REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG LOCAL DIVISION,

JOHANNESBURG

CASE NUMBER: 40586/2016

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED. **YES**

Date Signature

MAPHUTSE, KABATI GLADYS Applicant

and

MOTODEAL PARK (PTY) LTD t/a

MOTOR DEAL PREMIUM 1st Respondent

NEDBANK 2nd Respondent

JUDGMENT

SKIBI AJ

[1] This is an opposed application in which the applicant seeks *inter alia* the following relief:

[1.1] Cancellation of a sale agreement in respect of a pre-owned Nissan NP 200 with registration letters and numbers B[…] GP;

[1.2] Refund of the sum of R71 015-62 being a total sum of the deposit and all instalments paid as of 2 September 2016 in terms of the agreement;

[1.3] Refund of all instalments to have been paid by the applicant upon finalisation of this matter;

[1.4] Ordering the first respondent to return a motor vehicle, polo vivo with registration letters and numbers C[…] GP to the applicant which vehicle was used as a trade in;

[1.5] That in the event the vehicle mentioned in paragraph 1.4 above is no longer available then and in that case the monetary market value at the time of the agreement being a sum of R116 200-00, to be paid to the applicant within a period of 14 days from the date of order in favour of the applicant.

[1.6] the first respondent is ordered to pay the costs of this application.

[2] At all material times the applicant was the owner of the Polo Vivo referred to above as she had been driving the said vehicle for sometime. She decided to trade the vehicle in order so that she can purchase another vehicle. In December 2014 she went to the vehicle dealership of the first respondent (hereinafter to refer as Motordeal) to exchange or trade in her vehicle. Motor

deal prepared the documents for settlement of her then existing vehicle. The offer for settlement was processed. She was required to pay R10, 000.00 in addition to the settlement amount of her vehicle. She identified a Nissan NP 200 as the vehicle she was interested to purchase. The said Nissan NP 200 was financed by Motor Finance Corporation, a finance division of Nedbank (hereinafter referred as MFC or the second respondent). She alleges that the vehicle she bought had reached 63000km millage at the time she bought it. The value of the polo vivo she traded in was R116, 200.00.

[3] The agreement between the applicant and the second respondent was reduced to writing. The applicant alleges that the reason she for buying the vehicle was being informed by the first respondent that the vehicle has a full service history and a valid warranty. It was based on this condition that she agreed to purchase the vehicle. She avers that she was informed that she should not worry about a hard copy of the service book as all the services are recorded by Nissan in their system. The applicant was advised that at the next service interval she may take the vehicle to any Nissan accredited dealer who will be able to generate the vehicle service history and assist her accordingly.

[4] After signing all the papers and once the vehicle finance was approved the first respondent was instructed by the second respondent to deliver the vehicle to her. She acknowledged delivery of the vehicle and she confirmed that she inspected the vehicle had no defects. In the terms of the agreement it is recorded that the second respondent is the owner of the vehicle.

[5] When the vehicle reached 75 000km the applicant took the vehicle for service in Motordeal Johannesburg South dealership, in Ormonde and it was enquired if the vehicle has other mechanical problems which need to be fixed apart from the service. She mentioned that there is a noise coming from the engine of the vehicle and there was problem with the brake pads. She gave instructions that those be fixed and she left the vehicle to go to work. When she came back to collect the vehicle after work she was told that the brake pads and the noise in the engine was not fixed. She was also told that there were no records of service history on the system. The first respondent offered to repair the vehicle and gave her a courtesy vehicle and also extended the warranty for two years. The applicant considered this as a misrepresentation by the first respondent and lodged a complaint with Consumer Commission. The Commission appointed mediation in terms of section 70 (1) (c).

[6] It is common cause that the applicant lodged a complainant at the South African Consumer Commission (mediation) which gave a ruling. Aggrieved by the said ruling the applicant pursued the matter at the Motor Industry Ombudsman of South Africa (MIOSA). She did not succeed on both at mediation and arbitration. After the ruling was made by MIOSA the applicant instituted the application to this court.

[7] On 20 November 2019, the date of argument of the matter the parties reached a mutual agreement to first deal with the points in *limine* only. After arguments I reserved my ruling until 22 November but on that date the court

was not ready with the ruling and the parties were informed they will be notified on a later date.

[8] Before making a determination on the points in *limine* I must mention that on 30 April the second respondent was granted leave to file a supplementary affidavit and the said application which was unopposed by the applicant and it was granted. The judgment will be dealing with the points *in limine* raised.

[9] I am called upon to make a determination on the following points *in limine:*

[9.1] Whether the jurisdiction of this court is ousted.

[9.2] Whether the matter has already been adjudicated by motor industry ombudsman as envisaged in section 69 of the Consumer Protection Act[1].

(i) Whether this Court has Jurisdiction

[10] The main point of contention is whether the applicant prematurely approached this court without first exhausting all the remedies set out in the Consumer Protection Act[2] (hereinafter referred to as CPA). The second respondent contended that she prematurely approached this court in that she should have first exhausted all the mechanisms set out in section 69 (a) to (c). The second respondent referred to decided cases in support of his contention. This contention was opposed by the applicant. To determine this point one

[1] 68 of 2008
[2] 68 of 2008

has to consider the provisions of section 69 of the CPA and the case law as to how this provisions of this section was interpreted.

[11] Section 69 of the Act deals with the enforcement of a consumers' rights in terms of the CPA. The section reads:

69 (1) 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 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;

*(d) Approaching a court with jurisdiction over the matter, if <u>all</u> the remedies available to that person in terms of national legislation have been exhausted. (*own underlining)

[12] The applicant is a person contemplated in terms of section 4(1) of the CPA and the issue raised in this application concerns the enforcement of a right in terms of a transaction. The second respondent is a supplier as contemplated in section 69 (b) alternatively 69 (c)(i), in that there is an applicable industry ombud, accredited in terms of section 82(6) of the CPA, and the first respondent and second respondent the are subject to such ombud pursuant to the Government Notice 817 of 17 October 2014 in terms whereof the Motor Industry Ombudsman of South Africa is accredited in terms of section 86(6)(b) of the CPA.

[13] The second respondent's contention is that the applicant has not exhausted all the remedies available to her and that amounts to non-compliance with the provisions of section 69(1) of the CPA. Based on the failure to comply with the said statutory provisions of the Act this matter is prematurely before this court. It is contended that she ought to have first exhausted all the remedies as set out above.

[14] The second respondent has referred me to decided two cases where the issue of interpretation of section 69 of the CPA has been dealt with, being,

Joroy 4440 CC v Potgieter and Another NNO[3] and *Nzwana v Dukes Motors t/a Dampier Nissan*[4]*.* The Second respondent contended that according to these two cases the mechanism laid down in section 69 of the CPA had to be followed before an individual could approach a court for relief.

[15] In the *Joroy matte*r it was held that section 69 was peremptory and that a consumer could only approach a court if section 69 had been complied with.

> *"[8] I am not of the view that section 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 have been exhausted. The legislature was very specific in prescribing the redress that a customer has in terms of this section. I fail to see any other interpretation can be given to the word "if" consequently I do not venture into the rules of interpretation or the provisions of the CPA in this regard*."

[16] In addition it was found that :

[16.1] the foresaid interpretation was in accordance with the principle where a specialised framework has been created for the resolution of disputes, parties must pursue their claims primarily through such mechanisms and reference was made to *Chirwa v Transnet Ltd and others*[5]*,*

[16.2] in the case of the motor industry, the ombudsman has been accredited[6].

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[3] 2016 (3) SA 465 (FB)
[4] (1170/2018) [2019] ZAECGC 81 (3 September 2019)
[5] 2008 (4) SA 367 (CC) at para 10

[17] In the *Nzwana matter*[7] it was held that the provisions of section 69 do not infringe the provisions of section 34 of the Constitution. The court held that section 69 had to be complied with before the court was approached.

> *"[29] By virtue of section 69 (d) of the CPA there is a limitation upon access to Civil Court in matters arising under the CPA in respect of Consumer Rights (unless Common Law Rights) and thus with jurisdiction (not a Consumer Court) may be approached by a person with locus standi "if" all other remedies available to that person in terms of the National Legislation have been exhausted."*
>
> *[33] I agree with the commentary that this does not oust the court's jurisdiction but that it implies that a Court cannot be approached until all other statutory remedies (including section 69) have first been exhausted that do not entail Court intervention. This would seem to mean that in any action or application brought before a court would require to allege and plead due compliance.*
>
> *[37] In the result and having regard to the above it would seem then the requirement of prior compliance with statutory requirement of prior compliance with statutory remedies, particularly section 69, effectively presently temporarily bars applicant's access to this court on the facts."*

[18] The decision in the *Joroy*[8] matter was also approved and followed, with reference to the *Chirwa*[9] matter.

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[6] Joroy at par 9
[7] Supra at para 27
[8] Supra at para 10
[9] Chirwa at para 30 & 34

[19] The first respondent aligned itself with the argument by the second respondent in support of the argument of the court's lack of jurisdiction in this matter.

[20] The applicant's contention is that she had approached the legal insurance to seek advice on the matter. She had taken her matter to mediation seeking resolution but she didn't succeed and she pursed it further to the Motor Industry Ombudsman of South Africa (MIOSA). It has been contended on behalf of the applicant she didn't have to shop around other legal entities, she has fully complied with the provisions of section 69 of the CPA. It has been further argued that she has a right of access to court in terms of Section 34 of the Constitution, Republic of South Africa[10] (the Constitution). Further that she was entitled even to approach the court directly but she met all the preliminaries. The applicant relied on the provisions of section 4(1) of the CPA in his contention.

[21] The Consumer Protection Act was promulgated in terms of the Government Gazette No 817 (GG) dated 17 October 2014 signed by the Honourable Minister of Trade and Industry, Dr R. Davis. In terms of this GG the Motor Industry Ombud of South Africa is accredited in terms of section 86(6) of the CPA.

[10] 108 of 19996

[22] The section 69 hierarchy applicable is outlined by Lowe J in *Nzwana matter*[11] as follows:

> [31] With this background, section 69 hierarchy applicable is set out in The Commentary as follows:
>
> "33. **Summary of routes to redress.** It is submitted that in the absence of express directions by s 69, the section appears to imply that generally the preferred route for redress is the following: If a dispute as contemplated in the CPA arises between a consumer and a supplier and they cannot resolve such dispute between themselves, the parties should **first attempt to resolve their dispute by means of alternative dispute resolution** by approaching one (not all) of the alternative dispute resolution agents mentioned in the CPA if they have not previously and unsuccessfully attempted this route. If there is an ombud with jurisdiction or industry ombud in the particular sector, **the ombud may be approached**. Alternatively the **consumer may approach a consumer cour**t with jurisdiction as contemplated by the CPA, if such court exists and is operational. If these entities are unable to resolve the dispute, **a complaint may be lodged with the National Consumer Commission**. Consumers should however be mindful of the fact that the Commission does not investigate individual complaints anymore but only investigates endemic harmful business practices and trends and focuses on issues of policy, hence the **Commission may** decline to investigate a particular matter and **refer the consumer to another entity for assistance**. However, where the **Commission** does decide to accept the lodging of a complaint it **will then either issue a non-referral notice or refer the complaint to another regulatory authority** or will investigate the matter. After an investigation into a complaint, **the Commission may refer the matter to the National Prosecuting Authority** (in respect of an offence) or the equality court (in respect of discriminatory conduct), or where it concludes that prohibited conduct has occurred, **it may propose a draft consent order if agreement is reached with the respondent** regarding an appropriate order. Alternatively, the Commission may issue a compliance notice or refer the matter to a consumer court (if there is one in the province and the Commission believes that the issues raised by the complaint can be dealt with expeditiously and fully by such referral), or **it may refer the matter to the Tribunal**. Where the Commission issues a non-referral notice in response to a complaint, other than on the grounds contemplated in s 116, **the complainant may refer the matter directly to the consumer court or the Tribunal**, with leave of the Tribunal. It may happen that a consumer who resides in a remote area of the country, where there is no consumer court or alternative dispute resolution agent, is involved in a dispute with a supplier and no ombud with jurisdiction or no industry ombud exists that can deal with that matter. In such instance it is submitted that such consumer may then, as a first step in accessing redress, lodge a complaint with the Commission, which will then either deal with the

[11] Nzwana judgment at par 31

matter or divert it in accordance with s 72. With regard to referral of matters to the Tribunal it is further submitted that the fact that the Tribunal is mentioned first in s 69 does not justify the inference that the Tribunal may generally be approached as a 'point of first entry' in matters involving infringements of consumer rights. Apart from the fact that the Tribunal has limited capacity given the fact that it is an *ad hoc* body, the circumstances under which the Tribunal may be approached are clearly set out in ss 73, 74, 75, 114 and 116. It is clear from these provisions as discussed below that the Tribunal cannot be approached as point of first entry for purposes of redress in terms of the CPA as, even in the case of a direct referral by a consumer, the National Consumer Commission should have been approached first and should have non-referred the specific complaint." (highlighted in bold indicate the most basic steps)

[23] Before I make a determination, some background to this case is necessary.

Immediately after the applicant became aware of the defects in the vehicle she took the matter to mediation and the mediation gave a ruling. On 25 November 2015 the mediation came up with the following ruling:

"During the process the parties agreed to settle the dispute on the following conditions:

1. *The consumer will return the supplier's vehicle on the following conditions*

   The Supplier must provide the Consumer with the vehicle's service history and service book as promised at the point of sale.

2. *If the requested documents is not available the Consumer will accept her vehicle but reserve her rights to refer the matter to the Motor Industry Ombudsman without further negotiations or to prejudice her dispute."*

[24] The applicant was still not satisfied and she (took) referred the complaint to the

ombud as be paragraph 2 of the ruling of mediation. The ombud considered the complaint and made a ruling. On 13 June 2016, MIOSA made the ruling in the following:

"We rule that Mrs Maphutse must fetch her vehicle and return the courtesy vehicle back to Motordeal Vanderbijlpark. This action must take place within 15 days as of date of this correspondence"[12]

[25] To understand the reasons behind the decision I take on this point in *limine* raised one should understand the purposes of the Consumer Protection Act which are set out in the Act. The legislature deemed it necessary to enact this piece of legislation to simplify the process of resolving disputes between the consumers and the service providers in less expensive ways so that even the poorest of the poor would be able to take the dispute to the relevant legal entity; before, or without, incurring costs of litigation in a court of law. The purposes of this Act is set out in section 3 of the CPA.

Section 3 of the CPA reads"

> *"3. (1) The purposes of this Act are to promote and advance the social and economic welfare of consumers in South Africa by—*
>
> *(a) establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally;*

[12] Record page 26

(b) reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by consumers—

(i) who are low-income persons or persons comprising low-income communities;

(ii) who live in remote, isolated or low-density population areas or communities;

(iii) who are minors, seniors or other similarly vulnerable consumers; or

(iv) whose ability to read and comprehend any advertisement, agreement, mark, instruction, label, warning, notice or other visual representation is limited by reason of low literacy, vision impairment or limited fluency in the language in which the representation is produced, published or presented;

(c) promoting fair business practices;

(d) protecting consumers from—

(i) unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices; and

(ii) deceptive, misleading, unfair or fraudulent conduct;

(e) improving consumer awareness and information and encouraging responsible and informed consumer choice and behaviour;

(f) promoting consumer confidence, empowerment, and the development of a culture of consumer responsibility, through

individual and group education, vigilance, advocacy and activism;

(g) providing for a consistent, accessible and efficient system of Consensual resolution of disputes arising from consumer transactions…"

[26] The applicant chose to resolve her dispute with the service provider by the mechanisms set out in the CPA where she followed the mediation and arbitration processes. Section 69 (d) of the CPA says the consumer who chooses this process should exhaust all the remedies available to him/her before approaching the court. She has not complied fully with the requirements of section 69 (1) (a)-(c). She may only approach this court if she states facts under oath that she has complied fully with the provisions of the section 69 (1) (a)-(c).

[27] Counsel for the applicant referred me to the provisions of section 4 (1) of the CPA and contended that the applicant has a right to approach a court alleging that a right in terms of this Act has been infringed, impaired or threatened, or that prohibited conduct has occurred. This is indeed the case, but it is a last resort if one proceeds in terms of this Act. If the consumer chooses to utilise another civil law route in cases excluded by the provisions of the CPA he/she may approach the court directly. This is a similar approach which was followed in *Nzwana matter*[13]; *Joroy matter* and the latter referred to Constitutional Court decision of *Chirwa*[14]

[13] Nzwana judgment par 37
[14] Chirwa v Transnet Ltd and others 2008 (4) SA 367 (CC)

[28] Based on the reasons set out above and the case law; it follows that a point *in limine* regarding jurisdiction of his court is upheld. A finding is made that this Court's jurisdiction is ousted.

(ii) whether the matter has already adjudicated upon

[29] The second point *in limine* raised is that MIOSA has resolved the matter and the applicant chose not to appeal the ruling of MIOSA. It is common cause MIOSA made a ruling which is being challenged by the applicant. As I have just stated above; that this court's jurisdiction is ousted at this stage I choose not to express a view on the merits of the case. That being the case I am constrained not to make a determination on this second point *in limine*. The reason is simple, if I make a determination now, she will be prevented from exercising her right to approach other legal entities as set out in section 69 of the CPA.

[30] A lot has been argued about the interpretation of the agreements as was dealt with by the Supreme Court of Appeal in the case of *Singh v BMW Financial Services (SA) (Pty) Ltd and another*[15]. I am not going to express any view on that issue as it goes straight to the merits of the case if one has regard to the prayers in the notice of motion.

[31] In the result I do not make a finding on the merits of the dispute in this application since the applicant remains at liberty to utilize any of the dispute

[15] [2011] 2 All SA 185 (SCA)

resolution mechanisms available in terms of the CPA, and it would thus be inappropriate to comment on such merits, at this stage.

Costs

[32] On the issue of costs; in the normal course the costs follow the result. In any event the question of costs is within the discretion of the court and this discretion is exercised judiciously. The issue of jurisdiction has been raised by the second respondent. The first respondent did not raise this point in *limine*. Although the second respondent succeeded with this issue the applicant indicated well in advance that she is not seeking any relief against the second respondent. In my view, it will not be fair to penalise her with a cost order.

[33] In the result:

(a) The application is dismissed, due to the applicant's failure to allege compliance with all the alternative dispute resolution options applicable to this matter as referred to in Section 69 of the CPA.

(b) Each party to pay its own costs.

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N. SKIBI

Acting Judge of the High Court, Gauteng Local Division, Johannesburg

DATE OF HEARING: 20 November 2019

DATE OF JUDGMENT: 03 December 2019

APPEARANCES:

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