

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

Case number: **NCT/254302/2022/73(2)(b)**

In the matter between:

**NATIONAL CONSUMER COMMISSION**

APPLICANT

And

**SUGARBERRY TRADING 697 CC T/A  
AUTOWORLD GOODWOOD**

RESPONDENT

Coram:

Dr MC Peenze – Presiding member

Adv S Mbhele – Member

Adv C Sassman – Member

Date of Hearing – 20 March 2023

Date of judgment – 22 March 2023

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**JUDGMENT AND REASONS**

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**INTRODUCTION**

1. This is an application in terms of section 73 (2) (b) of the National Credit Act, 34 of 2005 ("the NCA"). The Applicant seeks an order in terms of which the Respondent is to be found to be in contravention of the Consumer Protection Act, 68 of 2008 ("the CPA"), and such contraventions to be declared prohibited conduct.
2. Based on these and other grounds, the Applicant also seeks an order directing the Respondent to refund the consumer the purchase price paid and such other relief as the National Consumer Tribunal ("the Tribunal") may consider appropriate.
3. The Tribunal conducted the hearing via a Teams technology link.

## THE PARTIES

4. The Applicant is the National Consumer Commission (“the NCC” or “the Applicant”), an organ of the state established in terms of section 85 (1) of the CPA, having its registered address at SABS Offices, 1 Dr Lategan Road, Groenkloof, Pretoria.
5. At the hearing, Ms Ntsako Ngobeni, a legal advisor within the NCC, represented the Applicant.
6. The Respondent is Sugarberry Trading 697 CC, registration number 2010/166151/23 (“the Respondent”), carrying on business at 17 Voortrekker Road, Goodwood, Cape Town. The Respondent trades as Autoworld Goodwood.
7. The Respondent did not oppose this application.
8. The Tribunal was satisfied that the Applicant had served the application on the Respondent at its last known address in terms of rule 30 (1) (b) of the Tribunal rules.<sup>1</sup> As the Respondent did not file an answering affidavit in this matter, the Tribunal proceeded to hear the application by default.

## JURISDICTION

9. Section 27 (1) (a) (ii) of the NCA empowers the Tribunal or a Tribunal member acting alone to adjudicate allegations of prohibited conduct by determining whether prohibited conduct has occurred and, if so, by imposing a remedy provided for in the NCA.
10. Section 150 of the NCA empowers the Tribunal to make an appropriate order concerning prohibited or required conduct under the NCA or the CPA. The Tribunal, therefore, has jurisdiction to hear this application.

## TERMINOLOGY

11. A reference to a section in this judgment refers to a section in the CPA. A reference to a regulation refers to the CPA Regulations, 2011 (“the regulations”)<sup>2</sup>.

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<sup>1</sup> Regulations for matters relating to the functions of the Tribunal and Rules for the conduct of matters before the National Consumer Tribunal, 2007 published under government notice 789 in Government Gazette 30225 on 28 August 2007.

<sup>2</sup> Published under Government Notice R293 in Government Gazette 34180 of 1 April 2011.

## THE APPLICATION

12. The Applicant alleges that it received a complaint, conducted an investigation, and referred the complaint to the Tribunal. The NCC seeks an order:
  - 12.1. Declaring the Respondent's contravention of sections 40 (1) (b), (c) and (d), 51 (1) (a), (b) and (c), 55 (2) (a) to (c), 56 (2) (a) and (b), 56 (3) (b) as prohibited conduct;
  - 12.2. Interdicting the Respondent from engaging in future prohibited conduct;
  - 12.3. Directing the Respondent to refund, without penalty and at the Respondent's risk and expense, for the defects to the motor vehicle of the consumer as follows:
    - (a) By refunding the consumer the deposit paid towards the purchase of the vehicle in the sum of R70,000.00;
    - (b) By settling the outstanding balance on the credit agreement between the consumer and MFC, a division of Nedbank Limited; and
    - (c) By refunding the consumer all instruments paid towards servicing the credit agreement between the consumer and MFC, a division of Nedbank Limited;
  - 12.4. Directing the Respondent to pay an administrative fine in the amount of R1 000 000.00 (one million rands); and
  - 12.5. Granting the Applicant such other relief as the Tribunal may consider appropriate contemplated in section 4 (2) (b) (ii).

## BACKGROUND

13. It is convenient to set out the background to this matter as reflected in the documents before the Tribunal.
14. This application stems from a complaint received by the Applicant on 5 November 2020 from a consumer, Raymond Godfrey Fisher ("the consumer"), against the Respondent. The consumer alleged that the Respondent engaged in prohibited conduct by delivering a motor vehicle that failed to satisfy the requirements and standards contemplated in section 55.
15. The consumer alleged that –
  - a) He purchased a BMW 335i Exclusive Automatic (E90) motor vehicle ("the vehicle") from the Respondent on or around 19 May 2020 for an amount of R141,292.00;

- b) The consumer paid a deposit of R70,000.00 to the supplier, and MFC, a division of Nedbank, financed the balance of the purchase price;
  - c) Within a day of purchase, the consumer detected defects and faults in the vehicle. The consumer detected heavy emissions, malfunctioning of the air conditioner, and an oil leak;
  - d) The consumer approached the supplier, who agreed to assess and repair the vehicle;
  - e) The consumer took the vehicle to Ariya Motors (Pty) Ltd t/a Bosch Service Centre, which conducted an assessment. With the supplier's consent, Ariya Motors repaired the vehicle on 20 May 2020. These repairs covered numerous defects in the motor vehicle, including but not limited to the reconditioning of the turbo, the reconditioning of the crank seal, the replacement of the rear main seal, and the replacement of the pulley seal;
  - f) The turbo, air-conditioning pump, heater, and tappet cover were still defective after the repairs. The consumer informed the supplier of the recurring defects on 12 June 2020. On 14 July 2020, the consumer requested the supplier to repair the recurring defects within seven days. Alternatively, the consumer requested a refund of the purchase price;
  - g) The supplier repaired the vehicle for a second time on 27 July 2022 at Benchmark Mechanical Workshop Centre. Hereafter, the defects persisted, despite the repairs done.
  - h) Upon noticing the failure on the part of the supplier to repair the motor vehicle successfully, the consumer requested the cancellation of the transaction and a refund of the purchase price. The supplier did not accede to the request for a refund.
16. On the strength of the above, the Applicant formed a reasonable suspicion that the Respondent contravened the CPA.
17. The Applicant subsequently appointed an employee, Ntsako Khoza ("Khoza"), to investigate possible contraventions of the CPA.
18. Khoza concluded, as appears from his investigation report, that the Respondent had contravened various provisions of the CPA:
- a) The Respondent supplied the consumer with goods that failed to meet the standards of sections 55 (2) (a) to (c);

- b) The vehicle had numerous pre-existing technical problems, including heavy smoke emission, the air conditioner not working, oil leaks, water leaking into the vehicle, and a malfunctioning sunroof;
- c) Despite attempts to repair the vehicle, these defects remain;
- d) The Respondent advertised the vehicle as having a full-service history but failed to provide the consumer with the service records; and
- e) The consumer requested a refund within the statutory timeframe, but the Respondent refused to provide a refund.

## **ISSUES TO BE DECIDED**

19. The Tribunal is required to consider and decide the following issues:
- 19.1 Whether the Applicant has proven a contravention under the CPA; and
  - 19.2 Whether the Applicant is entitled in law to the relief sought.

## **THE HEARING**

20. During the hearing on 20 March 2023, the Applicant submitted that the matter was very important to the consumer, as the defects in the vehicle are putting his family's safety at risk. The Applicant outlined how the consumer went to great lengths to ensure proper compliance with the processes of the CPA. However, the Respondent persisted in its refusal to recognise its obligation to refund the consumer for the faulty vehicle. As it is common cause that the Respondent had not successfully repaired the vehicle, the following defects persist:
- (i) air-conditioner does not work;
  - (ii) heater does not work;
  - (iii) sunroof does not close properly;
  - (iv) water continues to pull and paddle in the back-seat floor when it rains;
  - (v) oil is leaking from the tappet cover; and
  - (vi) there is a knocking sound on the lower control arm.
21. The Applicant also confirmed that the Respondent refuses to collect the vehicle. All attempts to return the vehicle to the Respondent were met with resistance.
22. The Applicant submitted to the Tribunal that the vehicle is not reasonably suitable for the purposes for which the vehicle is generally intended, namely, to take the consumer from point A to B safely.

Further, the vehicle is not of good quality, in good working order, and free of defects.

23. The Applicant argued that the vehicle is defective, and the defect qualifies as a defect in terms of section 53 (1) (a), as the vehicle was unable to perform as reasonably expected. This is confirmed by the diagnostic report from Outworks Brackenfell, as attached to the investigation report.<sup>3</sup> The diagnostic report reveals, amongst other things, that the vehicle's "Stem Seals and Intake Vanos Gear" are faulty.
24. According to the Applicant, the Respondent agreed to cancel the transaction, provided the consumer pays for the repairs and the kilometres driven per the normal AA rates. The Applicant argued that the Respondent's insistence that they would only repair the vehicle at the cost of the consumer is misplaced and in contravention of section 56.

## **THE PROVISIONS OF THE CPA**

25. Section 40 regulates unconscionable conduct and prohibits using physical force against a consumer. The supplier may also not use coercion, undue influence, pressure, duress, harassment, unfair tactics, or any other similar conduct in connection with any –
  - a. supply of goods to a consumer;
  - b. negotiation, conclusion, execution, or enforcement of an agreement to supply any goods or services to a consumer;
  - c. demand for, or collection of, payment for goods or services by the consumer;
  - d. marketing of any goods or services; or
  - e. recovery of goods from a consumer.
26. Section 55 (2) (a-c) states that consumers have the right to receive goods reasonably suitable for their intended purposes. They have a right to goods of good quality and in good working order. The goods must be free of defects and be useable and durable for a reasonable time.
27. Section 56 (2) states that 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. The supplier must,

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<sup>3</sup> See Annexure N to the investigation report.

at the direction of the consumer, either repair or replace the failed, unsafe, or defective goods or refund the consumer the price paid for the goods.

28. Section 56 (3) states that if a supplier repairs any particular goods within three months after the repair, and the failure, defect, or unsafe feature has not been remedied, the supplier must replace the goods or refund the consumer the price paid for the goods.
29. Section 51 outlines certain prohibited transactions, agreements, terms, or conditions. The CPA prohibits suppliers from misleading or deceiving consumers through their contractual arrangements with consumers. Contractual arrangements may also not waive or deprive consumers of their rights in terms of the CPA or avoid a supplier's obligation or duty in terms of the CPA.

## **ANALYSIS**

30. The Tribunal accepts the Applicant's version that the vehicle was defective at purchase as true and correct. The Tribunal also considered the undisputed fact that the Respondent attempted to repair these defects but that these defects persist, rendering the vehicle unsafe.
31. It is common cause that the vehicle was purchased on or around 19 May 2020. The Respondent attempted to repair the vehicle, but the defects persisted. Following the failure of the Respondent to repair the vehicle, the consumer attempted to return the vehicle.
32. As the consumer provided the Respondent with an opportunity to repair the vehicle, the consumer's request for a full refund is in line with the findings in the Supreme Court of Appeal in *Motus Corporation (Pty) Ltd v Wentzel*<sup>4</sup> ("Motus"). In paragraph 43 of the judgment, the court held that the consumer was not entitled to claim a refund of the purchase price before all events stipulated in section 56(3) occurred. In the case before the Tribunal, repairs have taken place, but the vehicle's condition did not change.
33. The CPA aims to protect consumers such as the Applicant from exploitation and abuse in the marketplace. As outlined above, the CPA will only be effective if there is a proper enforcement mechanism, affordable to consumers. It is, therefore, desirable to promote an economic

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<sup>4</sup> *Motus Corporation (Pty) Ltd and Another v Wentzel* (Case no 1272/2019) [2021] ZASCA 40 (13 April 2021).

environment that supports and strengthens a culture of consumer rights and responsibilities, business innovation, and enhanced performance.

34. The CPA places a vital responsibility on the supplier to ensure that all defects of a particular vehicle are determined and explained to the consumer before selling a second-hand vehicle. Where such defects would render the vehicle non-compliant to the standard as set by the CPA, it is subsequently expected from the supplier to ensure the consumer expressly agrees in writing to such defects before completing the sale and delivering the vehicle.
35. By failing to respect the consumer's rights to return the vehicle at the supplier's expense and to be refunded, the Respondent is not only exerting prohibited conduct as defined in the CPA.<sup>5</sup> The Respondent also infringes on the consumer's right to fair consumer practices and safe and good quality goods.
36. In the Tribunal's view, the vehicle did not satisfy the requirements of section 55 (2) because the vehicle was not suitable for its intended purpose; was neither of good quality nor in good working order and free of defects; and 'plainly' not safe and usable for a reasonable time. Therefore, the consumer was entitled, in terms of section 56 (2) (b), to return the vehicle at the Respondent's expense for repairs and subsequently request a refund in terms of section 56 (3) (b) if the defects were not remedied.
37. The Tribunal is further satisfied that the consumer attempted to return the vehicle to the Respondent. However, the Respondent refused the return of the vehicle at its expense and to provide a refund. Due to the Respondent's refusal, the consumer does not have to account for the vehicle's use, depletion, or deterioration over time. By failing to take possession of the vehicle and repair the vehicle as requested, the vehicle's risk shifted to the Respondent.
38. After considering all the evidence, the Tribunal is satisfied that the Respondent infringed upon the consumer's right to a refund of the purchase price.
39. Suppliers should understand that they remain responsible for delivering safe and quality goods. It is the suppliers' responsibility to repair goods that do not comply with the expected standard, and the consumer should not be required to use any of its own means to ensure such repair. Similarly, where the supplier fails to repair a defective vehicle, the consumer may request a refund, and such

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<sup>5</sup> Section 1 of the CPA defines prohibited conduct as "an act or omission in contravention of this Act".



a request must be honoured at the supplier's expense. The responsibility remains that of the supplier to respect the inherent statutory warranty, accept the return of the vehicle, and refund or replace the car as requested by the consumer.

## **FINDING**

40. The Tribunal finds that the Respondent has contravened sections 55 (2) (a-c), section 56 (2) (a), and section 56 (3) (b), and this conduct constitutes prohibited conduct.
41. The Tribunal further finds that the Applicant is entitled, in law, to a full refund of the vehicle's purchase price. The Applicant did not persuade the Tribunal that it may order the settlement of payments to the consumer's credit provider.
42. The Tribunal finds that the Respondent retains the risk for any damages to the goods following its refusal to collect or accept the return of the defective goods.
43. Although the record shows that the Respondent failed to provide the consumer with the service record, the Applicant did not persuade the Tribunal that the Respondent exerted coercion, undue influence, or other unacceptable conduct during the sale of the vehicle. Similarly, the Applicant neither persuaded the Tribunal nor vigorously pursued the issue of a prohibited sales agreement. The Tribunal, therefore, does not find a contravention of sections 40 (1) (b), (c) or (d) or section 51 (1) (a), (b) or (c).

## **OTHER REQUESTED ORDERS**

44. In the matter of *Coertze and Burger v Young*<sup>6</sup> it was confirmed that the Tribunal might, in terms of its statutory authority in terms of section 75 (4) (b), make any applicable order contemplated in the CPA or section 150 or 151 of the NCA. The Tribunal forthwith considers the other orders requested by the Applicant.

## **Consideration of an administrative fine**

45. The Applicant requested that the Tribunal imposes an administrative fine on the Respondent.

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<sup>6</sup> NCT/7142/2012/73(3)&75(b)&(2)CPA.

46. The Applicant submitted an argument on the factors listed in section 112(3) of the CPA that the Tribunal must consider.
47. Considering the nature of the contraventions and the importance of this issue for consumers, the Tribunal regards a fine as appropriate and justified. The sale of vehicles is a significant industry in South Africa. This industry impacts consumers daily. A clear message must be sent that non-compliance with the CPA will not be condoned or tolerated.
48. The nature, duration, gravity, and extent of the contravention  
The nature of the contravention is serious. A motor vehicle is an essential asset that a consumer will purchase. The consumer was deprived of the proper and safe use of the vehicle he bought for three years.
49. Any loss or damage suffered as a result of the contravention  
The consumer purchased a defective vehicle and did not have the benefit of successful repairs to the vehicle, or the return of the purchase price. Although the vehicle is still in his possession, the vehicle is not safe to use. The Applicant placed on record that being without the use of his vehicle caused the consumer stress and unnecessary inconvenience.
50. The behaviour of the Respondent  
The Respondent should have recognised its responsibilities in terms of the CPA. This behaviour indicates a dismissive attitude toward the rights of consumers, such as the consumer.
51. The market circumstances in which the contravention took place  
No specific evidence was provided to the Tribunal. However, based on the types of matters referred to the Tribunal, vehicle-related complaints against motor vehicle repairers are widespread. For the average consumer, purchasing a vehicle constitutes a highly costly and essential transaction.
52. The level of profit derived from the contravention  
No specific evidence was provided in this regard. Again, the Respondent would have derived the significant benefit of having the purchase price of R141,292.00 while failing to repair the vehicle or refund the consumer successfully.

53. The degree to which the respondent has cooperated with the Commission and the Tribunal  
The Respondent co-operated with the NCC's investigator based on the Applicant's submissions.
54. Whether the respondent has previously been found in contravention of the CPA.  
The NCC submitted no record of a previous investigation or finding against the Respondent.
55. The Applicant did not submit any evidence of the turnover of the Respondent. The Tribunal can, however, still impose a fine limited to a maximum fine of R1 000 000.00 (one million rands).
56. In this matter, the Tribunal is persuaded that a clear message must be sent that a second-hand car dealer cannot escape the peremptory provisions of the CPA. Their services must be aligned with the CPA. Consumers must be protected against suppliers accepting the purchase amount and not repairing a consumer's defective vehicle or refunding the consumer. The Tribunal must, however, also consider that the fine must not be so punitive as to discourage second-hand car dealers from engaging in a necessary and lawful business. It must be kept in mind that the fine imposed would be for a first offender. Further transgressions would be met with significantly higher penalties.
57. The Tribunal finds that a fine of R10 000.00 will be appropriate.
58. The Applicant requested that the Tribunal makes an order interdicting the Respondent from engaging in prohibited conduct in the future. Given the CPA's provisions, the interdict will serve no purpose because the Respondent may not engage in prohibited conduct<sup>7</sup>.

## **ORDER**

59. Accordingly, the Tribunal makes the following order:
- 59.1. The Respondent has contravened sections 55 (2) (a-c), section 56 (2) (a) and section 56 (3) (b) of the CPA;
- 59.2. The contraventions are declared prohibited conduct in terms of section 150 (a) of the NCA;

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<sup>7</sup> *Shoprite Investments Ltd v The National Credit Regulator* (509/2017 dated 18 December 2019).  
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- 59.3. The Respondent is ordered to pay R141,292.00 (one hundred and forty-one thousand two hundred and ninety-two rands), being the purchase price of the vehicle, within 15 business days after issuing of this judgment, to the consumer, Raymond Godfrey Fisher;
- 59.4. The Respondent is at its own cost to collect the vehicle from the consumer, Raymond Godfrey Fisher, at an address the Applicant is to provide to the Respondent within five business days after issuing of this judgment;
- 59.5. The Applicant is directed to ensure the execution of the order for re-payment of the purchase price of the vehicle to the consumer;
- 59.6. The Respondent is within 90 business days of the date of issue of this judgment to pay an administrative fine of R10,000.00 (ten thousand rands) into the National Revenue Fund's following bank account:

Bank: The Standard Bank of South Africa

Account holder: Department of Trade and Industry

Branch name: Sunnyside

Branch code: 05100

Account number: 317 650 026

Reference: NCT/254302/2022/73(2)(b) and the name of person or business making the payment;  
and

- 59.7. There is no order as to costs.

Dated in Centurion on 22 March 2023.

[signed]

**Dr MC Peenze**  
**Presiding Tribunal Member**

Authorised for issue by The National Consumer Tribunal

National Consumer Tribunal

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national consumer tribunal

Adv C Sassman (Tribunal member) and Adv S Mbhele (Tribunal member) concur.