveness of the *res vendita*, for the purpose for which it has been sold or for which it is commonly used... Such a defect is latent when it is one which is not visible or discoverable upon an inspection of the *res vendita*.”

[12] Looking at whether the vehicle had a defect, in the matter of *Motus Corporation (Pty) Ltd t/a Zambezi Multi Franchise and another v Wentzel*, the court held that:

“not every fault is a defect as defined, it must either render the good less acceptable than people generally would be reasonable, entitled to expect from the goods of that type, or it must render the goods less useful, practicable, or safe for the purposes for which they were purchased.” Further, in *Vousvoukis v Queen Ace CC t/a Ace Motors* it was held: “...it "would seem uncontentionous that a complex product is defective even where its defectiveness is attributable only to a fault in one of its components: for example a car is defective even when only its brakes fail...”

[13] According to Barnard J., it is the buyer's responsibility to demonstrate that the defect was present at the time the contract was signed and that the buyer was unaware of it. In casu, since the 1st Respondent purchased a brand-new vehicle, he qualified for the protections provided by section 55(2) and carried the onus to demonstrate the existence of the defect at the time of delivery or receipt of the vehicle.

Submissions

Appellant's submissions

[14] In light of section 55, the Appellant submitted that the vehicle does not fall short of the sub-provisions of this section. It is claimed that the purpose of 1st Respondent's purchase of the vehicle was primarily for transportation from point A to point B. Despite the rust, the car could nevertheless transport him and it has done so for 170,000 kilometres. The Appellant relies on the record of the appeal to support these submissions and to show that the 1st Respondent agreed that the vehicle was in good working order and of good quality. The Appellant stated that the 1st Respondent bears the onus of proving a defect in the vehicle. Further, it was stated that the 1st Respondent confirmed that nothing prevented his use of the vehicle. The Appellant also pointed out that no indication exists as to whether the vehicle did not fulfil any of the relevant standards.

1st Respondent's submissions before the Tribunal

[15] Upon reviewing the appeal record, the 1st Respondent acknowledged that the car's function was to transport him. He clarified that the car was still functional enough to fulfill its intended purpose despite the corrosion, but he did not explicitly concur that the vehicle was of good quality with no defect. He merely acknowledged that because he frequently services it that it was in fine operating order. Importantly, the 1st Respondent stated the rust has caused failure of the left rear shock and covered the undercarriage of the vehicle.

Discussion

[16] The Tribunal referred to section 55(2)(1) of the CPA, however, upon evaluation of the CPA there is no existence of section 55(2)(1). It is obviously an error as what was being referred to is ostensibly s 55 (2) (b). It is not appropriate to

disregard any defects found in the vehicle, including the rust on certain parts of the vehicle, even if it is still functional and fulfilling its intended purpose. Based on an analysis of the annexures, it is clear that the rust has spread extensively throughout the vehicle, affecting the metals. Although the vehicle can still be used to get the 1st Respondent from point A to point B, it is not meant to have a rusting or corrosion on any of its parts as a new vehicle. As a result, due to the existence of the rust one can say that the vehicle is less acceptable and unsafe than people generally would reasonably be entitled to expect from the goods of that type, a brand new car. This indicates a defect in the vehicle.

[17] Bearing in mind the above-mentioned principles on latent defects, the next question is determining whether the defect existed at the time of the purchase. On appeal record the 1st Respondent indicated that he serviced his car regularly. It must be wondered why, at the time of its regular maintenance, corrosion was not detected. There is however an indication of Mr Visser three years after incident having detected the defect. This, in turn, entails an assessment of the experts' evidence submitted to the court as regards the cause of the rust on the vehicle.

Whether the Tribunal award neglected the evidence presented before the Tribunal.

[18] The Appellant claimed rust developed from pool acid spilling, but the 1st Respondent denied any acid spill and requested proof. The 1st Respondent discovered further rust metal on the vehicle and expressed his dissatisfaction. The Appellant requested further investigation, but still maintained the rust was caused by acid and there was no fault on their manufacturing process. The samples of the rust were taken, too, by the 1st Respondent for his tests at PhysMet cc. The PhysMet tests revealed rust was caused by an aqueous (water) solution, not direct acid exposure. Each party adduced the evidence of an expert witness to prove the cause of the rust in the vehicle.

Applicable law

[19] It is important to discuss the nature, function, and proper judicial handling of expert evidence before moving on to the testimony of the experts summoned by the Appellant and the 1st Respondent. In *Schneider NO and others v AA and Another*, Davis J. outlined this function, and the ensuing duty of an expert witness as follows:

"In short, an expert comes to Court to give the Court the benefit of his or her expertise. Agreed, an expert is called by a particular party, presumably because the conclusion of the expert, using his or her expertise, is in favour of the line of argument of the particular party. But that does not absolve the expert from providing the Court with as objective and unbiased an opinion, based on his or her expertise, as possible. An expert is not a hired gun who dispenses his or her expertise for the purposes of a particular case. An expert does not assume the role of an advocate, nor gives evidence which goes beyond the logic which is dictated by the scientific knowledge which that expert claims to possess."

[20] Similarly, it is relevant to mention matter of *Nel v Lubbe* where the court held:

"...But the opinion of an expert witness is admissible whenever, by virtue of the special skill and knowledge he possesses in his particular sphere of activity, he is better qualified to draw inferences from the proved facts than the judge himself. A court will look to the guidance of an expert when it is satisfied that it is incapable of forming an opinion without it. But the court is not a rubber stamp for acceptance of the expert's opinion. Testimony must be placed before the court of the facts relied upon by the expert for his opinion as well as the reasons upon which it is based...The court will not blindly accept the assertion of the expert without full explanation. If it does so its function will have been usurped."

[21] Furthermore, in the matter of *McDonald's Corporation v Joburgers Drive-Inn*

Restaurant (Pty) Ltd and another; McDonald's Corporation v Dax Prop CC and another; McDonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd and Dax Prop CC, the court stated that:

“It is true that an expert may sometimes refer to hearsay sources in support of his views. However, if his views are entirely based on assertions which he obtained from somebody else, it is difficult to contend that the probative value of his evidence does not depend on the credibility of such other person. And in so far as the evidence is said to relate to a state of mind, this may be true in respect of some of the replies. It may be that in some cases the mere fact that an interviewee made a certain utterance may be relevant as indicating his state of knowledge (e.g. by his associating McDonald's with hamburgers). In some other cases it does seem to me, however, that it is the assumed truth of what is said by the interviewees which is ultimately reflected in the results of the survey.”

Appellant's Submission

[22] The Appellant points out the errors of the Tribunal in dealing with expert evidence in the heads of arguments. According to the Appellant, the way in which the Tribunal dealt with the evidence in the four short paragraphs indicates that it has made up its mind. It is my intention to consider the arguments put forward by the parties briefly in order not to repeat the expert witness testimony. Mr. Kevin Heunis, who has extensive experience overseeing the Ford Everest production plant, testified that there has never been a reported car rust issue. The Tribunal rejected his evidence on the basis that he failed to disclose that all car manufacturers, including Ford Motor Company, conduct regular quality control inspections on a representative sample. The Appellant argues that the Tribunal's rejection of the evidence was erroneous, unjustified, and unsustainable, claiming there was no justification for disbelieving the facts about manufacturing process.

[23] Regarding Mr. Burger's Genis evidence, he stated in his testimony that the 1st Respondent acknowledged there were no issues at the time of the transaction when he signed the Pre-Delivery Inspection. The CPA's provision of s 55(5) was invoked by the Tribunal to dismiss his claim. The Appellant contends that the Tribunal misunderstood the significance of section 55 (5) (a) they cited, and that their rejection of this evidence was also unjustified and unsustainable. With regard to Mr. Da Silva's testimony, the Appellant added that the other parts of his testimony remained unaffected even in the absence of any medical proof demonstrating the skin irritation. Furthermore, the Appellant claimed that even though Mr. Visser provided testimony, the tribunal disregarded it since it was not clear if he personally did the tests.

Discussion

[24] The fact that, because Mr. Heinus has never encountered this problem or heard of a complaint regarding rust on a manufactured car does not imply that it will never occur. In fact, the 1st Respondent's signature on the Pre-Delivery inspection certifies that he acknowledged there was no problem when the car was purchased.

It's important to remember that the 1st Respondent is not an expert in cars or the manufacturing process; as such, he could not have known, in the event that he was a fair buyer, where and how to check for defects when he bought the car. This fault is clearly a latent defect, the rust was hidden under the carpets, it was not visible or apparent upon inspection of the vehicle. It can be argued that a reasonable buyer who was not well-versed in the issues or flaws to look for in a vehicle would have thought the car was flawless when they bought it. Also as stated in section 55(5)(a) of the CPA it is indeed irrelevant whether the defect could have been dictated by the consumer at the time of purchase.

[25] It is unclear why the Appellant would have expected the Tribunal to rely on a skin irritation argument if there had been no medical evidence. Mr. Da Silva's testimony might have helped the Appellant's case only if there had been medical

proof of skin irritation. Since Mr. Visser did not perform the tests personally, his evidence can be deemed to amount to hearsay. However, had the test-performer appeared to testify to his evidence, it might have been taken into consideration. The tribunal was justified in not accepting that evidence.

[26] The Appellant further challenged Mr. Thompson's testimony on the ground that he has only tested for chlorine. He did not test the pH of the samples, which was capable of detecting acid. Mr Thompson had concluded that "noting the low levels of chlorine found within the corrosion product, it was apparent that the corrosion attack experienced within the vehicle, was the consequence of exposure to an aqueous solution that was contaminated with normal levels of chlorine, and not due to direct acid exposure." The Appellant submits, therefore, that Mr. Thompson's evidence alone cannot establish whether there was an acid spill in the vehicle. According to Mr. Visser, Mr. Thompson confused "the circumstances under which rust is produced. It is not the result of iron and hydrochloric acid rather iron hydroxide dissolved in an acidic medium". However, Visser lost sight of the fact that Thompson also stated that the compound noted in the vehicle is rather formed via the reaction of iron, water and atmospheric oxygen. Comparing the evidence of Mr. Thompson and that of Mr. Visser, however, reveals that Mr. Thompson evidence can assist the court reach a decision. Even though I agree with the Appellant, that it appears that several further tests were left out of Mr. Thompson's evidence. Mr. Thompson however carried out the test himself and was honest that he did not test the samples' pH. Mr. Visser did not conduct the test himself and therefore his evidence reliant on hearsay evidence. If the court relies on hearsay evidence, there are certain safe guards applicable, otherwise it will be inadmissible. Hence, the Tribunal was correct when it dismissed Visser's evidence.

[27] The rusting of the vehicle is directly linked to the definition of a defect. It is unpersuasive for the appellant to claim that the 1st Respondent had spilled the acid. If there was an acid spill, one would have wondered why the rust started manifesting under the carpet lid and not on the carpet, chairs and seatbelts. Therefore, the vehicle should be repaired by the appellant in accordance with the order of the

Tribunal.

Whether the repair remedy awarded by the Tribunal is appropriate.

[28] It is important to remember that the car was bought in November of 2017. The 1st Respondent discovered rust on the vehicle's rear loading area's boards under the carpet lid on 28 January 2018. He claims that he noticed it for the first time since it was hidden under a carpet lid when he was checking if there were jumper cables in his car. The 1st Respondent also stated that he discovered rust in additional areas, such as the undercarriage, after the appellant inspected the vehicle in February 2018 and brought it back to him. Importantly, the initial discovery of the corrosion came merely two to three months after the purchase of the vehicle. On the face of it, it appears that the 1st Respondent can rely on section 56 (2) provisions because there has not yet been a lapse of the period of six months as provided for in the regulation.

[29] Section 56 reads as follows:

"Implied warranty of quality –

(1) In any transaction or agreement pertaining to the supply of goods to a consumer there is an implied provision that the producer or importer, the distributor and the retailer each warrant that the goods comply with the requirements and standards contemplated in section 55, except to the extent that those goods have been altered contrary to the instructions, or after leaving the control, of the producer or importer, a distributor or the retailer, as the case may be.

(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 –

(a) repair or replace the failed, unsafe or defective goods; or

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

(3) If a supplier repairs any particular goods or any component of any such goods, and within three months after that repair, the failure, defect or unsafe feature has not been remedied, or a further failure, defect or unsafe feature is discovered, the supplier must

(a) replace the goods; or

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

[30] The tribunal ordered the Appellant to remove the rust and repair the 1st Respondent’s car back to the standard it should have been in if there was no rust. In *Motus Corporation (Pty) Ltd t/a Zambezi Multi Franchise and another, supra*, the facts of the matter slightly resembles the facts of this matter before the court. The Respondent, Ms. Wentzel, purchased a vehicle from the Applicant later upon discovering a defect, she argued that the vehicle fell short of the provisions of the Consumer Protection Act. The remedy she sought was a refund of the purchase price relying on section 56. The court held the following:

“To obtain the refund remedy Mr Wentzel had to show, first, that Renault repaired the defective parts; secondly, that within three months after the repairs, the defects had not been remedied or that a further failure was discovered.”

[31] All that the Appellant did was look into what was causing the car's corrosion. It never made an effort to repair the defects. The Tribunal was therefore correct that

repairing the defect is the appropriate remedy available to the 1st Respondent.

[32] Under the circumstances the following order is made:

1. The appeal is dismissed with costs.
2. The order of the tribunal stands, that is:

“The Appellant is ordered to remove the rust and repair the Respondent’s car back to the standard it should have been if there was no rust”.

N V Khumalo
Judge of the High Court
Gauteng Division, Pretoria

I agree

M M D LENYAI
Judge of the High Court
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