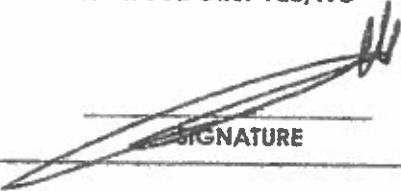




IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

CASE NUMBER: 34022/ 2018

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
<u>19 / 07 / 2019</u> DATE	
 SIGNATURE	

In the matter between:

ABIGAIL WENTZEL

APPLICANT

And

AUTOFIT FITMENT CENTRE RENAULT (PTY) LTD –ZAMBEZI

FIRST RESPONDENT

RENAULT SOUTH AFRICA (PTY) LTD

SECOND RESPONDENT

THE MOTOR FINANCE CORPORATION (PTY) LTD t/a M.F.C.
RESPONDENT

THIRD

JUDGMENT

MAVUNDLA, J.

- [1] The applicant launched an application for payment in an amount of R256 965.84, being alleged purchase price of the vehicle, a Renault Kwid, and tenders the return of the vehicle. The application has been launched on the premise that the first and second respondents ("the respondents") have breached the Consumer Protection Act, 68 of 2008 ("CPA"), specifically sections 49(1)(b), 55 (2)(b) and (c), and 56(2)(b)-56(3).
- [2] It is common cause that the applicant purchased a new vehicle from the first respondent for an amount of R131 491. 23 on 7 December 2017. The purchase price, service maintenance plan, finance and interest totalled an amount of R256 965.84.
- [3] According to the applicant when she started the aforesaid vehicle while it was still on the showroom floor, she heard a ticking and or rattling sound coming from the front part of the vehicle. She immediately asked the first respondent's sales representative by the name of Nicolas Andrade about the sound, as same was alarming, and he replied that it was a very common noise on the Kwid (the model of the new vehicle) that all of them have it, and that it is simply just the navigation system starting up.
- [4] On 11 December 2017, the applicant called the representative of the first respondent, to inform him that the said noise had gotten more intense, and that the new vehicle's hazards lights have now started flashing when the vehicle is started, which was further accompanied by the rattling noise. The said representative informed her that he was going to speak to the service department and revert to her. On the 14 December 2017 she had not heard from the said representative, she sent him an email inquiring when the problems could be fixed. She further stated in the email that she had detected further defect with regard to the air conditioner, which was not working properly, as same did not produce and or emit cold or cool air. She attached annexure B email dated 14 December 2017.
- [5] On 19 December 2017 she received an email from the representative of the first respondent advising her to bring the vehicle the following Monday, which she did. She was informed by one Danie, a mechanic or technical manager of the first respondent, that the new vehicle was sold to her with a faulty immobilizer "module". She was further

advised that as a result of the replacement of the "module", that the vehicle's control central locking was now functional. She had not been aware that this feature on the new vehicle was broken and or faulty.

- [6] The applicant collected the vehicle from the service department of the first respondent on 19 Decembers 2017. On the same date she noticed that the Blue tooth would stop functioning once the vehicle exceeded the speed of 70 km/h. On the course of the subsequent few days she noticed further components in the new vehicle giving trouble. She consequently contacted the second respondent telephonically, and was advised to contact the Motor Vehicle Industry Ombudsman of South Africa (MIOSA)) for possible assistance.
- [7] On the 15 January 2018 she informed Nicolus of the screeching noise of the brakes, the rattling on the driver's front window, and that the braking system was uneven, on 25 January 2018 she sent a photo marked annexure E to the first respondent to show that the roof rails were defective, and pulling away from the vehicle. The roof rails were subsequently "super glued" in place by the first respondent as they did not have the necessary tools.
- [8] On 14 March 2018 the applicant returned the vehicle to the first respondent. The vehicle she contended suffered from the following, *inter alia*:
- 8.1 a rattling sound coming from the front of the vehicle, to the extent that the hazard lights come on;
 - 8.2 the air conditioning system is not blowing cold air;
 - 8.3 the vehicle had a faulty "module";
 - 8.4 the central locking system did not work and or was faulty;
 - 8.5 the foot brakes were faulty and screeched;
 - 8.6 the driver's side window is loose, and railed while driving the vehicle;

- 8.7 the Bluetooth car kit and or system does not work when the vehicle exceeded 70km/h;
- 8.8 the roof rails started to pull off of the vehicle;
- 8.9 the back panels of the vehicle started to pull off;
- 8.10 the vehicle makes a ticking sound (separate to the sound recorded herein above), at the front left-hand side of the vehicle;
- 8.11 emergency mobilizer activating at unexpected times;
- 8.12 navigation system had a loose connection causing certain ticking noises;
- 8.13 roof racks began coming loose after again after being replaced.

[9] On 14 March 2018 Mr Werner Petzer the first respondent's dealer principal acknowledged the defects on the vehicle and offered to purchase the vehicle from her (much like a trade-in) at its current "blue book" value, and would attempt to restructure a more promising vehicle finance agreement in order to purchase a "demo model" Renault Clio, which was a model provided to her as a curtesy car during some of the repairs. This conduct is in contravention of section 68(1)(c) as the first respondent attempted to alter or proposed to alter the terms and conditions of a transaction or agreement with her as the consumer, to her detriment.

[10] The applicant contended that the first and second respondents contravened sections 49(1)(b); 55(2)(b)(c) and 56((2)(a)(b) and (3 of the Act in that:

- 10.1 failed to draw her attention to the fact that the agreement included an assumption of risk or liability by the respondents, in any manner that satisfies the formal requirements of section 49(3) to (4);
- 10.2 failed to deliver to the applicant a vehicle that is of good quality, in working order and free of any defects and that is useable and durable;

- 10.3 failed to repair or replace the vehicle and refund the applicant with the price for the vehicle;
- 10.4 failed to properly and satisfactorily and or completely repair the vehicle and or the defects.
- 10.5 further defects have since come to light.
- [11] The applicant referred the dispute and issues herein to the Motor Industry Ombudsman of South Africa (MIOSA). It would seem that the first respondent has also responded to MIOSA. however, it would seem that there was delay or inaction in finalising the dispute by MIOSA. She cannot refer the matter to the National Consumer Commissioner while the matter is still pending before MIOSA. She finds herself obliged to approach court for the relief set out herein above.
- [12] The applicant contended further that she has exhausted all remedies provided to her in term of section 49(1)(b); 55(2)(b)(c) and 56(2)(a)(b) & (3).
- [13] The respondents in opposing the application raised points *in limine*, in that:
13. 1.1 the applicant failed, in terms of 69(a)(b) and(c) of the CPA to refer the matter to the Tribunal; the applicable industry ombud with jurisdiction; to the applicable industry ombud; accredited in terms of section 82(6); to the consumer court; alternative dispute resolution and filing a complaint with the Commissioner;
- 13.1. 2 the applicant has referred the matter to MIOSA, has therefore acted in terms of section 69 of the Act and MIOSA and the latter has not made a ruling and therefore the matter is still pending before MIOSA;
- 13.1.3 The applicant has therefore approached this Court prematurely
- 13.2.1 The matter is *lis pendens* before MIOSA and in terms of section 69 of CPA this Court cannot adjudicate over this matter.

13.3.1 the applicant has failed to comply with the provisions of rule 18(6) of the Uniform Rules of Court in that she failed to annex a copy of the agreement to her founding affidavit.

13.4. there is patently foreseeable dispute of facts, in that:

13.4.1 the respondents, in so far as the alleged faulty brakes, which is denied, the sound was due to lack of ABS and simply required to be deglazed;

13.4.2 the respondents dispute the mechanical condition of the car and contends that;

(i) it cannot be resolved without expert evidence, cross examination of witnesses;

(ii) applicant was warned through her attorneys of disputes of facts;

(iii) the alleged foot brake sound, only required glazing, which was done;

(iv) the droning of the Blue tooth was as the result of the natural normal running noise of a Renault Kwid;

(v) the roof rails were repaired;

(vi) the dispute of facts is incapable of being resolved on affidavits.

[14] The respondents contend further, *inter alia*, that:

AD MERITS

14.1 there is no entity called Renault Proprietary Limited Zambezi Dealership and that the correct citation is Motus Corporation Proprietary Limited trading as Zambezi Multi Franchise;

14.2 there is no Act Companies Act 61 of 1993 but only the Companies Act No 61 of 1973 and the Companies Act No 71 of 2008;

- 14.3 the respondents deny having breached any warranty or any agreement between the parties or any provision of the CPA;
- 14.4 in terms of the agreement the plaintiff is not entitled to cancel the agreement;
- 14.5 the applicant failed to inform the respondents in writing of the extent and nature of complaint , and failed to refer the matter to Ombud of Motor Industry in terms of clause 6.1 of the agreement;
- 14.6 the applicant has been driving around with the vehicle as there is no alleged defect claimed and or complaint that the respondent has rendered the vehicle unusable;
- 14.7 After each and every repair effected by the respondents, the applicant never brought the vehicle back nor complained of any further defect;
- 14.8 it is denied that there was any defect with the air conditioning and the vehicle was never brought back for such repair;
- 14.9 the first time the applicant brought the vehicle back for repairs was on 27 December 2017;
- 14.10 it is denied that ether vehicle was sold with a defective locking system, or any faulty module with the central locking system;
- 14.11 whatever fault that occurred thereafter, this was repaired and returned to the applicant in a good working condition;
- 14.12 regarding the Bluetooth system malfunctioning, the applicant only complained about this on 23 =February 2018 when she complained of the noisy brakes;
- 14.13 the only repair to the car was the glazing of the brakes as the vehicle had no ABS; and the roof rails were replaced as curtesy.
- 14.14 the drowning of the Bluetooth was not a problem but simply the natural high noise level of the car;

14.15 the respondent attended to the complaints of the applicant reported on 27 December 2017, 23 January 2018 and 23 February 2018.

14.16 the applicant elected to have the vehicle repaired, which repairs were done, and she is therefore not entitled to cancellation and or refund of the purchase amount.

[15] With regard to the points *in limine* raised by the respondents, I am of the view that these stand to be dismissed for the reasons stated herein below:

15.1 The applicant contended that she exhausted all remedies provided to her in term of section 49(1)(b); 55(2)(b)(c) and 56(2)(a)(b) & (3). In my view, consideration of these remedies require a pragmatic approach.¹ It brooks no argument that traversing each and every remedy, presents time frames and expenses. It could hardly have been the intention of the Legislature, to create a much more laborious and expensive mechanism for consumer to follow, before approaching the court. In my view, it was not the intention of the Legislature, that in exhausting the remedies available, it was meant that the consumer must travers all the labyrinths of every available remedy, before approaching a court. That type of approach would be prejudicial to consumers, firstly in that it would be a laborious and expensive process; secondly by the time the consumer had exhausted all the available processes, would be met with prescription by the time he /she approaches the Court. In my view, it suffices if the consumer has embarked on at least one of the available remedies, as the applicant, *in casu*, did by approaching MIOSA, which she found wanting. *Vide S v Barends*² This must be so because sections 69 and 70 are not couched in peremptory terms, and therefore it is open to the consumer to pick and choose one of the alternatives available; *vide Imperial Group (Pty) Ltd t/a Auto Niche Bloemfontein v MEC: Economic Development, Environmental Affairs and Tourism Free State Government and Others*.³ In the

¹ Vide *Weenen Transitional Local Council v Van Dyk* where the Court advocated a common-sense approach by asking whether the steps taken were effective to bring about the exigibility of the claim measured against the intention of the legislature.

² 2017 (1) SACR 193 (NCK) at 197 para [7] a-198f. 7].

³ [2016] 3 ALL SA 794 (FB) at 43.

circumstances, I find that the applicant has substantially complied with the requirement that she exhaust the remedies afforded her before she could approach the court;

15.2 In respect of the *lis pendent*, I find also that in view of the withdrawal of the matter before MIOSA, there is therefore *no lis pending* and accordingly the applicant is properly before this court.

15.3 in respect of the alleged none compliance with rule 18(6), I am of the view that then fact that the applicant did not attach to her founding affidavit the purchase agreement, the respondents have not been prejudiced thereby. Besides, they cured whatever defect, if any, by such production. Besides, the affidavit contained all the necessary averments required in motion pleadings, unlike in trial matters where rule 18(6) is peremptory. I am of the view that this point *in limine* cannot succeed.

15.4 In so far as the issue of dispute of fact is concerned:

- (i) it is instructive to refer to the matter of *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*⁴, where the Court held that where factual disputes in motion proceedings arose, relief may only be granted if the facts averred in the applicant's affidavit, that have been admitted by the respondent, together with the facts alleged by the respondent, justify the order sought;
- (ii) it is common cause that the applicant purchased a new motor vehicle from the first respondent;
- (iii) it is common cause that she reported her complaints to the sales person of the first respondent while the vehicle was still on the showroom floor of her complaints and subsequently shortly thereafter;

⁴ 1984 3 SA 623 (a) AT 634e-l.

- (iv) It is common cause that the first respondent had to fix some of the complaints raised by the applicant, not only once, or twice but thrice;
- (v) It is common cause that, the first respondent had to glaze the breaks of the new vehicle; work on the roof panels of a new vehicle;
- (vi) it is common cause that in effort to ameliorate the problem, the first respondent attempted to buy back the vehicle from the applicant and offered her a different model;
- (vii) regard being had to the admitted facts, the denials by the respondents that the defects were not material, cannot be sustained and therefore, need to be rejected and the version of the applicant be accepted as most probable that the new vehicle was not in good condition as would be expected of a new vehicle.
- (viii) accordingly the point of dispute of fact, in my view must also fail.

[16] It is important to have regard to the provisions of the Act which provides, *inter alia*, that:

16.1 The purposes of the Consumer Protection Act 68 of 2008 is, *inter alia*, to protect the economic interests of consumers, develop effective redress of the consumer (vide preamble of the Act); protecting the consumer from unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices; and deceptive unfair or fraudulent conduct (vide s3(d);

16.2 The court is enjoined to develop common law as necessary; to improve the realisation and enjoyment of the consumer's rights in general, and to promote the spirit, purposes of the Act. (vide s4(2);

I am of the view that the courts must take a robust approach towards the economic giants, such as the respondents *in casu*, who can flex their financial muscle to bully unsuspecting consumers to accept flawed goods, and raise all sort of spurious defences and denials. In this case there were too many flaws or

defects for a new vehicle. I am inclined to learn towards protecting the rights and interest of the applicant. ,

16.3 The Act accords the consumer the right to be supplied with good quality goods, which are in good working order and free of any defect, reasonably suitable for the purposes they are intended for (s55(2)). In my view, for a new vehicle to have so many defects, some pointed out whilst it was still on the showroom, can hardly be said to be of a good quality.

16.4 The applicant, as a consumer, has *inter alia*, a right, within six months of delivery, to return the goods without any penalty and be refunded full purchase amount, the consumer may require the supplier to repair the goods or replace the goods. If the repair fails or further defects are discovered the supplier must replace the goods or refund the consumer the price paid by the consumer for the goods; (s56(2)).

The applicant returned the vehicle to the first respondent on more than one occasion. She complained on further subsequently discovered defects. The fact that she initially chose to have the vehicle repaired, does not obliterate her right to demand repayment or replacement of the goods.

The admission by the respondents that the vehicle made naturally high noise level, buttress the applicant's contention that the Bluetooth was drowned by the noise. I would have expected the first respondent to have pointed this alleged natural large noise aspect to the applicant before she took delivery. I am not persuaded by the respondent's contention. In my view, the vehicle right from the onset, was simply not of good quality any version to the contrary must be rejected, as I do.

16.5 Section 69(d) provides that a consumer may approach the court having jurisdiction over the matter, if all other remedies available to that person in terms of the national legislation have been exhausted. In this regard, as already pointed out

herein above, I am satisfied that the applicant has satisfied the provisions of this subsection.

16.6 Taking all the circumstances of this case, the balance of probabilities, favour that the applicant be refunded the full purchase amount of the vehicle together with interest.

[17] On the 4 September 2018 the matter served in the unopposed court roll, after the respondent had served a Rule 30 notice, contending non-compliance with rule 18(6). The matter was removed from the unopposed roll and it was ordered that costs will be costs in cause. It is trite that costs follow the event. In the exercise of my discretion, such reserved costs, are to be borne by the respondents as well, primarily because the applicant is the successful party.

[18] I do take into account the fact that the applicant, does not have a dip pocket as compared to the respondents. She must have been highly prejudiced and inconvenienced in having to seek redress from the respondents. The dictates of fairness demand that a punitive costs order be awarded against the respondents. This will compel the respondents to ensure that they sell to the public good quality commodities. In the exercise of my discretion the respondents are mulcted with attorney and client costs order.

[19] In the premises the following order is issued:

1. That the respondents are jointly and severally, the one paying the other to be absolved, ordered to repay the applicant the total purchase and finance charges for the Renault Kwid in an amount of R256 965.84 within fifteen (15) days of this order;
2. That the aforesaid amount shall be paid to the trust account of the applicant's attorneys of record, within fifteen (15) days of service of this order;

3. That the respondents, are jointly and severally, the one paying the other to be absolved, ordered to pay taxed or agreed costs on attorney and client scale.
4. That the applicant returns the relevant vehicle to the premises of the first respondent, on the date of payment of the amount mentioned in order 1 above.



N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

DATE OF JUDGMENT : 19 / 07 / 2019

APPLICANT'S ADV : ADV QUINTEN SAM van der HEEVER

INSTRUCTED BY : ELLIOT ATTORNEYS

RESPONDENTS' ADV : ADV R. CARVALHEIRA

INSTRUCTED BY : DREYER ENGELBRECHT ATTORNEYS INCORPORATED.