THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case No: 479/2018

In the matter between:

THE MOTOR INDUSTRY OMBUDSMAN OF SOUTH AFRICA **APPELLANT**

and

SILVER PARK MOTORS CC T/A SILVERTON MOTORS **FIRST RESPONDENT**

THE MINISTER OF THE DEPARTMENT OF TRADE AND INDUSTRY **SECOND RESPONDENT**

Neutral citation: *The Motor Industry Ombudsman of South Africa v Silver Park Motors CC* (479/18) [2019] ZASCA 71 (30 May 2019)

Coram: Maya P, Cachalia, Molemela and Schippers JJA, and Gorven AJA

Heard: 17 May 2019

Delivered: 30 May 2019

Summary: Registration as retailer under Consumer Protection Act 68 of 2008 – meaning of 'accessories' in South African Automotive Industry Code of Conduct (the Code) – seller of fuel and engine oils not a supplier or retailer of accessories under the Code.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Avvakoumides AJ sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Schippers JA (Maya P, Cachalia and Molemela JJA and Gorven AJA concurring):

[1] The appellant is the ombud for the South African automotive industry, accredited in terms of s 82 of the Consumer Protection Act 68 of 2008 (the Act), and the South African Automotive Industry Code of Conduct[1] (the Code) prescribed by the second respondent, the Minister of Trade and Industry (the Minister), under the Act. The appellant is the independent dispute resolution forum for the automotive industry, its suppliers and customers. It is funded by contributions from participants in the industry, calculated in terms of the Code.[2]

[2] On 30 November 2015 an official of the appellant inspected the premises of the first respondent from which it conducts a fuel retailer's business, and enquired of its member, Mr Ronald Dennis, why it had not registered as a retailer under the Act and the Code. The official was told that the first respondent would

[1] 'Consumer Protection Act, 2008: Prescription Of The South African Automotive Industry Code And Accreditation Of The Alternative Dispute Resolution Scheme Administered By The Motor Industry Ombud Of South Africa As An Accredited Industry Ombud GN R817, *GG* 38107, 17 October 2014.'

[2] Clause 13.2 of the Code provides that the appellant 'is funded by the Automotive Industry in the manner as set out in Schedule 5.'

not register with the appellant because it does not form part of the motor industry envisaged in the Code.

[3] Consequently, on 19 April 2016 the appellant applied to the Gauteng Division of the High Court, Pretoria, for a declaratory order that the first respondent was a retailer as defined in the Act and thus liable for a contribution to finance the appellant's activities in giving effect to the Code. The grounds for the application were that first respondent was a retailer or supplier of accessories of vehicles as envisaged in the definition of 'Automotive Industry' in the Code, because it conducted business as a fuel retailer. It sold Shell fuel and Shell Helix car engine oils containing additives which supposedly cleaned, repaired and protected vehicle engines, Wynn's products and other types of accessories for motor vehicles, from a shop on its premises. These included 'accessories' that were put into the fuel tank of a motor vehicle or used in conjunction with the vehicle.

[4] The first respondent opposed the application. It did not dispute that it was a retailer of Shell fuel and lubricants and Wynn's products; and that ancillary to its main business as a fuel retailer, it sold general convenience items, magazines, sweets and fresh produce from the shop on its premises. However, it denied that the fuel and lubricants it sold were motor vehicle accessories within the ordinary meaning of that term; that it was a retailer or supplier of 'accessories' as envisaged in the definition of 'Automotive Industry'; and that it sold 'other types of motor vehicle accessories' (not described at all in the founding affidavit).

[5] The first respondent contended that the appellant was not entitled to the contributions claimed as these had not been determined in accordance with the Code. It brought a counter-application in which it sought an order joining the Minister as the second respondent, and in the event that it fell within the definition

of 'Automotive Industry', that the provisions of the Code requiring retailers to pay mandatory contributions to the appellant be reviewed and set aside on the ground that they were *ultra vires* the Act. The joinder application was granted and the Minister opposed the counter-application.

[6] The central issue before the court a quo was whether the first respondent was a retailer or supplier of accessories as envisaged in the definition of 'Automotive Industry' in clause 2.3 of the Code (the definition). A related issue was whether it 'renders a related repair or replacement service to consumers in respect of such vehicles', because the fuel and additives it sold purportedly enhanced the functioning of vehicles. The definition reads:

' "Automotive Industry" means importers, distributors, manufacturers, retailers, franchisors, franchisees, suppliers and intermediaries who import, distribute, produce, retail or supply passenger, recreational, agricultural, industrial, or commercial vehicles, including but not limited to passenger vehicles, trucks, motorcycles, quad cycles or, whether self-propelled or not an internal combustion propelled engine for a boat, or import, distribute, manufacture, retail or supply any completed components and/or accessories to such vehicles, and/or renders a related repair or replacement service to consumers in respect of such vehicles; and trailers, and "anyone who modifies, converts or adapts vehicles".'

[7] The matter came before Avvakoumides AJ who found that the first respondent was not a retailer of accessories, neither did it render a repair or replacement service to consumers as contemplated in the definition. The application was therefore dismissed. By reason of its conclusion that the first respondent did not fall within the definition, the court a quo did not consider it necessary to decide the review application. The appeal is with its leave.

[8] It is common ground that the first respondent is not an importer, distributor, retailer or supplier of vehicles as defined in the Code. The only question is whether it is a retailer or supplier of accessories of recreational, agricultural,

industrial or commercial vehicles specified in the definition (the specified vehicles).

[9] Counsel for the appellant submitted that the first respondent is a distributor, retailer or supplier of completed components or accessories to the specified vehicles, and that it renders a repair or replacement service to consumers in respect of such vehicles within the meaning of those terms in the definition. In support of this submission it was contended that the sale of fuel to consumers is a 'replacement' of the fuel in their vehicles; that fuel which purports to clean, repair and maintain engines 'constitutes a related repair service'; and that by providing an air pump on its premises to fix slow punctures or to replace air in the tyres of vehicles, the first respondent also renders a repair or replacement service to consumers.

[10] There is no evidence that the first respondent is a retailer of 'completed components' within the meaning of that term in the definition. It is difficult to see how the sale of fuel to consumers is converted to a 'repair or replacement service' in respect of their vehicles; or how the first respondent could ever be a retailer or supplier as envisaged in the definition, of air to inflate tyres which is freely provided to motorists at garages or service stations. Counsel for the appellant rightly abandoned this argument.

[11] What remains then is whether the first respondent is a retailer or supplier of 'accessories', more specifically whether the fuel, Shell Helix car engine oils and Wynn's products are 'accessories' as contemplated in the definition. The appellant's counsel submitted that these were accessories 'in terms of the ordinary English meaning of the word' for the following reasons. Fuel is added to a motor vehicle not only to 'make it more useful' but also to complete it – the vehicle would not be able to drive without it. The purpose of the Code is to protect

consumers and it would be incongruous to interpret a non-essential addition to a vehicle such as a spoiler as an accessory, but not fuel 'which is an essential component' of the vehicle. In accordance with the principle in the law of property, once fuel, an 'accessory', is added to a motor vehicle 'it ceases its separate identity and forms part of the motor vehicle' and 'the owner of the thing becomes the owner of the accessory'.[3] However, the appellant's counsel conceded that this principle found no application in this case, and that the issue was one of statutory construction.

[12] It is a settled principle of statutory construction that when interpreting a legislative provision, what must be considered is the language used, the context in which the provision appears, the apparent purpose to which it is directed, and the background to its preparation and production.[4]

[13] The starting point is s 2 of the Act. It provides that the Act must be interpreted in a manner that gives effect to its purposes set out in s 3. These include promoting and advancing the social and economic welfare of consumers in the country by, inter alia, promoting fair business practices; and protecting consumers from unconscionable, unfair and improper trade practices, and deceptive, misleading, unfair or fraudulent conduct.[5]

[14] Industry codes are governed by s 82 of the Act. Section 82(1)*(a)* provides that an 'industry code' means a code:

'(i) regulating the interaction between or among persons conducting business within an industry; or

(ii) regulating the interaction, or providing for alternative dispute resolution, between a person contemplated in subparagraph (i) and consumers. . . .'

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[3] *Macdonald Ltd v Radin NO & The Potchefstroom Dairies and Industries Co Ltd* 1915 AD 454 at 467.
[4] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18; *Amcu & others v Chamber of Mines of South Africa & others* [2017] ZACC 3; 2017 (3) SA 242 (CC) para 34.
[5] Section 3(1)*(c)* and *(d)* of the Act.

In terms of s 82(2) the Minister by regulation may prescribe an industry code on the recommendation of the National Consumer Commission. If a proposed industry code provides for a scheme of alternative dispute resolution, when recommending that code to the Minister, the Commission may also recommend that the scheme be accredited as an 'accredited industry ombud'.[6]

[15] The Code does not define the term 'accessories' and it must therefore be given its ordinary meaning having regard to the particular context in which it is used. In the Shorter Oxford English Dictionary[7] 'accessory', as a noun, means:

'An additional or subordinate thing; an adjunct, an accompaniment; a minor fitting or attachment. . . .'

As an adjective the word is defined as follows:[8]

'Of a thing: additional; subordinately contributing, dispensable; adventitious.'

[16] In my view, on its plain wording and a sensible construction of the definition, the word 'accessories', means additional, subordinate things; accompaniments; and minor fittings or attachments to, for example, passenger vehicles, such as tow bars, sun shades, mud flaps, boot spoilers, mats designed to fit a particular brand of car and the like. Fuel such as petrol and diesel, Shell Helix engine oils and Wynn's products simply do not fall into this category. In the ordinary language of the definition and in the particular context, an 'accessory' is neither something that makes the vehicle more useful nor complete. A vehicle without fuel or engine oil is not anything less than a vehicle.

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[6] Section 82(6) of the Act.
[7] *Shorter Oxford English Dictionary on Historical Principles* 6 ed (2007) at 13.
[8] Ibid at 13.

[17] Thus in *Silke*,[9] Sutton JP, in construing the meaning of 'accessories and equipment' in a price control regulation in order to determine whether a wireless set was an accessory of a car, said:

'There is no definition of "accessory" or of "equipment" in these regulations, but it seems to me that the definition which is given of "accessory" in Chambers' *Twentieth Century Dictionary* is the one that we should apply, namely, that an accessory is a secondary, additional or non-essential item of equipment. In a case of this kind we must, to some extent, use our knowledge of what constitutes an accessory to a motor-car and what constitutes equipment, and it seems to me that the difference between an accessory and equipment is this; that an accessory is an amenity in the car; it may be something more but it is at least an amenity which is not necessary for the proper use of the car, such as a wireless or a clock or a cigarette-lighter, whereas equipment would be something that is necessary for the proper use of the car, such as windscreen wipers, bumpers or a speedometer.'

[18] Counsel for the first respondent referred us to various foreign cases in which the word 'accessory' was interpreted.[10] These were however of limited assistance because they concern the appropriate classification of things for purposes of customs duty according to classification schemes and rules of interpretation for those schemes, which courts are obliged to apply in the countries concerned. But that does not detract from the ordinary meaning of 'accessory' considered in those cases. So for example in *Amoena*,[11] Lord Carnwath said that one would not naturally describe petrol as 'a part or accessory of a car'. In similar vein, Lehane J in *Boehringer*[12] concluded that 'fuel is not an accessory for a vehicle, a tape for a recorder or a film for a camera'. Likewise in *Polaroid Australia*,[13] Gibbs J, stated that:

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[9] *R v Silke* 1947 (4) SA 297 (C) at 298-299.

[10] *Amoena (UK) Ltd v Revenue and Customs Commissioners* [2016] 4 All ER 705; [2016] UKSC 41; *Chief Executive Officer of Customs v Boehringer Mannheim Australia Pty Ltd* [1997] FCA 1235; 26 AAR 375; *Deputy Commissioner of Taxation v Polaroid Australia Pty Ltd* (1971) 46 ALJR 32; *Re National Panasonic (Australia) Pty Limited and Collector of Customs (New South Wales)* [1985] AATA 132 (5 June 1985); and 330651 BC Ltd v HMTQ 2003 BCCA 658.

[11] *Amoena* fn 10 para 41.

[12] *Boehringer* fn 10.

[13] *Polaroid Australia* fn 10 at 656-657.

'. . . [A] film is not part of a camera, nor a bullet of a gun, nor petrol of a motor vehicle. . . An accessory for a camera is an extra and additional part of the equipment of the camera itself such as a light meter, a filter or a wide-angle lens, and in the ordinary course of language a film would not be referred to as an accessory for a conventional camera, nor a film pack or a picture roll as an accessory for a Polaroid camera.'

[19] The plain language of 'accessory' in the definition as meaning additional or subordinate things, minor fittings or attachments is underscored by the immediate statutory context: 'accessories' is used in close association with, but in contradistinction to, 'completed components' of the specified vehicles. Thus retailers and suppliers of components of, and accessories to, those vehicles fall within the definition. The Shorter Oxford English Dictionary defines 'component', inter alia, as:

'A constituent part; *spec.*: ***(a)*** any of the separate parts of a motor vehicle, machine, etc . . . .'[14]

A component or constituent part of a vehicle is therefore something that is essential or integral to its functioning, such as a piston, crankshaft, cylinder head, and an ignition and exhaust system.

[20] Fuel pumped into the tank of a vehicle, car engine oils and Wynn's products are obviously not vehicle components. Neither are these, in my opinion, and as a matter of common sense, accessories. On the appellant's argument, petrol or diesel stored in underground fuel tanks of a fuel retailer's premises – most certainly not an addition or minor attachment to a car – would be an accessory of a vehicle. And if fuel in a storage tank is not an accessory of a vehicle, then it is inconceivable how it can be transformed into such an accessory when it is pumped into the vehicle's tank.

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[14] *Shorter Oxford English Dictionary* fn 7 at 473.

[21] The contextual meaning of 'accessories' is further strengthened by the fact that importers, distributors, manufacturers, retailers or suppliers who render a 'related repair or replacement service to consumers in respect of such vehicles; and trailers, and "anyone who modifies, converts or adapts vehicles"', are also included in the definition. In other words, only those engaged in a repair or replacement service connected to the retail or supply of the specified vehicles, or who modify vehicles, are part of the automotive industry. Again, fuel retailers are excluded. It is thus hardly surprising that all of the automotive industry associations listed in Schedule 1 to the Code are retailers of vehicles or vehicle components.

[22] Further, the above interpretation is consistent with the purposes of the Act and the Code – to regulate relations between persons conducting business within the automotive industry, to provide for a scheme of alternative dispute resolution between consumers and participants in the industry, and to create an industry ombudsman to provide alternative dispute resolution services. The Code states that it is an industry code which applies to the entire automotive industry as defined; that it relates to conduct for the supply of goods and services by the automotive industry and consumers across the country; and that it focuses on consumer protection, supplier guidance and fair business practices.

[23] Counsel for the appellant however submitted that the purpose of the Code was to protect consumers against rogue or dishonest retailers selling substandard fuel to unsuspecting consumers, which would be defeated if the term 'accessory' were interpreted to include a spoiler which is a non-essential item of a vehicle, but not fuel which is an essential component without which the vehicle cannot function. Consumers, so it was submitted, would not be entitled to approach an ombud and be left without a remedy.

[24] The submission does not bear scrutiny. Consumers of fuel and lubricants are protected under the Consumer Goods and Services Industry Code of Conduct (the Consumer Goods Code),[15] prescribed by the Minister as the industry code for the consumer goods and services industry; and in terms of which the consumer goods and services ombud is the accredited industry ombud under s 82 of the Act. The Consumer Goods Code is a catch-all code covering the retail or supply of goods and services, and provides that the words, 'Consumer', 'Goods' and 'Service' have the meaning given to them in s 1 of the Act. Thus, 'consumer' means, inter alia, 'a person to whom goods or services are marketed in the ordinary course of a supplier's business'. The term 'goods' includes:

'*(a)* anything marketed for human consumption;

(b) any tangible object not otherwise contemplated in paragraph *(a)*...'

[25] The Consumer Goods Code expressly excludes from its ambit (a) participants and entities regulated by another code prescribed by the Minister under s 82 of the Act, such as the Code; and (b) the automotive industry. The former code defines the 'Consumer Goods and Services Industry' as meaning:

'. . . [A]ll Participants and/or entities involved in the Supply Chain that provides, markets and/or offers to supply Goods and Services to Consumers, unless excluded in terms of clause 4.4 hereof.'

Clause 4.1 provides:

'The Code applies to all Participants, unless they are regulated elsewhere by other public regulation, a code prescribed by the Minister in terms of section 82 of the CPA and/or where a complaint falls within the jurisdiction of an Ombud with Jurisdiction, or an Industry Ombud accredited in terms of section 82(6) of the CPA.'

Clause 4.4 reads:

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[15] 'Consumer Protection Act (66/2008): Prescription of the Consumer Goods and Services Industry Code and Accreditation of the Alternative Dispute Resolution Scheme Administered by Consumer Goods and Industry Ombud as an Accredited Industry Ombud in terms of Section 82 of the Act GN R 271, *GG* 38637, 30 March 2015.'

'This Code excludes: transactions that are not covered by the CPA and/or that are governed by other public regulation; the automotive industry, Electronic Communication Service as defined in section 1 of the Electronic Communications Act, 2005 (Act No. 36 of 2005) and transactions with organs of state or financial institutions.'

[26] So, contrary to the appellant's contention, consumers indeed have a remedy and are entitled to lodge a complaint with the Office of the Consumer Goods and Services Ombud in cases where rogue or dishonest fuel retailers sell substandard products to them. This too, the appellant's counsel conceded.

[27] The definition makes it clear that the Code applies to retailers or suppliers of the specified vehicles, component parts and accessories of such vehicles, and those who render repair or replacement services connected with those vehicles. It does not apply to fuel retailers who do not engage in these activities. It follows that the court a quo was correct and that the appeal must fail.

[28] The appeal is dismissed with costs.

A Schippers
Judge of Appeal

APPEARANCES

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