

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

**Case number: NCT/206558/2021/73(2)(b)**

In the matter between:

**NATIONAL CONSUMER COMMISSION**

**APPLICANT**

and

**SANDOWN MOTOR HOLDINGS (PTY) LTD  
TRADING AS MERCEDES-BENZ BRYANSTON**

**RESPONDENT**

Coram:

Dr M Peenze – Presiding Tribunal member

Mr A Potwana – Tribunal member

Ms N Maseti – Tribunal member

Date of hearing – 25 April 2022 via the Teams digital platform

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**POINTS IN LIMINE RULING**

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**APPLICANT**

1. The Applicant is the National Consumer Commission (the Applicant), a juristic person established in terms of section 85 of the Consumer Protection Act 68 of 2008 (the CPA).
2. Mr Jabulani Mapumlo and Mr Ludwe Biyana, legal advisers in the Applicant's legal services department, represented the Applicant at the hearing of this application.

**RESPONDENT**

3. The Respondent is Sandown Motor Holdings (Pty) Ltd, trading as Mercedes-Benz Bryanston, a private company with its registered business address at 193 Bryanston Drive, Gauteng.
4. Adv Ellis from the Pretoria Bar, instructed by Manaka Attorneys Inc., represented the Respondent at the hearing of this application.

## APPLICATION TYPE AND FOCUS OF THE RULING

5. The Applicant referred this application to the National Consumer Tribunal (the Tribunal) in terms of section 73(2)(b) of the CPA.
6. In this ruling, we will deal with the technical legal points argued on 25 April 2022 only. On that day, the parties did not argue the merits of the complaint in order to enable the Tribunal to consider the technical legal points raised by the Respondent's legal representative. Due to a difference of opinion on some of the findings, our colleague and co-panellist, Dr Peenze, has decided to write a dissenting judgement. Her judgement appears immediately below the order we have granted.

## JURISDICTION

7. Section 27(a)(ii) of the National Credit Act 34 2005 (the NCA) empowers the Tribunal or a Tribunal member acting alone in accordance with the NCA or the CPA 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.

## FACTUAL BACKGROUND

8. On 19 October 2021, the Applicant referred a matter to the Tribunal in terms of section 73(2)(b) of the CPA using the prescribed Form: T1.73(2)(b) CPA. The application documents were served on the Respondent by hand on 15 October 2021. In "*Part D: Order sought from the Tribunal*", the Applicant stated that it seeks an order in the following terms:
  - 8.1. Declaring that the Respondent has contravened the following provisions of the CPA –
    - 8.1.1. Section 55(2)(a) to (d); and
    - 8.1.2. Section 56(1), (2)(a) and (b)
  - 8.2. The Respondent's contravention of sections 55(2)(a) to (d) and 56(1),(2)(a) and (b) of the CPA be declared prohibited conduct;
  - 8.3. The Respondent be interdicted from engaging in conduct detailed in 8.1. and 8.2 above;
  - 8.4. Directing the Respondent to refund the complainant the purchase price paid by the Consumer for the motor vehicle by –
    - 8.4.1. Settling the outstanding balance on the credit agreement between the Consumer and MFC in respect of vehicle finance account number: 20863640001;

- 8.4.2. Refunding to the Consumer the deposit in the sum of R45 000.00 paid by the Consumer towards the purchase price of the Hyundai i20 motor vehicle with registration numbers: HM 27 DR GP together with interest at the prescribed rate;
- 8.5. Directing the Respondent to pay an administrative penalty in the amount of 10% of the Respondent's annual turnover or R1 000 000.00; whichever is the greater; to the National Revenue Fund referred to in section 213 of the Constitution; and
- 8.6. Any other appropriate order contemplated in section 4(2)(b)(ii) of the CPA.
9. The complaint details are explained in the Applicant's founding affidavit, which was deposed to by the Applicant's Deputy Commissioner, Ms Thezi Mabuza (Ms Mabuza). Ms Mabuza submitted that she deposed to the Applicant's founding affidavit pursuant to her having studied the investigation report authored by Miehleko Magagula (Mr Magagula). The investigation report was annexed to Ms Mabuza's founding affidavit.
10. At the outset, Ms Mabuza averred that the complaint was lodged within the prescribed time as a period of three years has not lapsed since the cause of the complaint arose. The Applicant received a complaint from Ms Asaaf Parker (the Consumer) on 23 September 2019. The Consumer is based in Cape Town. On 12 June 2018, she purchased a second-hand Mercedes-Benz CLA45 (hereinafter referred to as "the motor vehicle") from the Respondent, based in Johannesburg, for R722,836.81. The motor vehicle was delivered in Century City, Cape Town, on 8 August 2018. According to the Applicant, the sales representative noticed exterior dents and advised the Consumer to test drive the motor vehicle. The Consumer discovered that the motor vehicle was defective mechanically and cosmetically, its interior was damaged, and she felt too many things were wrong with the motor vehicle. The Century City sales representative insisted that she should take the matter up with the Respondent. She took the motor vehicle and immediately called the Johannesburg sales representative. However, her attempts to get assistance from the Respondent were all in vain.
11. The Consumer felt unsafe and that her life was in danger when operating the motor vehicle as it could not get into reverse, and gears could not change. The sunroof was faulty, the driver's mirror was cracked, and the motor vehicle made a screeching noise when coming to a standstill. The Respondent arranged for the motor vehicle to be taken to Century City, Cape Town, where faults were verified. The invoice showed damages to the value of about R130 000.00. The Respondent offered to replace the vehicle and offered the Consumer two replacement vehicles which were not to her liking on 28 and 29 August 2018. She considered taking one, but the Respondent eventually

told her that the vehicle had been sold, and the parties failed to reach an amicable agreement. She demanded a refund in writing. The Respondent refused and handed the matter to its lawyers. The Applicant formed a reasonable suspicion that the Respondent had contravened the CPA based on the above.

12. From the Applicant's investigation report, it appears that the Consumer advised the Commission's inspector, Mr Magagula, that she purchased the motor vehicle for the sum of R722 836.81, including Value Added Tax (VAT) and paid a deposit of R50 000.00. The balance of R674 044.31 was financed through a Motor Vehicle Finance Agreement (Finance Agreement) the Consumer concluded with Standard Bank Limited (Standard Bank) on 8 June 2018.
13. On 20 October 2021, the Registrar issued a Notice of Filing and served it to the parties. On 11 November 2021, the Registrar issued a Notice of Set Down for the hearing of the matter to take place on 19 January 2022 and served it to the parties. On or about 25 November 2021, the Respondent's attorneys, Manaka Attorneys Inc., filed an application for condonation for the late filing of the Respondent's answering affidavit and the Respondent's answering affidavit. On 24 February 2022, the Registrar issued the Tribunal's ruling granting the Respondent condonation for the late filing of its Answering Affidavit.
14. The deponent to the Respondent's answering affidavit is Alexandra Cristina Dos Santos Boavida, an adult female employed by the Respondent (Ms Boavida). She stated that before dealing with the allegations contained in the Applicant's affidavit, she would deal with the issue of "*prescription in terms of section 116 of the CPA.*"

#### *The Respondent's time-bar point in limine*

15. Ms Boavida averred that, on the Applicant's own version, the Consumer received the motor vehicle on 8 August 2018. She realised that the motor vehicle was defective on the same day. The Tribunal has previously held that the three-year statutory period commences running on the date that a consumer becomes aware of the defects to the goods. This was confirmed by the High Court, Pretoria, in *FirstRand Bank v Ludick* and in *FirstRand Bank v Nel*. It follows that the Applicant should have referred the complaint to the Tribunal on or before 7 August 2021. It is common cause that the complaint was lodged more than two months after the three years expired. In the circumstances, "*the Applicant is non-suited, and the matter has become prescribed by virtue of the provisions of section 116 of the CPA.*"

*The Respondent's answers to the merits of the Applicant's case*

16. Turning to the merits of the Applicant's case, Ms Boavida submitted that the Respondent conducted a full 60 points pre-delivery inspection check of the motor vehicle on or about 11 June 2018 and only found the following defects:
  - 16.1. Spare wheel bolts;
  - 16.2. Faulty brake pads; and
  - 16.3. Faulty cigarette lighter.
17. The defects mentioned above were repaired. In addition to the motor vehicle's full 60 points pre-delivery inspection check, a computer diagnostics test was conducted on 13 June 2018. The computer diagnostics test is designed to pick up any fault with the mechanics of the motor vehicle. No faults were noted at all. On 19 June 2018, the motor vehicle was sent to the Roadworthy Test Centre. No mechanical defects were picked up, and a Roadworthiness Certificate was issued. The motor vehicle was registered in the Consumer's name on 25 June 2018. On 30 June 2018, the Consumer signed a 14 day or 1000km exchange conditions document. On 26 August 2018, the Consumer signed a Delivery Document. In this document, the Consumer acknowledged, among others, that she had inspected the motor vehicle and there were no defects that she could see. Those present were pointed out, or she had found them so minor that she was prepared to accept the vehicle in that condition.
18. Concerning the Finance Agreement, Ms Boavida averred that the Respondent is not a party to this agreement and cannot cancel the agreement. The Respondent cannot be held liable for any penalties and interest for the Consumer's early cancellation of the agreement. This is in line with *Motus Corporation (Pty) Ltd t/a Zambesi Multi Franchise and Another v Wentzel*. The Consumer is only entitled to claim the refund of the purchase price once a claim has been established in terms of section 56 of the CPA. The Respondent could not tender the price paid for the vehicle, as the Consumer insisted on payment of all penalties and interest owing to Standard Bank in terms of the Finance Agreement.
19. Ms Boavida stated that the Respondent denies that it sold a vehicle to the Consumer with the defects as alleged by the Consumer. It claimed that it carried out all the required inspections prior to delivery and obtained a roadworthiness certificate. Further, the Respondent submits that it offered to exchange the vehicle with a substitute vehicle, which the Consumer refused. Neither the

Applicant nor the Consumer provided factual evidence that the motor vehicle was defective as alleged. The Respondent did not supply a motor vehicle that was not reasonably suited for the purposes for which it was intended. The Respondent supplied to the Consumer a motor vehicle of good quality, in good working order, and free of any defects. The motor vehicle was useable and durable for a reasonable period of time having regard to the use of which it would normally be put and to the surrounding circumstances of its supply. The Respondent repaired all defects, including those which were not attributable to it, within a reasonable time. Ms Boavida proceeded to answer the allegations contained in Applicant's founding affidavit *ad seriatim* by either denying or admitting the allegations made by the Applicant.

20. On 10 March 2022, the Applicant delivered its replying affidavit. The deponent is Ms Mabuza. The salient aspects of Ms Mabuza's submissions were that the alleged cause of action has not been extinguished by prescription. The Respondent's conduct constitutes continuing conduct. The *FirstRand Bank Limited v Ludick* is not relevant to this matter. She proceeded to respond *ad seriatim* to various aspects of the Respondent's answering affidavit.

## **THE HEARING**

21. The Registrar set this application down for hearing on 25 April 2022. At the hearing, the Applicant informed the Tribunal that it would not persist with the plea to refund the Consumer the outstanding balance on the credit agreement between the Consumer and Standard Bank. Instead, it insists on a refund of the purchase price paid by the Consumer, excluding penalties and interests, as the Tribunal has no jurisdiction to make an order on the latter.

### ***The Respondent's time limitation point in limine***

22. Adv Ellis argued that the Applicant referred the complaint to the Tribunal outside the period prescribed under section 116(1)(a) of the CPA on 19 October 2021. This was more than three years after the motor vehicle was purchased on 8 August 2018. The request for a refund and payment of the credit shortfall on 9 October 2018 also occurred more than three years before the Applicant referred the matter to the Tribunal. The failure to refund the purchase price is not a continuing practice but an act identical to that of rendering an invoice. Such conduct should rather be characterised as an omission to repay a debt. As is the case under the Prescription Act 68 of 1969 (Prescription Act), the prescribed time for enforcing a debt starts running when the debt becomes due and payable. The period does not continue indefinitely.

*The Applicant's counter-argument to the Respondent's point in limine argument*

23. The Applicant submitted that the Respondent's refusal to refund the Consumer's purchase price constitutes continuing conduct as envisaged under section 116(1)(b) of the CPA. The Applicant argued that the return of the vehicle and the request for a refund was made within the first six months after the delivery of the vehicle. The subsequent failure by the Respondent to refund the Consumer's purchase price constitutes a contravention of the Consumer's right to a refund prescribed under section 56(2) of the CPA. Accordingly, the Respondent's continuous disregard of the Consumer's demand for the refund of the purchase price constitutes a continuing prohibited conduct as envisaged under section 116(1)(b) of the CPA. As this prohibited conduct continues, the Consumer's complaint referral to the Tribunal is allowed in terms of section 116(1)(b) of the CPA.
24. The Applicant argued that the Consumer did not request any repairs to the motor vehicle. The Respondent repaired the clutch on its own initiative. The Consumer requested a refund after negotiations to replace the motor vehicle failed.

*Analysis*

25. From the outset, we state that we have read the minority judgement of our colleague and fellow panellist, Dr Peenze. We agree with her finding that the Tribunal does not have the requisite jurisdiction to make a finding whether the Respondent committed prohibited conduct concerning the allegation that it contravened sections 55(2)(a) to (d) of the CPA. We do so on the basis that the Applicant referred the matter to the Tribunal after the expiry of three years after the cause of complaint arose. We are of the view that in respect of section 55(2) complaints, the three year time period prescribed under section 116(1)(a) of the CPA started running on the day that the Consumer received the goods on 8 August 2018 and expired on 7 August 2021. Section 55(2)(a) to (d) of the CPA states-

*"Except to the extent contemplated in subsection (6), every consumer has a right to receive goods<sup>1</sup> that-*

- (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;*

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<sup>1</sup> Underline inserted for emphasis.

- (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, 1993 (Act No. 29 of 1993), or any other public regulation.”*

26. Clearly, the cause of action in respect of an allegation that a respondent contravened section 55(2) arises when a consumer receives the goods. However, the cause of action in relation to an allegation that a respondent contravened section 56(2) may arise at anytime “*within six months after the delivery of any goods to a consumer.*” Section 56(2) of the CPA states-

*“Within six months after the delivery of any 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.”*

27. In our view, the act or omission that is the cause of the complaint in respect of a section 56(2) of the CPA is a supplier’s failure or refusal to repair, replace or refund the consumer the price paid by the consumer if the goods fail to satisfy the requirements and standards contemplated in section 55 within the period of six months prescribed under this section. We point out that in the context of section 56(2) of the CPA, the provisions of section 55 exist to define the standards that goods must adhere to. The standards are but one of the *facta probanda* that must be proved to succeed with a section 56(2) claim. On their own, the standards contemplated in section 55 do not constitute a cause of action. It is a supplier’s refusal to repair or replace or refund the consumer the purchase price that causes a consumer to take steps to enforce the rights to repair or replace or refund. In the absence of a refusal to repair or replace or refund, such as when a supplier agrees to repair or replace or refund, there is no cause of action even if the goods fail to meet the standards contemplated in section 55.

28. In the present matter, it is common cause that the Consumer claimed that the motor vehicle was defective and demanded a refund, in writing, within the prescribed six months of delivery. Despite the demand, the Respondent did not refund the price she paid for the motor vehicle. The cause of action is the Respondent’s refusal to refund purchase price. Since the refusal is continuing, the



cause of action is continuing. Section 116(1)(b) of the CPA does not prohibit the Applicant from referring a course of conduct or a continuing practice that has not ceased to the Tribunal. Section 116(1)(b) states-

*“A complaint in terms of this Act may not be referred or made to the Tribunal or to a consumer court more than three years after-*

*(a) ...*

*(b) in the case of a course of conduct or continuing practice, the date that the conduct or practice ceased.”*

29. Concerning the decision of the High Court in the *Ludick* matter, we are of the view that the findings of the High Court in that matter are not relevant to the allegation that the Respondent refuses to refund the purchase price. In that matter, the High Court pronounced that the Tribunal does not have the power to hear matters referred to it more than three years after the cause of action arose. Whilst we agree with the decision of the High Court, and that the Tribunal is bound by its decision, we are of the view that in the *Ludick* matter, the High Court was not dealing with allegations of a continuing practice as envisaged under sections 166(1)(b) of the NCA and 116(1)(b) of the CPA. In that matter, the allegations were that the appellant extended credit recklessly. The provisions of section 80(1) of the NCA are unambiguous. They state that a credit agreement is reckless *“at the time<sup>2</sup> that the agreement was made, or at the time when the amount approved in terms of the agreement is increased, other than an increase in terms of section 119(4).”* Clearly, by definition, reckless lending is not continuing practice but is conduct that occurs at a specific time. Thus, in the *Ludick* matter, the High Court was not dealing with continuing practices. This view is supported by the contents of paragraphs 16, 26 and 28 of that judgement. In these paragraphs, it is patently clear that in the *Ludick* matter, the High Court was not analysing an act or omission that constituted continuing conduct envisaged in sections 166(1)(b) of the NCA and 116(1)(b) of the CPA but acts or omissions contemplated in section 166(1)(a) of the NCA. The provisions of section 166(1)(a) of the NCA prohibit the referral of complaints to the Tribunal or a consumer court more than three years after the act or omission that is the cause of the complaint. They are not concerned with continuing practices. These are regulated under sections 166(1)(b) of the NCA and 116(1)(b) of the CPA. In this matter, the Applicant alleges that the Respondent’s continuing failure to refund the purchase price constitutes a continuing practice; hence we are of the view that the pronouncement of the High Court in the *Ludick* matter is not relevant to the facts of this case

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<sup>2</sup> Underline inserted for emphasis.

because, as explained in paragraphs 26,27 and 28 above, we are of the view that the allegations in this matter pertain to a continuing practice.

### *Findings*

30. In view of the provisions of section 116(1)(a) of the CPA, the Applicant cannot refer the allegations that the Respondent contravened section 55(2)(a) to (d) to the Tribunal after three years from the date of cause of action. We are persuaded that, in terms of section 116(a) of the CPA, the Tribunal does not have the requisite jurisdiction to make a finding whether the Respondent committed prohibited conduct in relation to the allegation that it contravened section 55(2)(a) to (d) of the CPA. The provisions of section 55 are clear. The cause of action as far as it relates to selling a faulty vehicle occurred when the Consumer collected the motor vehicle on 8 August 2018, more than three years before the complaint was referred to the Tribunal. Consequently, this *point in limine* must succeed.
31. Concerning the Respondent's claim that the Applicant is time-barred from referring the section 56(2) complaint to the Tribunal, we believe that the Respondent's continuing refusal to refund the purchase price constitutes continuing conduct. Thus, the Applicant is not prohibited from referring this complaint to the Tribunal.
32. We do not agree with the Respondent's argument that the provisions of section 116(1)(b) are analogous to the provisions of the Prescription Act. In the Prescription Act, there is no provision that regulates the time for instituting legal proceedings in respect of continuing practices.
33. If we are in error in finding that the Respondent's alleged refusal to refund the Consumer the purchase price constitutes a continuing conduct or practice, we rely on the provisions of section 4(2)(b) and (3) of the CPA read with the provisions of section 34 of the Constitution in finding that the Applicant's right of access to means of redress requires that the Tribunal interprets the Respondent's continuing refusal to refund to the Consumer the purchase price paid for the vehicle as a continuing conduct or practice that must be resolved by a competent Tribunal or court. Section 4(2)(b) of the CPA states-

*"In any matter brought before the Tribunal or a court in terms of this Act the Tribunal or court, as the case may be, must—*

- (i) promote the spirit and purposes of this Act; and*

- (ii) *make appropriate orders to give practical effect to the consumer's right of access to redress, including, but not limited to-*
  - (aa) *any order provided for in this Act; and*
  - (bb) *any innovative order that better advances, protects, promotes and assures the realisation by consumers of their rights in terms of this Act."*

34. Section 4(3) of the CPA states-

*"If any provision of this Act, read in its context, can reasonably be construed to have more than one meaning, the Tribunal or court must prefer the meaning that best promotes the spirit and purposes of this Act, and will best improve the realisation and enjoyment of consumer rights generally, and in particular by persons contemplated in section 3(1)(b)."*

35. Section 34 of the Constitution states-

*"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."*

36. In this matter, the Consumer returned the motor vehicle to the supplier. She continues to pay instalments in terms of the Finance Agreement. It is our view that if we do not interpret the Respondent's continuing refusal to refund the purchase price as continuing conduct, we will not be promoting the spirit and purposes of the CPA, and we will not be making appropriate orders to give practical effect to the Consumer's right of access to redress as we are required to under section 4(2)(b) of the CPA. And, we will not be acting in accordance with section 4(3) of the CPA.

***The Respondent's claim that the relief sought is irregular***

37. The Respondent submitted that the Applicant refers to a "Hyundai i20" on the Form TI.73 (2) (b) CPA, which is not the vehicle sold to the Consumer. Although the balance of the documents presented to the Tribunal correctly refers to the 2016 Mercedes Benz CLA45 AMG, as sold to the Consumer, the Respondent argued that the failure to refer to the correct vehicle in the Notice of Referral is an irregularity. According to the application before the Tribunal, the Tribunal is being requested to order the *refund the Consumer of the deposit in the sum of R45,000.00 paid by the Consumer towards the purchase price of the Hyundai i20 Motor Vehicle, together with interest.*

The Applicant has not filed an application to amend but has confirmed that its referral to a *Hyundai i20* is incorrect and was due to an administrative error and oversight.

#### *Analysis and finding*

38. We find that the issue raised by the Respondent is an important one. The Applicant must take the necessary steps to ensure that the correct motor vehicle that forms the subject matter of these proceedings is reflected in Form Tl.73(2)(b) CPA. Rule 15(1) of the Tribunal Rules states –

*“An Applicant or Respondent may at any time prior to the conclusion of the hearing of the matter, apply by way of Form Tl.r15 for an order authorising an amendment of documents filed in connection with the proceedings, save that where all parties to the proceedings consent in writing to a proposed amendment, such amendment may be effected by merely delivering the amended documents to the Tribunal and to the parties.”*

#### **Non-joinder of Standard Bank**

39. The Respondent submitted that Standard Bank financed the vehicle, and it is presently the owner of the motor vehicle. Moreover, Standard Bank has an interest in the matter as the Consumer obtained credit based on her confirmation to Standard Bank that the vehicle was inspected and found to be in good order.

#### *Analysis*

40. Rule 16 of the Tribunal Rules states-

- “(1) The Tribunal may of its own accord or on application by a party combine any number of persons, either jointly, jointly and severally, separately, or in the alternative, as parties in the same proceedings, if their rights to relief depend on the determination of substantially the same questions of law or fact.*
- (2) A party to proceedings, on giving notice to the other parties, may apply to the presiding member for an order to substitute a person for a current party.*
- (3) A joinder or substitution in terms of these rules will not affect the validity of any proceedings in the matter.”*

41. In *Klaase v van der Merwe N.O.*,<sup>3</sup> the Constitutional Court held that:

*“The test for joinder is that a party must have a direct and substantial legal interest that may be affected prejudicially by the judgment of the court in the proceedings concerned. In ITAC, this Court confirmed the test and said that a party seeking joinder must have a direct and substantial interest in the subject matter. The Court held that the overriding consideration is whether it is in the interests of justice for a party to intervene in litigation.”*

42. In *Snyders and Others v de Jager*,<sup>4</sup> the Constitutional Court held that:

*“A person has a direct and substantial interest in an order that is sought in proceedings if the order would directly affect such a person’s rights or interest. In that case the person should be joined in the proceedings. If the person is not joined in circumstances in which his or her rights or interests will be prejudicially affected by the ultimate judgment that may result from the proceedings, then that will mean that a judgment affecting that person’s rights or interests has been given without affording that person an opportunity to be heard. That goes against one of the most fundamental principles of our legal system. That is that, as a general rule, no court may make an order against anyone without giving that person the opportunity to be heard.”*

### *Finding*

43. On the basis that Standard Bank is the registered owner of the motor vehicle, we find that it is in the interest of justice that it should be joined. As the *dominis litis*, the Applicant must take the necessary steps to ensure that the application documents are served on all the parties who have a direct and substantial interest in the subject matter,

### **ORDER**

44. Accordingly, for the reasons set out above, the Tribunal makes the following order: -

44.1 The Tribunal will not conduct a hearing on whether the Respondent contravened section 55(2)(a) to (d) of the CPA;

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<sup>3</sup> [2016] ZACC 17 at paragraph 45.

<sup>4</sup> [2016] ZACC 54 at paragraph 9.

- 44.2 The Tribunal can conduct a hearing on whether the Respondent contravened section 56(2)(b) of the CPA;
- 44.3 The Applicant must file an application to join Standard Bank Limited within 15 business days;
- 44.4 Within 15 business days of the finalisation of the joinder application, the Applicant must file an application to amend the filed Form: T1.73(2)(b) CPA; and
- 44.5 There is no order as to costs.

Done and dated 1 June 2022.

[Signed]

Mr A Potwana  
Tribunal Member

Ms N Maseti (Tribunal Member) concurs.

#### **MINORITY JUDGMENT : MC PEENZE**

#### **NCC v Sandown Motor Holdings**

#### **NCT/20655/202/73**

1. I have considered the majority judgment regarding the time-bar point *in limine*. Regrettably, I disagree with the reasoning and order. The High court confirmed that the Tribunal does not have any discretion to extend the time bar and the Applicant's submissions in this matter do not provide any basis for the Tribunal to depart from the binding judgment by the High court. I wish to confirm my minority view as follows:
2. The circumstances surrounding this complaint appear to fall within the CPA's general ambit. The applicant brought the consumer's claim under section 56(2)(b)<sup>5</sup> for a refund of R722,836.81, based on the respondent's alleged contravention of section 55<sup>6</sup> on 8 August 2018, when the sale of the vehicle occurred.<sup>7</sup> As the cause of the complaint arose on 8 August, the applicant was bound to refer the complaint to the Tribunal by 8 August 2021. The applicant filed its application with the

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<sup>5</sup> Section 56 (2) outlines as follows:

"56 (2) *Within six months after the delivery of any 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".*

<sup>6</sup> Section 55 (2) (b) of the CPA requires a supplier to provide goods of good quality, in good working order and free of defects.

<sup>7</sup> Section 56 (1) refers to "any transaction or agreement about the supply of goods to a consumer".

Tribunal on 19 October 2021. More than 3 years lapsed between the cause of action and filing of this application with the Tribunal.

3. On the documents before the Tribunal, the applicant is claiming a refund on the consumer's behalf, based on the sale of a defective vehicle by the respondent. The respondent asserted that such a claim prescribed. During the hearing of this matter, the applicant argued that the respondent's failure to refund the consumer amounts to a "continuing practice", which practice constitutes a separate cause of action in this matter. Therefore, the applicant argued, the claim has not prescribed.
4. Section 116 (1) (a) refers to the act or omission that is the cause of the complaint. The Tribunal has subsequently issued several recent judgments dealing with the time-bar issue. Also, our courts have ruled that the expression '*cause of action*' means everything necessary for a plaintiff to prove to support a right to a judgment. It does not comprise every piece of evidence necessary to prove every fact, but every fact necessary to be proved.<sup>8</sup>
5. The consumer's statutory right to return the vehicle within six months after delivery, in line with section 56(2), is not in dispute. If the vehicle is defective on the date of delivery, the consumer may claim a refund from the supplier. If the supplier fails to refund the consumer, the consumer may bring an action to compel the supplier. In such an instance, the cause of the action is the alleged sale of a defective vehicle, and not the refusal to pay.
6. Section 116 of the CPA<sup>9</sup> restricts bringing an action before the Tribunal three years after the act or omission that is the cause of the consumer's complaint. As the applicant brought its action in this matter outside the statutory period, the Tribunal does not have jurisdiction to hear this matter.
7. In matters of this nature, the Tribunal has previously considered the excessive period the complaint lay with the applicant to interrupt prescription. However, the High court, as referred to above, has now confirmed that the Tribunal does not have any power to interrupt or extend the time bar<sup>10</sup>. The

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<sup>8</sup> *Deysel v Truter and Another* 2005 [5] SA 598 CPD at para 64. See also *McKenzie v Farmers Co-operative Meat Industries Ltd* 1922 AD 16.

<sup>9</sup> Section 116 of the Act concerns the limitations of bringing an action. It provides that a complaint in terms of the Act may not be referred or made to the Tribunal more than three years after the act or omission that is the cause of the complaint; or in the case of a course of conduct or continuing practice, the date that the conduct or practice ceased.

<sup>10</sup> *First Rand Bank Ltd v Ludick A 277/2019* High Court of South Africa, Gauteng Division, Pretoria, 18 June 2020 (unreported) at para [16].

High court's judgment binds the Tribunal. Although the judgment referred to section 166 of the NCA, the wording of section 166 is identical to section 116 of the CPA.<sup>11</sup>

8. Moreover, the applicant did not vigorously pursue its submission that the Tribunal should exercise its discretion by considering the purposes of the CPA and the time the complaint lay with the NCC. Those submissions were no more than bald statements in the face of section 116's peremptory provisions.
9. Further, the applicant did not submit a clear basis for the Tribunal to depart from the binding judgment by the High Court. In particular, the applicant failed to substantiate how the failure to make a refund is not linked to the cause of action. The demand for a refund is exclusively linked to the sale of an allegedly faulty vehicle in August 2019, when the vehicle was allegedly sold with defects. Thus, the cause of the complaint arose on that day. The respondent's subsequent refusal to refund the Complainant does not constitute an automatic continuing contravention of sections 55 or 56 and it does not create a new cause of action. If the supplier elects not to refund the consumer, the onus is on the consumer to take any steps necessary to initiate the enforcement processes.
10. As the applicant instituted proceedings based on section 56(2), the applicant will be required, among others, to prove that the requirements and standards contemplated in section 55 were not satisfied, by proving that non-compliance with those standards constitutes prohibited conduct in terms of section 55. The right to a refund can only realize once the applicant proves the unacceptable state of the vehicle at the date of purchase, being the cause of action.
11. As the cause of action occurred more than 3 years before lodging this application, the Tribunal does not have the statutory authority to make a finding on the state of the vehicle at the date of purchase. Consequently, the Tribunal will also not be able to make a finding on the nature of the respondent's conduct in refusing the applicant a refund, as such a finding must in law be based on a finding on the state of the vehicle at the date of purchase.

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<sup>11</sup> **Limitations of bringing action**

**116.**

(1) A complaint in terms of this Act may not be referred or made to the Tribunal or to a consumer court more than three years after—

(a) the Act or omission that is the cause of the complaint; or

(b) in the case of a course of conduct or continuing practice, the date that the conduct or practice ceased.



12. It follows that sections 55 and 56 of the CPA must be read together in this application to consider the respondent's alleged prohibited conduct. Section 55 describes the standards a supplier must adhere to, and section 56 describes the consequences of a supplier failing to comply with those standards, which may also constitute prohibited conduct. Section 56 contains a direct reference to section 55. Accordingly, the Tribunal cannot make a finding that the consumer must be refunded in terms of section 56 unless it finds that the goods as provided on the date of purchase did not adhere to the standards as described in section 55.
13. Based on the above, I am persuaded that the Tribunal does not have the requisite jurisdiction to make a finding whether the respondent committed prohibited conduct concerning the allegation that it contravened sections 55 (a), (b), and (d) of the CPA. This is so as the cause of action, as far as it relates to selling a faulty vehicle, originated more than three years before the complaint was referred to the Tribunal.
14. Further, I am not persuaded that the respondent's refusal to make a refund constitutes a separate act and continuing prohibited practice as argued by the applicant in this matter. The respondent's refusal results from a dispute on the quality of sold goods, and the sale of such goods is the cause of action that applies to this matter.
15. Section 55 describes the standards a supplier must adhere to, and section 56 describes the consequences of a supplier failing to comply with those standards. If sections 55 and 56 of the CPA are read as separate forms of misconduct, they will have no effect and meaning. Section 56 contains a clear and direct reference to section 55. One cannot make a finding that the consumer must be refunded, the goods replaced or repaired in terms of section 56 unless one makes a finding on section 55. Section 55 does not state that refusing to refund the consumer may be regarded as continuing conduct and, therefore, as prohibited conduct. Accordingly, the refusal to refund in this instance does not constitute a separate act and the supplier may therefore raise the time bar as a defence.
16. My conclusion would state that the application was filed outside the three years required by section 116 of the CPA. The applicant was bound to refer the complaint to the Tribunal by 8 October 2021. However, it did not do so, and the complaint has prescribed under section 116 of the CPA. Therefore, the Tribunal is unable to consider this application. The point *in limine* is upheld, and the application is dismissed. The other points in limine become moot.

DATED ON 13 JUNE 2022

[Signed]

**Dr MC Peenze**

Presiding member

**Authorised for issue by The National Consumer Tribunal**

**National Consumer Tribunal**

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