IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)

CASE NO: 2181/2020
Reportable: YES / NO
Circulate to Judges: YES / NO
Circulate to Magistrates: YES / NO
Circulate to Regional Magistrates: YES / NO

In the matter between:

MASEGO PRECIOUS MAKADU	Applicant
and	
NTT VOLKSWAGEN	First Respondent
MOTOR INDUSTRY OMBUDSMAN	Second Respondent
VOLKSWAGEN FINANCIAL SERVICES SOUTH AFRICA (PTY) LTD	Third Respondent
WESBANK MOTOR FREE STATE & NORTHERN CAPE	Fourth Respondent

Heard on: **18 February 2022**

Delivered on: **31 May 2024**

JUDGMENT

RAMAEPADI AJ

INTRODUCTION

1 The applicant, Masego Precious Makadu ('Makadu') has brought an application in this court for an order, *inter alia:*

1.1. For the delivery of a new Volkswagen Polo Vivo 1.0 TSI 2019 Motor Vehicle without latent or patent defects.

1.2. That the recommendation made by the second respondent under reference number 360815/AS be set aside, within ten (10) days of granting this order.

1.3. If specific performance cannot be tendered, that the sale agreement between the parties be cancelled and that the applicant be refunded.

1.4. That the first respondent bears the costs of this application.

2 The applicant also seeks condonation for the late filing of her replying affidavit. The application for condonation is not opposed by the respondents.

3 The main application is opposed by the first, third and fourth respondents. They do so on procedural, as well as substantive grounds. On procedural grounds, the first, third and fourth respondents oppose the main application on five (5) grounds.

3.1. First, the applicant has cited the first respondent as 'NTT Volkswagen'. NTT Volkswagen is a branding name for various Volkswagen

dealerships around the country. It is not an entity with standing in legal proceedings. The applicant has therefore cited a non-existent entity. The proper citation of the first respondent is NTT Volkswagen Kimberley, a division of NTT Motors Lowveld (Pty) Ltd.

3.2. Second, the relief sought in prayers 1 and 3 of the notice of motion is unenforceable.

3.3. Third, in prayer 2 of the notice of motion, the applicant seeks a review of the decision / recommendation of the Motor Industry Ombudsman without complying with the procedure prescribed in Uniform Rule 53.

3.4. Fourth, the applicant has failed to exhaust the internal remedies provided for under the Consumer Protection Act, 68 of 2008 ('the CPA') before approaching the court.

3.5. Fifth, misjoinder of the fourth respondent to the proceedings. There is no explanation in the founding affidavit for joining the fourth respondent to the proceedings.

4 On the merits, the first, third and fourth respondents oppose the main application *inter alia* on the basis that:

4.1. In terms of the notice of motion, the applicant claim the replacement of the motor vehicle as 'specific performance', but she does not explain in her affidavit on what basis she could contractually be entitled to specific performance in the form of the replacement of the vehicle.

4.2. Section 5(2)(d) of the CPA precludes the applicant from obtaining an order in prayer 3 of the notice of motion seeking cancellation of the instalment sale agreement.

4.3. To the extent that the applicant's case for cancellation of the instalment sale agreement may be based on the common law basis of a defect, the election to cancel would have had to be communicated to the other contracting party, which did not happen in this case.

4.4. The applicant has not made a case in her founding affidavit that she would, on the basis of section 14(2)(b)(i)(bb) of the CPA, be entitled to any of the relief sought in the notice of motion because, the provisions of paragraph (bb) are subject to those of subsection 3(a) and (b) of section 14 in terms of which the applicant would upon cancellation of the agreement have remained 'liable to the supplier for any amounts owed', as well as for 'a reasonable cancellation penalty'. There is no allegation in the applicant's founding affidavit, that all outstanding amounts have been paid or that payment thereof is tendered.

4.5. The applicant has not made out a case in the founding affidavit for a refund of the purchase price of the vehicle. There is no allegation in the founding affidavit that when the vehicle was towed in on 12 August 2019 or at any time thereafter (at least until 15 August 2019), the applicant expressed the wish to be refunded.

4.6. A loose fuse is not a 'defect' for purposes of the CPA, which would entitle the applicant to replacement of the vehicle. In terms of section 53(1)(a) of the CPA, only a 'material imperfection in the manufacture of the goods or components' or a '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' would qualify as a defect. There is no evidence that the loose fuse had rendered the vehicle 'less useful, practicable or safe' than reasonably expected' or, that the vehicle had, as a result of the loose fuse, not been 'useable and durable' for a 'reasonable period of time'.

4.7. The applicant has not made out a case in the founding affidavit for a replacement or a refund by the first, third, or fourth respondents, because neither the first respondent, the third respondent, nor the fourth respondent was the 'supplier' of the vehicle for purposes of section 56(3) of the CPA. Further, there is no allegation in the founding affidavit, that after 15 August 2019, the 'defect' appeared not to have been remedied, or that some 'further failure, defect or unsafe feature' was discovered within those three (3) months.

5 In the discussion below, I deal with the respondents' grounds of opposition summarized above. Before doing so, it is necessary to set out a brief background of this matter.

PERTINENT BACKGROUND

The following background facts emerge from the affidavits filed off record and are largely common cause between the parties.

6 On 1 August 2019 the applicant concluded an instalment sale agreement with the third respondent for the sale of a brand new Volkswagen Polo Vivo 1.0 TSI ('the vehicle'). The first respondent ('NTT Volkswagen Kimberley') is the dealership that assisted with the transaction and delivery of the motor vehicle to the applicant on 1 August 2019.

7 When the applicant attempted to start the motor vehicle on 12 August 2019, it would not start and a brash noise emanated from the ignition. The applicant reported the incident to the first respondent and the motor vehicle was towed to the first respondent's premises.

8 Later that day at around 16h00 pm, the first respondent informed the applicant telephonically that the motor vehicle had been tested and that it was in working

order. The applicant then proceeded to the first respondent's premises. At the first respondent's premises, the applicant was given two options, either to leave the vehicle with the first respondent until the issue underlying the complaint recurs or, to take the vehicle and monitor it herself. The applicant was then advised that should the issue underlying the complaint recur, she should call roadside assistance and a technician will be dispatched to diagnose the vehicle wherever it may be. The applicant elected to leave the vehicle at the first respondent's premises.

9 Whilst still at the first respondent's premises, the applicant demanded a diagnostic report, which was given to her by Ms. Tania Van Wyk ('Ms. Van Wyk'). On perusal of the diagnostic report, the applicant realized that her vehicle was incorrectly described as a sedan, whereas it is a hatchback.

10 On 13 August 2019 the applicant contacted the third respondent and explained her experience. The third respondent informed her to collect the motor vehicle from the first respondent's premises as there were no defects in the motor vehicle and it was fit for use.

11 On 15 August 2019 a technician reported that the vehicle would not start, but instead made a '*clack clack* noise' when an attempt was made to start it at the first respondent's premises. The workshop foreman (Barry Wessels) assessed the vehicle and the diagnosis revealed that the fuse pin was not making secure contact, resulting in a lack of power to the ignition when an attempt was made to start the vehicle. The fuse was replaced and inserted in a different vacant fuse socket, which allowed for a secure connection.

12 The applicant was contacted and informed of the status of the vehicle and that the matter had been rectified, but the applicant refused to take delivery of the vehicle.

13 Thereafter, the applicant requested cancellation of the instalment sale agreement.

14 On 23 August 2019 the fourth respondent informed the applicant that the first respondent had declined the applicant's request for cancellation of the agreement.

15 On 27 August 2019 the applicant's attorneys gave a formal notice of cancellation of the instalment sale agreement in terms of section 14 of the CPA.

16 On 10 September 2019 after complaints by the applicant, a representative of the first respondent offered to replace the first respondent's vehicle, but when it emerged that the replacement vehicle was not available in the applicant's choice, the applicant referred the matter to her legal representatives.

17 On 17 September 2019, the first respondent's attorneys informed the applicant's attorneys that the first respondent was willing to offer the applicant a replacement vehicle of the same specifications as the vehicle purchased by the applicant albeit on a 'without prejudice' basis, and that if she was not willing to accept that offer, her vehicle was ready for collection. The applicant was requested to confirm her position before close of business on 19 September 2019.

18 On 19 September 2019 the applicant's attorneys advised that the applicant rejected the offer and insisted on cancellation of the instalment sale agreement

19 On or about 7 October 2019, the applicant lodged a complaint with the Motor Industry Ombudsman of South Africa (MIOSA). In its report dated 3 June 2020, MIOSA resolved that as the vehicle was repaired, it could not support the applicant's expectation that the supplier must cancel the deal. The applicant was advised that, should she approach the National Consumer Commission, a copy of the Ombudsman's file would be supplied to her free of charge.

PROCEDURAL GROUNDS OF OPPOSITION

Failure to exhaust internal remedies

20 The first and third respondents have raised as a preliminary point, the applicant's failure to comply with section 69(d) of the CPA. They contend that the applicant is non-suited on amongst others, the basis that she approached this Court for the relief sought in the notice of motion without first exhausting all the other remedies available to her in terms of national legislation. In this regard, reference was made to section 69 of the CPA, which provides that:

"69. Enforcement of rights by consumer –

A person contemplated in section 4(1) may seek to enforce any right in terms of this Act or in terms of a transaction or agreement, or otherwise resolve any dispute with a supplier, by –

(a) referring the matter directly to the Tribunal, if such a direct referral is permitted by this Act in the case of the particular dispute;

(b) referring the matter to the applicable ombud with jurisdiction, if the supplier is subject to the jurisdiction of any such ombud;

(c) if the matter does not concern a supplier contemplated in paragraph (b)-

(i) referring the matter to the applicable industry ombud, accredited in terms of section 82(6), if the supplier is subject to any such ombud; or

(ii) applying to the consumer court of the province with jurisdiction over the matter, if there is such a consumer court, subject to the law establishing or governing that consumer court;

(iii) referring the matter to another alternative dispute

resolution agent contemplated in section 70; or

(iv) filing a complaint with the Commission in accordance with section 71; or

(d) approaching a court with jurisdiction over the matter, if all other remedies available to that person in terms of national legislation have been exhausted."

21 Mr. Olivier who appeared on behalf of the third respondent at the hearing of this matter, submitted that the implication of section 69(d) is to require a consumer to first exhaust all the internal remedies before approaching the civil courts. He further submitted that the 'other remedies' referred to in section 69(d) would include those provided in sections 70 and 71 of the CPA, like initiating a complaint with the National Consumer Commission, approaching the Consumer Court and approaching the National Consumer Tribunal.

22 Mr. Olivier further submitted that the import of section 69(d) of the CPA is to limit the rights of a consumer to approach a court for redress, before exhausting the remedies in section 69(a)-(c).

23 Section 69(d) of the CPA has been the subject of various decisions of this Court and the Free State High Court. The decision of the Free State High Court in *Joroy 4440 CC v Potgieter and Another NNO* is instructive. In that case – *Joroy 4440 CC*, the Free State High Court dealt with an issue similar to the one raised by the first and third respondents in this case, thus, – whether the applicant had the right to approach this court for redress without first exhausting her remedies under the CPA.

24 In that case – *Joroy 4440 CC*, the court per Reinders J found that section 69(d) of the CPA required a consumer to first exhaust all the other remedies provided in terms of national legislation (*i.e*. the CPA) before approaching the court for redress.

> “I am not of the view that s 69(d) can reasonably be construed to have more than one meaning at all. I am in agreement with Mr *Tsangarakis* that the wording of the said section is clear and unambiguous. It is specifically stated that the consumer may approach the court if all the aforementioned avenues of redress have been exhausted. The legislature was very specific in prescribing the redress that a customer has in terms of this section. . .”

25 A similar approach was adopted by the Northern Cape High Court in *Imperial Group (Pty) Ltd t/a Auto Niche Bloemfontein v MEC: Economic Development, Environmental Affairs and Tourism, Free State Government and others*. At paragraph [19] of the Judgment, the court held:

> *“The Legislature has created a statutory framework in adopting the CPA to deal with the rights and obligations of suppliers and consumers to ensure speedy, inexpensive and fair procedures. A specialised framework has been created for consumers and suppliers to resolve disputes. Parties must pursue their claims primarily through these mechanisms. See: Chirwa v Transnet Ltd and others [2007] ZACC 23; 2008 (4) SA 367 (CC). . . The Constitutional Court has repeatedly held that where legislation has been enacted to give effect to a constitutional right(s), a litigant should rely on that legislation to give effect to the right(s), or else to challenge that legislation as being inconsistent with the Constitution . . . The NCA, CPA and the Free State Act were specifically enacted to entrench and govern the realisation of the fundamental consumer rights under the Constitution. . .”*

26 Then, later at paragraph 21 of the Judgment, the court held:

> *“The High Court’s right of review is limited in casu. The remedies provided in the CPA, read with section 148 of the NCA have to be pursued. . .”*

27 These remarks were endorsed by Olivier J in *Dipico v Imperial Group Limited*

t/a Cargo Motors Klerksdorp and Another ('Dipico'), in the following terms:

> *"I respectfully agree with this. In my view the "clear … intention of the Legislature" is that the provisions of section 148(1), in providing an internal remedy of appeal and when read in context, would indeed oust any conceivable power of review by the High Court of a decision of a single member provincial Consumer Court that has not yet been subjected to an appeal by a full provincial Consumer Court. Put another way, in my view the High Court's only source of power to review the proceedings of a single member Tribunal or Consumer Court would be the provisions of section 148(2)(a), and that power can only come into existence through an unsuccessful internal appeal to the full Tribunal or Consumer Court."*

28 Then at paragraph [26] of the Judgment, the court made clear that failure to exhaust internal remedies [an internal appeal in that case] rendered the review premature. The Court observed thus:

> *"In my view the second respondent's judgment is therefore not susceptible to review by this court at this stage. The applicant's failure to follow the route of an internal appeal not only rendered this application premature, it also failed to activate this court's power of review in terms of section 148(2)(b)."*

29 The same approach was adopted by Chesiwe J in *Africa Trading & Supply (Pty) Ltd v City Square Trading 604 (Pty) Ltd*. In that case – *Africa Tradi*ng, relying on the principle established by the Constitutional Court in *Chirwa*, the court had the following to say about the import of section 69 of the CPA:

> "[14] The tribunal as set up by the CPA is a statutory body that can deal with disputes between a consumer and a supplier. The legislature has considered it appropriate to give it jurisdiction to deal with such disputes. Section 69 is clear and unambiguous. It specifically stated that the consumer may approach the court if all remedies have been exhausted. In

terms of section 82(b), the Motor Industry Ombudsman of South Africa (MIOSA) deals with dispute resolution between consumers and the motor industry. There is no evidence that the plaintiff approached MIOSA.

[15] In Chirwa *supra* the Constitutional Court held that where a specialised framework has been created for the resolution of disputes, parties must pursue their claim through such mechanisms.

[16] Commentary on the Consumer Protection Act (Naude and Eiselen Juta states as follows:

'Implied hierarchy. Section 69 does not set out a specific hierarchy or order according to which the bodies or entities mentioned in the section may be approached, save for expressly providing that a (civil) court with jurisdiction over the matter may be approached 'if all other remedies available to that person in terms of national legislation have been exhausted'. It is, however, submitted that s 69, read in context with various other sections of the Act which impact on it, contains an implied hierarchy. The preferred route to redress in terms of this implied hierarchy is that alternative dispute resolution body should first be approached in an attempt to resolve a dispute before a complaint is filed with the Commission, which can either deal with the complaint or refer it to another body in accordance with the provisions of the CPA, or issue a non-referral.'

[17] It is clear from section 69 that a consumer has to exhaust all remedies before approaching a court. As stated in Chirwa that a specialized framework created for dispute resolutions must be pursued. The plaintiff gave no evidence whatsoever that remedies provided for in the CPA were exhausted. The plaintiff approached this court as a court of first instance. As correctly stated by the defendant, the plaintiff did not plea or allege non-compliance with section 69, whereas the defendant in the opposing affidavit raised the non-compliance with section 69. The plaintiff further averred in

the Rule 37(4) questionnaire that it was not obliged to exhaust its remedies in terms of the Act. This conduct of the plaintiff is unacceptable.

[18] In Joroy 4440 CC v Potgieter and Another NNO, the court said:

'I am not of the view that s 69(d) can reasonably be construed to have more than one meaning at all. I am in agreement … that the wording of the said section is clear and unambiguous. It is specifically stated that the consumer may approach the court if all the aforementioned avenues of redress have been exhausted. The legislature was very specific in prescribing the redress that the customer has in terms of this section. I fail to see how any other interpretation can be given to the word 'if'.'

[19] In my view, the plaintiff by claiming that it was not obliged to exhaust all remedies is incorrect. The legislature by prescribing these provisions was to ensure that matters are resolved speedily and are less costly if resolved at the Tribunal. This further ensures that the courts are not overburdened with matters that have a Tribunal to resolve any dispute between parties.''

30 In *Imperial Group (Pty) Ltd t/a Cargo Motors Klerksdorp v Dipico and another*, the court *per* Phatshoane J (as she then was) found the following remarks in the *Commentary on the Consumer Protection Act* (Original Service 2014) by the learned author C Van Heerden in Naude & Eiselen (eds) to be persuasive:

"Thus it is clear that where ombuds exist, whether ombuds with jurisdiction or industry ombuds, they are to be preferred to approaching other dispute resolution agents. Alternatively to approaching the above alternative dispute resolution bodies a consumer may approach a consumer court of the province with jurisdiction, if there is such a consumer court. Therefore if a consumer resides in a province where there is a consumer court, such consumer is not barred from approaching the consumer court even if an ombud with jurisdiction exists. However, there is a distinct possibility that

the consumer court may decline to hear the matter and refer the dispute to the ombud with jurisdiction instead, on the basis that such ombud has the appropriate expertise to deal with the matter. In principle civil courts should be approached as an option of last resort in order to deal with a dispute between a consumer and a supplier, except in instances where it is clear that such court either has exclusive jurisdiction to deal with the matter or to make a specific order such as a damages award or would otherwise be best suited to improve the realisation and enjoyment of consumer rights as contemplated by s 4(3)." My emphasis.

31 The principle that emerges from the authorities referred to above, is that section 69(d) of the CPA only limits the right to approach the civil courts until all the internal remedies have been exhausted. Section 69(d) is not the only provision in legislation that limits the right to approach the courts. Section 7(2)(a) of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA) is another. It requires a litigant to first exhaust internal remedies before instituting review proceedings.

32 The obligation imposed on a litigant to first exhaust internal remedies before approaching the courts is not an unnecessary burden. It serves an important purpose of ensuring that the administrative dispute resolution mechanism provided for in the relevant legislation is not undermined. This was explained by Mokgoro J in *Koyabe and Others v Minister for Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae),* albeit in the context of a PAJA review:

> "[35] Internal remedies are designed to provide immediate and cost-effective relief, giving the executive the opportunity to utilise its own mechanisms, rectifying irregularities first, before aggrieved parties resort to litigation. Although courts play a vital role in providing litigants with access to justice, the importance of more readily available and cost-effective internal remedies cannot be gainsaid.
>
> [36] (A)approaching a court before the higher administrative body is given

the opportunity to exhaust its own existing mechanisms undermines the autonomy of the administrative process. It renders the judicial process premature, effectively usurping the executive role and function. The scope of administrative action extends over a wide range of circumstances, and the crafting of specialist administrative procedures suited to the particular administrative action in question enhances procedural fairness as enshrined in our Constitution*. . .*"

33 The internal remedies provided for in the CPA include those provided for in sections 70 and 71. Section 70 allows a consumer who seeks to resolve a dispute in respect of a transaction or agreement with a supplier to refer the matter to either of the following dispute resolution agents:

33.1. an ombud with jurisdiction, if the supplier is subject to the jurisdiction of any such ombud;

33.2. an industry ombud accredited in terms of section 82 (6), if the supplier is subject to the jurisdiction of any such ombud;

33.3. a person or entity providing conciliation, mediation or arbitration services to assist in the resolution of consumer disputes, other than an ombud with jurisdiction, or an accredited industry ombud; or

33.4. applying to the consumer court of the province with jurisdiction over the matter, if there is such a consumer court, subject to the law establishing or governing that consumer court.

34 If the matter is not resolved, and the dispute resolution agent concludes that there is no reasonable probability of the parties resolving their dispute through the process referred to in sub-paragraph 33.1 to 33.4 above, then, the agent may terminate the process by notice to the parties, whereafter the party who referred the matter to the agent may file a complaint with the Commission in accordance with

section 71.

35 Upon receipt of the complaint, the Commission must investigate the complaint and at the end of the investigation, the Commission may do one of three things. It may either:

35.1. issue a notice of non-referral to the complainant in the prescribed manner; or

35.2. refer the matter to the National Prosecuting Authority, if the Commission alleges that a person has committed an offence in terms of the Act; or

35.3. if the Commission believes that a person has engaged in prohibited conduct, it may refer the matter to the equality court or; refer the matter to the consumer court of the province in which the supplier has its principal place of business, if there is a consumer court in that province or; refer the matter to the Tribunal.

36 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:

36.1. the consumer court, if any, in the province within which the complainant resides, or in which the respondent has its principal place of business, subject to the provincial legislation governing the operation of that consumer court; or

36.2. the Tribunal, with leave of the Tribunal.

37 If a matter is referred directly to a consumer court, the respondent may apply to the Tribunal. The Tribunal must then conduct a hearing into the matter

referred to it, and may make any order including, declaratory order, imposing an administrative fine in terms, requiring repayment to the consumer of any excess amount charged, together with interest, or any other appropriate order.

38 It is plain from the scheme of the CPA set out above, that the CPA contains a comprehensive dispute resolution mechanism to resolve disputes between consumers and suppliers. The legislative intention behind the dispute resolution scheme of the CPA must have been that disputes between consumers and suppliers must, as the first port of call, be resolved through the dispute resolution mechanism provided for in the CPA. It is only in cases where the CPA does not provide a remedy or, after exhausting all the internal remedies that a consumer will be entitled to approach the civil courts for redress.

39 Surely, allowing a consumer to approach the civil courts for redress in circumstances where the CPA provides redress, without first resorting to the dispute resolution mechanism in the CPA, will undermine the scheme of the CPA.

40 It is common cause between the parties that, save for lodging a complaint with MIOSA, the applicant did not refer the matter to the Consumer Tribunal, which is the next level of the internal remedies provided for in the CPA. Once it is so, then it follows that the applicant did not exhaust all the internal remedies provided for in the CPA before approaching this Court for redress. That is precisely the type of conduct that is prohibited in terms of section 69(d) of the CPA.

41 Consequently, the applicant’s right to approach this Court for redress is limited by section 69(d) of the CPA. She may not approach this court until she has exhausted all the remedies in the CPA, including those referred to in sections 70 and 71.

42 In light of the conclusion I have reached on this point, it becomes unnecessary to determine the other issues raised by the parties.

COSTS

43 It is clear from the papers that the applicant felt that she was bullied and her rights as a consumer were being infringed by the respondents. This application, misguided as it may have been, was evidently a genuine attempt on her part to vindicate her rights. In the circumstances, I do not think this is a proper case to award costs against the losing party.

CONCLUSION

44 For all the reasons advanced above, I find that the applicant should have exhausted all the internal remedies before approaching this Court for redress, which she has failed to do. The first and third respondents' point *in limine* based on section 69(d) of the CPA is upheld.

ORDER

45 In the result, I make the following order:

1. Condonation for the late filing of the replying affidavit is granted.

2. The application is refused for failure to exhaust all the internal remedies provided for in the CPA.

3. Each party is to pay their own costs.

M J Ramaepadi

Acting Judge of the High Court of South Africa, Northern Cape Division, Kimberley

APPEARANCES

For the Applicant:	Adv. Lesego Motau
Instructed by:	Macbeth Attorneys Inc. Mbombela
For the First Respondent:	Adv. D C Jankowitz
Instructed by:	Van De Waal Inc. Kimberley
For the Third Respondents:	Adv. J L Olivier
Instructed by:	De Waal Inc. Kimberley