IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case No: A76/2024

In the matter between:

UNICITY TRADING (PTY) LTD t/a CAPE SUV	Appellant
and	
THE NATIONAL CONSUMER COMMISSION	First Respondent
ALISON JANET EVANS	Second Respondent
THE NATIONAL CONSUMER TRIBUNAL	Third Respondent
C SASSMAN N.O.	Fourth Respondent

(in his/her capacity as the presiding Tribunal member)

Coram: Van Leeve, AJ (Erasmus, J concurring)
Heard on: 24 May 2024
Delivered on: 22 August 2024

JUDGMENT

Van Leeve, AJ (Erasmus J, concurring)

[1] This an appeal brought by Unicity Trading (Pty)Ltd t/a Cape SUV (Unicity) in terms of Section 148(2) of the National Credit Act No. 34 of 2005 against the Consumer

Tribunals Judgment handed down on 1 February 2024. The tribunal ordered that as such below:

> '25.1 The First Respondent has contravened Section 56(3)(b) of the Consumer Protection Act;
> 25.2 The contravention is declared prohibited conduct in terms of Section 150(a) of the National Credit Act 34 of 2005;
> 25.3 The First Respondent is ordered to pay the Second Applicant R151 900.00 (One Hundred and Fifty-one Thousand, Nine Hundred Rand) being the purchase price of the vehicle, within 30 business days after issuing of this judgment;
> 25.4 The Respondent must, at its own cost, collect the Daihatsu Terios vehicle with registration number CY 46125 from an address provided by the Second Applicant within five business days of the issuing of this judgment;
> 25.5 There is no cost order.'

[2] The Appellant conducts a business whereby they trade in the buying and selling of second-hand motor vehicles. The First Respondent is The National Consumer Commission established in terms of Section 85 of the Consumer Protection Act. The Second Respondent purchased a vehicle from the business which turned out to be defective. The Third Respondent is The National Consumer Tribunal which judgment and order is the subject of this appeal.

[3] On 01 February 2024 the Third Respondent handed down a ruling against the Appellant in which the Third Respondent ruled that the Appellant pay the Second Respondent an amount of R151 900.00 being the purchase price of the motor vehicle purchased by the Second Respondent within 30 days of the ruling. It is against this ruling that the Appellant now appeals. The Second Respondent filed a cross appeal, pending the outcome of the Appellant's appeal on the basis that she was successful before the Tribunal and would therefore have been entitled to a cost order in her favour.

Facts

[4] On 22 June 2019 the Second Respondent purchased a used Daihatsu Terios from the Appellant. Prior to the delivery of the vehicle, she took the vehicle on a test drive for a short distance. In the afternoon of 22 June 2019, she took possession of the vehicle and proceeded to her residence. Not far from the dealership, she realised that the vehicle presented with a shudder and an uneven drive. She immediately notified a representative of the Applicant who said that the shudder is the way the vehicle drives intimating that there is nothing wrong with the vehicle. It is instructive to note that 22 June 2019 was a Saturday.

[5] On the first available opportunity, being 24 June 2019, the Second Respondent wrote a lengthy email to the Appellant complaining about the condition of the vehicle. On 25 June 2019, the vehicle was returned to the dealership for repairs. Unfortunately, this was the first but certainly not the last time that this vehicle had to be returned to the dealership for repairs. The vehicle was with the Appellant for a considerable amount of time to effect repairs before it was returned to the Second Respondent.

[6] On 04 September 2019, the gear box ceased to function necessitating the Second Respondent to engage the services of her Attorney to cancel the agreement with the Applicant. On 10 September 2019, the Second Respondent through the intervention of her Attorneys cancelled the agreement and tendered the return of the vehicle and a refund of the purchase price. This tender was refused by the Appellant.

[7] Whilst acknowledging that a gearbox failure existed, the Appellant argued before the Tribunal that the failure of the gearbox was due to the driving style of the Second Respondent. The Appellant relied on a report from Mr. Deon Rademeyer from the Motor Industry Organisation who opined as such. This was rejected by the Tribunal as speculation and the Tribunal found that there was no evidence to support this finding.

[8] The Tribunal applied Section 56(3)(b) of the Consumer Protection Act in granting the relief sought.

> 'Section 56(3) provides if a supplier repairs any particular goods or any component of such goods, and within 3 months after the repair, the failure, defect or unsafe feature has not been remedied, or a further failure, defect or unsafe feature is discovered, the supplier must: (a) replace the goods, or (b) refund to the consumer the price paid by the consumer for the goods.'

[9] It is accepted that the repairs done between delivery of the vehicle and the ultimate breakdown did not include repairs to the gearbox. The gearbox failure was just one of the numerous faults that had occurred since the Second Respondent purchased this vehicle.

Arguments on appeal

[10] The Appellant's version that since there are two mutually destructive versions does not give rise to the matter being referred since the Appellant's version of how the gearbox malfunctioned is based on a report by Mr. Deon Rademeyer who bases his opinion on speculation and not on fact. Hence the Appellant's argument on appeal in respect of this ground is without merit.

[11] The second ground of appeal by the Appellant is that the failure of the gearbox on 4 September 2019 was a further defect as envisaged in section 56(3) of the Consumer Protection Act. Having regard to the fact that the vehicle presented with problems from the date of purchase up to and including 4 September 2019, is an indication that the vehicle was defective from the start.

Argument On behalf of the Tribunal

[12] The First Respondent responded with reference to the specific wording of Section 56(3) arguing that the breakdown of the gearbox constitutes a further failure which reads as follows:

'If a supplier repairs any particular goods or any component of any such goods, and within three months after the repair, the failure, defect or unsafe feature has not been remedied, or a further failure defect or unsafe feature is discovered, this API must-replace the goods or refund the consumer the purchase price paid by the consumer for the goods.'

[13] They further argued that this matter is distinguishable from other matters where the chain of repairs and failures are not as intricately connected as in the instant matter, there is merit in this argument.

[14] On the facts of this case it is clear that immediately after the Second Respondent took possession of the vehicle, the first defects started presenting itself. This continued until eventually on 4 September 2019 the gearbox finally broke. Section 56(3) of the Consumer Protection Act extends to a further defect. If one has regard to the facts from the date the Respondent took possession of the vehicle there is no doubt that the vehicle was defective from the start. The Appellant had a responsibility to recall the unsafe product when he became aware the first day that the Second Respondent reported the defects to him.

Cross appeal

[15] The Applicant in the cross appeal stated that the second respondent did not need to attend the proceedings as the matter was argued by the first respondent at no cost to her.

[16] It is not argued on appeal, that Section 56(3)(b) which was applied by the Tribunal, is not applicable, or that it would only have been applicable if prior repairs had been done to the gearbox.

[17] In conclusion, the simple reading of the words in the Section 56(3)(b) and the purpose of protecting the consumer cannot be favourable to the Appellant. The purpose of the Consumer Protection Act is to promote a fair, accessible and sustainable marketplace for consumers products and services and for that purpose to establish national norms and standards relating to consumer protection to provide for improved standards of consumer information, to prohibit unfair practises. The ruling of the Tribunal is therefore confirmed.

Costs

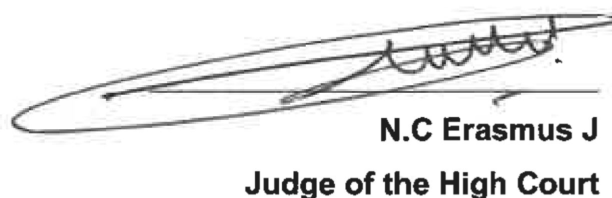
[18] We were referred to the decision of the Supreme Court of appeal in *The National Consumer Commission* v *Univision Services Association NPC* (618/2017) [2018] ZASCA 44 (28 March 2018) where it was definitively found that in instances like these a cost order is inappropriate and not provided for in law. Therefore, [the Tribunal could not make a cost order in favour of the Second Respondent. There is therefore no merit in the cross appeal. I am therefore of the view that the Appeal should be dismissed with no order as to costs.

A. Van Leeve

Acting Judge of the High Court

I concur

and it is so ordered



N.C Erasmus J

Judge of the High Court

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