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**IN THE NATIONAL CONSUMER TRIBUNAL
HELD IN CENTURION
Via TEAMS**

Case number: **NCT/152160/2020/75(1)(b)**

In the matter between:

GREGORY ROBERT WILLIAMS

APPLICANT

and

**LAZARUS MOTOR COMPANY (PTY) LTD
t/a LAZARUS FORD CENTURION**

RESPONDENT

Coram:

Prof. B. Dumisa	–	Presiding Member
Ms. D. Terblanche	_	Member
Prof. K. Moodaliyar	_	Member

Date of Hearing	–	18 October 2021
Date of Judgment	-	26 January 2022

JUDGMENT AND REASONS

APPLICANT

1. The Applicant is **GREGORY ROBERT WILLIAMS** (hereinafter referred to as “**the Applicant**”), a major male who resides at Amarosa, in the GAUTENG Province. He was represented by Ms. Chinettee De Beer, an Attorney from Hinrichsen Attorneys, at the hearing.

RESPONDENT

2. The Respondent is **LAZARUS MOTOR COMPANY (PTY) LTD t/a LAZARUS FORD CENTURION**, whose physical address is 400 West Avenue, Highveld, Centurion, Pretoria, in the Gauteng Province (hereinafter referred “**the Respondent**”). The Respondent was represented by Adv. Mark Cook, of the Group One Advocates, briefed by Mr. George Greenback of Swartz Weil Van Der Merwe Greenburg Inc Attorneys.

3. This is an application in terms of Section 75(1)(b) of the Consumer Protection Act 68 of 2008 (“the CPA”).

4. This matter was earlier adjudicated by a single member of the National Consumer Tribunal (the Tribunal) for Leave to Refer, which was granted by a single member on the 21st of May 2021.

5. This is an opposed application. A panel of three Tribunal Members must adjudicate on the merits of a matter where a single member granted the Applicant direct leave to refer his matter to the Tribunal to hear the case.

BACKGROUND

6. The Applicant, during November 2017, purchased a new Ford Everest 2.2 A/T XLT with registration number [...]and VIN [...] from Lazarus Motor Company (Pty) Ltd t/a Lazarus Ford Centurion. The sales representative who assisted him was Mr. Bartell Wolmarans.

7. The Applicant alleges that on 28 January 2018, he noticed rust on the bolts of

the rear loading area of the vehicle beneath the carpeted lid. He says he also saw extensive flakes of rust behind and below the car seats.

8. The Applicant reported this to Mr. Bartell Wolmarans, who indicated that the Applicant should bring the vehicle in for evaluation in February 2018, which the Applicant did. The Applicant says that the vehicle was returned to him on the same day.

9. The feedback from Lazarus Ford was that the rust was a result of spillage of pool acid by the Applicant, hence the Respondent was not liable for any subsequent repair work.

10. The Applicant denies that he ever spilled any pool acid in the vehicle.

11. The Applicant alleges he later noticed rust in various other parts of the vehicle, including the undercarriage. He took a series of pictures showing the rust and corrosion, which he forwarded to the Respondent.

12. The Applicant was requested to return the vehicle to the dealership for a second time so that a factory representative of Ford South Africa could further investigate and evaluate the vehicle.

13. The Applicant was provided with a courtesy vehicle, also a Ford Everest, to use during the period while his car was with Lazarus Ford. The Applicant alleges he noticed that even this courtesy car also showed signs of rust.

14. The Applicant further alleged that the Respondent did make a tentative offer to repair the car provided the Applicant was prepared to pay for the costs involved in the repairs and then the Respondent would be willing to supply the labour. There was no agreement on this Respondent's offer.

15. The Applicant further alleged that *"On 19 April 2018, a representative of Ford South Africa contacted my colleague, Mr. Jooste telephonically and indicated that as far as they were concerned the claim is dismissed and the matter closed for further*

discussion since Ford South Africa is of the opinion I sprayed the inside and undercarriage of the vehicle with pool acid that caused the subsequent damage and rust to the vehicle.”

CONSIDERATIONS OF THIS MATTER BY THE MOTOR INDUSTRY OMBUDSMAN SOUTH AFRICA (MIOSA)

16. The Applicant lodged a formal complaint on 15 April 2018, but Ford South Africa did not respond to the MIOSA inquiries in writing.

17. On 4 July 2018, MIOSA informed the Applicant that the Respondents were uncooperative, hence MIOSA was left with no option but to close the file *“since they did not receive the courtesy of a response and viewed it as a contravention of the South African Automotive Industry Code of Conduct and Section 82(8) of the Consumer Protection Act 68 of 2008 (“the Act”)”*.

CONSIDERATIONS OF THIS MATTER BY THE NATIONAL CONSUMER COMMISSION (NCC)

18. The Applicant lodged the complaint with the NCC, dated 7 November 2018.

19. The NCC issued a notice of non-referral, a year later on 12 December 2019, on grounds that the complaint *“Does not allege any facts which, if true, would constitute grounds for a remedy under the Consumer Protection Act, 2008”*.

20. The Applicant approached the Tribunal for a referral based on Section 75(1)(b) of the CPA.

THE HEARING

21. A three-member panel was allocated to hear this matter on 18 October 2021.

22. The hearing was conducted virtually via Microsoft Teams audio and video transmission.

APPLICANT'S SUBMISSIONS

23. At the hearing, the Applicant set out the facts which led to this hearing. These facts have been set out under the background above; hence, it is unnecessary to repeat them here.

24. The Applicant brought Mr. Russell Thompson as an expert witness:

24.1 Mr. Thompson is an independent forensic engineer with about 35 years of experience;

24.2 He has a BSc (Engineering) and an MSc Degree in Materials Engineering, both from the University of Cape Town;

24.3 He has work experience in the Air Force and the railways, and is now self-employed;

24.4 He runs his private business under the name PhysMet CC;

24.5 He said that the Applicant, at the beginning of March 2018, brought him rust debris from the Ford Everest vehicle in question;

24.6 Mr. Thompson said the samples did not have any traces of hydrochloric acid, the pool acid, as alleged by the Respondent;

24.7 He also challenged the Respondent's expert witness(es) that there was hydrochloric acid spilled in the car that was a cause of the rust. He argued that hydrochloric acid is not selective, hence if it attacked the Ford Everest it would have attacked it aggressively and not just at certain areas;

24.8 He argued "*The orange-brown colour of the corrosion product noted inside the vehicle, however, was typical of the oxyhydroxide form of iron (rust). This compound is rather formed via the reaction between iron, water, and atmospheric oxygen*"; and

24.9 He concluded, "*Further, 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 nominal levels of chlorine, and not due to direct acid exposure*".

THE RESPONDENT'S SUBMISSIONS

25. The Respondent brought four witnesses to give the testimony on their behalf:

- 25.1** Mr. Kevin Heunis (Ford Motor Company of South Africa);
- 25.2** Mr. Ferdie Visser (Expert Witness);
- 25.3** Mr. Kobus Burger Genis (Lazarus Ford salesperson); and
- 25.4** Mr. Tony Da Silva (Ford After Service Manager).

26. The Respondent called Mr. Kevin Heunis as one of the Respondent's witnesses. His relevance to this matter was that he ran the Ford Motor Company's Silverton Plant where the Ford Everest and Ford Ranger are produced. His position was that he has had a long experience in charge of the plant where the Ford Everest is produced and that there has been never been any incident before where anyone claimed there was rust in the car in any car produced in this plant:

26.1 They produce about 550 cars a day or about 100 000 vehicles per year;

26.2 He said all the Ford vehicles produced here go through a thorough dipping process where they are primed before painting both internally and externally;

26.3 He said the same thorough process is used before they install the car seats and seatbelts; and

26.4 He said no corrosive materials are allowed inside the plant.

27. The Respondent also called Mr. Kobus Burger Genis, who is their salesperson at Lazarus Ford Centurion, to comment on what he knows about this case:

27.1 He said he and Mr. Tony Da Silva had been responsible for the Pre-Delivery-Inspection, PDI, of this car before the Applicant took delivery of it;

27.2 The Applicant had signed the PDI forms indicating everything was in

order at the time of delivery;

27.3 He said that he and other colleagues at the Lazarus Ford premises got some itchy irritations on their hands when they touched some parts of this car when the Applicant brought in after complaining about rust;

27.4 He said the Applicant admitted to having transported pool acid in his car;

27.5 He said he believed the itchy feeling was linked to hydrochloric acid being present in the car; and

27.6 He said they took some samples from the car to Pro-Technic for tests.

28. The Respondent also called Mr. Tony Da Silva, who is a Ford Motor Corporation After-Sales Manager as their third witness:

28.1 He said he had dealt directly with the Applicant on this matter;

28.2 He said he was part of the colleagues who felt the skin irritation like others and burning feeling in his eyes when he entered the Applicant's car; and

28.3 He said at the back loading area of the car there was plastic with a tyre repair kit with rust, which was not part of the Original Manufacturers Equipment, OMEs.

29. The Respondent also brought Mr. Ferdie Visser as their fourth witness:

29.1 Mr. Visser holds National Diplomas and an MTech in Chemical Engineering;

29.2 He previously worked for the South African Police Services, SAPS, specializing in forensics. He also serves on the international chemical

weapons body;

29.3 He first dealt with a set of samples brought by Lazarus Ford Centurion;

29.4 He later dealt with another set brought by the Applicant; and

29.5 Mr. Visser's testimony was not clear and was complicated more by the confusion he created about whether it was he or his colleague Ms. Refiloe Mnisi who did tests on the set of samples brought by Lazarus Ford Centurion, as he did not sign off on the report for the Respondent.

THE PROVISIONS OF THE CPA

PART H of the CPA deals with the Right to fair value, good quality, and safety (ss 53-61)

30. Section 55 deals with the Consumer's rights to safe, good quality goods
Subsection 55(2) gives the following rights to the consumers that they a right to receive goods:

- (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, Act 29 of 1993, or any other public regulation.*

31. Section 56 deals with 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 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 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.*

EVALUATION OF EVIDENCE

32. The Applicant's expert witness, Mr. Russel Thompson, was very thorough in his testimony. The most crucial aspects of his testimony were that

32.1 The rust debris from the Ford Everest vehicle in question did not have any traces of hydrochloric acid, the pool acid, as alleged by the Respondent. This seriously weakens the Respondent's case, as their whole defense revolves around the allegation that the Applicant had spilled pool acid on the car which the Respondent claimed was the cause of the rust.

32.2 He advanced very convincing arguments why hydrochloric acid, pool acid, was not the cause of the rust in the car. He said hydrochloric acid is not selective, saying if it had been the cause the rust would have been all over the car and not just concentrated around the small areas. He even advanced an alternative explanation for the rust in the car. He said the rust in the car was probably a manifestation of oxyhydroxide, which is formed via the reaction between iron, water, and atmospheric oxygen.

32.3 Based on the above, it is clear that Section 55(2)(1) of the CPA applies here, as the rust on certain parts of this car render it defective, though some other provisions of this Section may not necessarily be applicable because

most other aspects of this car seem to be reasonably suitable for the purposes for which this car was bought.

33. The Respondent's four witnesses were not necessarily as convincing as the Applicant's witness.

33.1 Mr. Kevin Heunis, the Respondent's Manager for their main Silverton plant where this car was manufactured, gave detailed impressive statistics about the rigorous processes they put their cars through to ensure the highest quality levels, especially in ensuring their cars are rust-free. He mentioned that this was the very first time they have ever received a rust complaint, having produced millions of cars over the years. What Mr. Heunis did not mention was that all car manufacturers, including Ford Motor Corporation, systematically conduct quality control checks on a representative sample of cars produced, to ascertain there are no deviations from their quality levels. This was a significant omission on his part because there is always the first time.

33.2 Mr. Kobus Burger Genis, the Respondent's salesperson who sold this car to the Applicant, emphasized that the Applicant signed the Pre-Delivery-Inspection, PDI, forms, which he deemed as an admission that nothing was wrong with the car at the time of purchase. However, Section 55(5)(a) of the CPA clearly states that *"it is irrelevant whether the product failure or defect was latent or patent, or whether it could have been detected by a consumer before taking delivery of the goods"*. This witness further alleged that the Applicant admitted that he spilled the pool acid in the car, which the Respondent argued was the real cause of the rust being complained of.

33.3 Mr. Tony Da Silva, the Respondent's After-Sales-Manager, is one of the Respondent's employees who said they felt skin irritation and a burning feeling in their eyes when entering the Applicant's car. They contended that this was due to the pool acid they alleged was spilled in the car by the Applicant. The major problem with this allegation is that these employees

could not supply any medical evidence in support of their allegations.

33.4 Mr. Ferdie Visser, who was supposed to be the Respondent's expert witness, raised more questions than answered in his testimony. He dealt with the samples supplied by both the Applicant and the Respondent, but it was not clear what his findings were in both cases. It was further not easy to accept his testimony because there were unanswered questions on whether he carried out the tests required, or that other people did the tests as it transpired during his cross-examination.

CONCLUSION

34. The Applicant made extensive submissions about the rust that he found on his car, but he never complained about any mechanical and/or electrical aspects of the car.

35. He has already covered over 170 000km since purchasing this car four years ago in November 2017. He drives about 100km per day; about 3600km per month; and about 43000km a year. This aspect of the Applicant having driven over 170 000km in four years however does not favour the application of Section 56 on this matter, in terms of returning the car or getting a refund, as this proves that the car was generally suitable for the purposes for which it was bought.

36. After listening to the expert witness for the Applicant and four witnesses for the Respondent:

36.1 All the witnesses said one thing in common, that there was rust inside and outside the Applicant's car;

36.2 The major point of the dispute revolves around the cause of that rust;

36.3 There were inconsistencies about the "itchy feelings" that at least two of the Respondent's witnesses alluded to in trying to build up their case that the Applicant spilled pool inside the loading area of the car. They could not

explain the rust elsewhere inside the car and on the undercarriage;

36.4 Mr. Visser could not confirm under oath that he did the tests on the set of rust samples done for the Respondent. This rendered his testimony hearsay; and

36.5 Mr. Russell Thompson gave the most convincing testimony refuting that the rust inside and outside the Applicant's car was caused by pool acid.

37. Having considered Section 117 of the CPA, which deals with **Standard of Proof**, saying "*In any proceedings before the Tribunal, or before a consumer court in terms of this Act, the standard of proof is on the balance of probabilities*", the Tribunal has concluded that both the written submissions by the parties, and mostly the oral evidence led during the hearing favours the Applicant's version.

ORDER

38. Accordingly, the Tribunal makes the following order:

38.1 The Applicant's application is granted;

38.2 The Respondent is ordered to remove the rust and repair the Applicant's car back to the standard it should have been in if there was no rust; and

38.3 There is no order as to costs.

DATED ON THIS 26th DAY OF JANUARY 2022

[signed]

Prof B.C. Dumisa

Presiding member

With Ms. D. Terblanche (Member) and Prof. K. Moodaliyar concurring