

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO.: A195/19

REPORTABLE: YES/NO
OF INTEREST TO OTHER JUDGES: YES/NO
REVISED.

In the matter between:

PATRICK MDLULI

Appellant

and

THE NATIONAL CONSUMER TRIBUNAL

First Respondent

M NKOMO

Second Respondent

(in her capacity as the presiding tribunal member)

JERMANIE INVESTMENTS AND PROJECTS(PTY)LTD

Third Respondent

APPEAL JUDGEMENT

Mfenyana AJ

Introduction

[1] The appellant in this matter appeals against the decision of the National Consumer Tribunal (the Tribunal) handed down on 24 February 2019.

[2] The decision followed upon a referral by the appellant of a complaint in terms of section 75(1)(b) of the Consumer Protection Act¹, in respect of a dispute between the appellant and the third respondent. The said section provides that a consumer may, with leave of the Tribunal, refer a matter directly to the Tribunal in certain circumstances including where the National Consumer Commission (Commission) has issued a notice of non-referral for one or other reason.

[3] Having referred the complaint to the Commission for investigation, the Commission on 1 June 2018, issued a notice of non-referral on the basis that the matter involved a dispute of fact which could only be appropriately addressed through an adjudication process. Thus, the appellant was advised to refer the matter to the Tribunal.

[4] After satisfying itself that the appellant had complied with all the relevant processes necessary for the referral of the matter to the Tribunal, the Tribunal granted leave for the appellant to refer the matter directly to it in accordance with section 75(1)(b). The hearing took place on 9 October 2018 and 1 February 2019 before a full panel of three tribunal members. The Tribunal delivered its judgement on 24 February 2019. It is that judgement which forms the basis of this appeal.

Grounds of appeal

[5] The grounds of appeal are set out in the notice of appeal. In essence, the appellant contends that the presiding tribunal member erred in the following respects:

- (a) in failing to appreciate that the cause of action was premised on a breach of contract and/or implied warranty of quality;
- (b) in failing to award the appellant restitution damages and place the appellant in the position he would have been in had no contract been concluded;

¹ Act 68 of 2008

- (c) in finding that interest was not payable to the appellant despite the fact that the appellant became liable for interest at the rate of 23.5% as a result of the agreement;
- (d) in refusing to award legal costs to the appellant.

[6] It is necessary to set out the peculiar framework from which the appeal emanates. Of particular relevance is the interplay between the Consumer Protection Act and the National Credit Act (the NCA)² together with applicable regulations. This correlation is manifest from the fact that the Tribunal is established in terms of section 26 of the National Credit Act. Section 75(1) of the Consumer Protection Act is mirrored in section 141 the National Credit Act. Section 148(2)(b) of the NCA regulates appeals and reviews in respect of both the National Credit Act and the Consumer Protection Act, and provides that a participant in a matter before a full panel of the Tribunal may appeal to the High Court against the decision of the Tribunal. As such, this appeal is brought in terms of section 148(2) of the NCA.

Factual background

[7] On 17 January 2018 the appellant purchased two motor vehicles from the third respondent for the total amount of R263 000.00. He paid the purchase price in full, having obtained a loan from Capitec Bank. The terms of the sale agreement between the appellant and the third respondent were *inter alia* that the third respondent would provide the appellant with the service records of the vehicles. The appellant also alleges that he had specifically stated to the third respondent that the vehicles should not have been involved in accidents prior to the transaction. He took possession of the motor vehicles, and when the third respondent failed to supply the service records as agreed, the appellant took the vehicles to a body repair centre for assessment. The assessment report revealed that both vehicles had previously been severely damaged and reconditioned before being sold to the appellant. Within seven days of taking possession, and on the basis of the report, the appellant returned both motor vehicles to the third respondent, as he believed that the third respondent had misrepresented material facts to him concerning the condition of the

² Act 34 of 2005

motor vehicles. He requested a refund of the full purchase price of R263 000.00. When the third respondent failed to refund him, he sought and obtained legal assistance. The matter was eventually referred to the Tribunal for adjudication.

Tribunal hearing

[8] At the hearing of the matter, the appellant was represented by a firm of attorneys. The third respondent did not attend the hearing. In his submissions, the appellant informed the Tribunal that he had returned the motor vehicles within seven days of taking delivery and requested a refund of the full purchase price. When the third respondent failed to refund him, he instructed Legal Wise to assist him. Legal Wise issued a letter of demand to the third respondent but this did not yield any results as the first respondent simply ignored the demand. The appellant then approached the Motor Industry Ombudsman (MIOSA). After the matter was conciliated upon by MIOSA, it remained unresolved and was referred to the Commission, and ultimately to the Tribunal.

[9] After hearing submissions from the appellant, the Tribunal ordered the refund of the full purchase price. The Tribunal refused the appellant's prayer for interest and 'legal fees', and also declined to make an order in respect of costs.

Issues to be determined on appeal

[10] At the heart of the appellant's grounds for appeal, are two main issues; costs and interest.

[11] It is common cause that the transaction for the purchase of the two motor vehicles concluded between the appellant and the third respondent was financed through a loan granted by Capitec Bank to the appellant in the amount of R249 999.00 (Two hundred and forty- nine thousand nine hundred and ninety nine rand). Gleaned from the documents filed of record, is that interest was levied on the loan amount at the rate of 23.15% per annum over a period of 77 months. According to the loan agreement the total amount of interest was R239 698.73 for the duration of the contract term. The appellant contends that the third respondent is liable to pay

this interest as he took out the loan solely to finance the transaction, which he ultimately had to cancel because of the third respondent's breach.

[12] In his notice of appeal, the appellant further contends that interest is payable without the appellant having to prove that he suffered any loss. He further avers that he was deprived of the productive use of his money by the third respondent and is entitled to be compensated for this loss. The third respondent was in default, leading to a further contention by the appellant that the rate of interest at 23.15% was deemed to have been admitted by the third respondent. The Tribunal found that the appellant had not provided any argument to support this prayer or tendered any evidence that the respondent required the appellant to fund the purchase of the vehicles through a bank loan. On that basis the Tribunal refused to reimburse the appellant for the interest charged.

[13] In relation to costs, the record shows that the appellant incurred costs to the tune of R68 980.19 in respect of legal services provided by his erstwhile firms of attorneys, to wit, Gildenhuys, Malatji Attorneys, Marais and Parsons Attorneys, and finally Kietzmann Attorneys from June 2018 through to February 2019 when the matter was ultimately heard by the Tribunal. The third respondent did not oppose the application and thus did not take part in the proceedings. The appellant sought, but was not awarded costs.

[14] In declining to make a cost order, the Tribunal's reasoning was that as the third respondent had not participated in the proceedings, he could not be said to have been fivoulous and vexatious as to warrant a punitive cost order against them. While making reference to the section 147 of the NCA, which provides the circumstances in which costs may be awarded, the Tribunal did not venture into the reasons why a cost order was deemed not to be applicable in the circumstances.

[15] The appellant contends however that the there is no justification for the Tribunal to depart from the general rule that costs should follow the result. Thus he further contends that the Tribunal did not properly apply its mind and exercised its discretion arbitrarily based on a wrong principle.

Discussion

[16] As far as the order for the refund of interest goes, the Tribunal stated that there was no evidence that the third respondent required the appellant to fund the purchase of the motor vehicles through a bank loan. The Tribunal further stated that there is no basis in fact and in law for ordering the third respondent to refund the interest he paid to the bank in respect of the bank loan. In summary, the Tribunal concluded that the appellant had not made out a case to be granted costs and interest as prayed for.

[17] It is worth noting that what the appellant sought was interest at the rate of 23.15% as levied by Capitec Bank. His claim was for restitution as he contended that he would not have taken out the loan 'but for' the failed transaction and need to be placed in the position he would have been in, had the misrepresentation not occurred. The difficulty with this contention is that it does not appear *ex facie* the evidence that the appellant was induced by the third respondent to seek a loan from Capitec Bank to finance the transaction. Underlying this reasoning is whether the appellant suffered any damages as a result. Put differently, whether the appellant would have taken the loan had it not been for the misrepresentation. In that case the appellant would have a claim for damages. Regarding the appellant's contention that he lost out on the productive use of his capital and therefore entitled to interest, the issue is whether by reason of taking the loan the appellant suffered any damages and whether he proved such damages.

[18] It appears to me that what the appellant seeks to enforce is a claim for damages based on interest. He would need to prove such damages. The question that confronts this court is whether such damages were proved in the Tribunal and it seems to me that they were not. That being the case, a court of appeal cannot substitute its decision for that of the Tribunal in the circumstances. What would be appropriate in the circumstances, is for the the appellant to institute a damages claim before an appropriate forum if he believes that such claim can be proven.

Costs

[19] The trite principle in relation to costs is that costs are within the discretion of the court, which discretion must be exercised judicially. As far as legislation is concerned, section 147 of the NCA is instructive in this regard. It provides:

“ Costs

(1) Subject to subsection (2), each party participating in a hearing must bear its own costs.

(2) If the Tribunal-

(a) has not made a finding against a respondent, the member of the Tribunal presiding at a hearing may award costs to the respondent and against a complainant who referred the complaint ...

(b) has made a finding against a respondent, the member of the Tribunal presiding at a hearing may award costs against the respondent and to a complainant who referred the complaint ...

“

[20] The issue is whether the appellant was justified in approaching the Tribunal. If the order issued by the Tribunal is anything to go by, it is clear that there was merit to the appellant's complaint and to that end, the Tribunal ordered the third respondent to refund the appellant the purchase price of the two motor vehicles in full. It can therefore not be gainsaid that the appellant's complaint was warranted. In that respect there appears to be no plausible reason in my view, why the appellant should not be entitled to costs.

[21] Citing Rule 25 (7) of the Rules of the Tribunal, which states that punitive costs may be awarded against any party who is found to have made a frivolous and vexatious application to the Tribunal, the Tribunal went further to exonerate the third respondent on the basis that their non- participation in the proceedings signified that they did not manipulate the process of the Tribunal and thus no cost order falls to be

awarded against them. I do not agree. To my mind, the specific reference in the selfsame Rule 25 to “a party who is found to have made a frivolous or vexatious application to the Tribunal” applies in the circumstances of the present matter, to the appellant, who was the applicant in the proceedings before the Tribunal. By the same token, the appellant could not be said to have ‘made a frivolous and vexatious application’ to the Tribunal in his referral of the complaint, as to disentitle him to costs. There is simply no justification why the appellant should be put out of pocket, instituting the application before the Tribunal. The Tribunal’s reference to the third respondent (respondent) in the circumstances is in my view erroneous. The reference may be considered relevant to the scale of costs to be awarded, and not a determination whether or not costs should be awarded. For these reasons, I am of the view that the exercise of the discretion by the Tribunal was premised on a misreading or a misinterpretation of the applicable provision of the Tribunal Rules and costs in general. On that basis, this court should see its way clear to interfere with the Tribunal’s exercise of its discretion.

Order

[22] In the result the following order is made:

- 1. The third respondent is liable for the costs incurred by the appellant in instituting the application before the Tribunal.**
- 2. The appeal in respect of interest is dismissed.**
- 3. The third respondent shall pay the costs of the appeal.**

S. M MFENYANA AJ
ACTING JUDGE OF THE HIGH COURT
HIGH COURT, PRETORIA

I agree

T J RAULINGA J
JUDGE OF THE HIGH COURT
HIGH COURT, PRETORIA

For the Appellant : In person

For the First Respondent : No appearance

For the Second Respondent : No appearance

For the Third Respondent : No appearance

Heard on : 10 March 2022

Judgement handed down on : 11 May 2022