

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

Case number: **NCT/183856/2021/73(2)(b)**

In the matter between:

NATIONAL CONSUMER COMMISSION

APPLICANT

And

TITANTRADE 17 CC T/A TITAN AUTO

RESPONDENT

Coram:

Dr MC Peenze – Presiding member

Adv J Simpson – Member

Mr A Potwana – Member

Date of Hearing – 15 November 2021

Date of judgment – 20 November 2021

JUDGMENT AND REASONS

APPLICANT

1. The Applicant is the **National Consumer Commission** (“the NCC” or “the Applicant”), an organ of state established in terms of section 85 (1) of the Consumer Protection Act 68 of 2008 (“the CPA” or “the Act”) having its registered address at SABS Offices, 1 Dr Lategan Road, Groenkloof, Pretoria.
2. At the hearing, Mr Ludwe Biyana, a prosecutor within the Commission, represented the Applicant.

RESPONDENT

3. The Respondent is **Titantrade 17 CC t/a Titan Auto**, a close corporation duly registered in terms of the company laws of the Republic of South Africa ("the Respondent"). The physical address of the Respondent is 1 Digtebij Street, Kuilsriver in the Western Cape.
4. At the hearing, Adv Tiaan du Preez represented the Respondent.
5. During the day before the hearing, officials from the Tribunal's Registrar ("the Registrar") advised the Tribunal panel that the Respondent filed a condonation application for the late filing of its replying affidavit and subsequently wished to postpone the matter. The Respondent opposed the request for postponement. During the hearing on 15 November 2021, the Respondent confirmed that it had withdrawn its application for condonation and wished to proceed with the hearing as set down.
6. The matter continued opposed.
7. The National Consumer Tribunal ("the Tribunal") conducted the hearing via a Teams technology link due to the physical distancing protocols imposed in response to the Covid-19 pandemic.

JURISDICTION

8. Section 27 (1) (a) (ii) of the National Credit Act, 2005 ("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. 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

9. 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")¹.

¹ Published under Government Notice R293 in Government Gazette 34180 of 1 April 2011.

APPLICATION TYPE AND THE RELIEF SOUGHT

10. The Applicant brings this application in terms of Section 73 (2) (b) of the CPA.
11. The NCC alleges that it received a complaint, conducted an investigation, and referred the complaint to the Tribunal. The NCC seeks an order:
 - 11.1. Declaring the Respondent's contravention of Section 55 (2) (a) to (c) and Section 56 (2) (b) of the CPA as prohibited conduct;
 - 11.2. Interdicting the Respondent from engaging in future prohibited conduct;
 - 11.3. Directing the Respondent to refund the complainant the amount of R 117 000.00, the purchase price he paid for the 2010 Chevrolet Cruze 1.8 LS motor vehicle. This amount must be paid with interest in accordance with the prescribed rate as per the Interest Act No. 55 of 1975, from the date on which it is paid to the Respondent to date of final payment;
 - 11.4. Directing the Respondent to pay the complainant the sum of R 2 450,00, being the amount paid by the complainant for the major service to the 2010 Chevrolet Cruze 1.8 LS motor vehicle. This amount must be paid with interest in accordance with the prescribed rate as per the Interest Act No. 55 of 1975, from the date on which it is paid to the Respondent to date of final payment;
 - 11.5. Directing the Respondent to pay the complainant the sum of R 2 136,65, being the amount paid by the complainant for the repairs to the 2010 Chevrolet Cruze 1.8 LS motor vehicle. This amount must be paid with interest in accordance with the prescribed rate as per the Interest Act No. 55 of 1975, from the date on which it is paid to the Respondent to date of final payment;
 - 11.6. Directing the Respondent to pay an administrative penalty in the amount of 10% of its annual income, or an amount, of R1 000 000.00 (one million rands), whichever is the greater; and
 - 11.7. Granting the Applicant such other relief as the Tribunal may consider appropriate contemplated in section 4 (2) (b) (ii) of the CPA.

BACKGROUND

12. It is convenient to set out the background to this matter as reflected in the documents before the Tribunal.
13. This application stems from a complaint received by the Applicant from a consumer who 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. By supplying the consumer with a motor vehicle that failed to meet the requirements and standards contemplated in section 55, the Applicant submitted the Respondent acted in contravention of section 55 (2) (a) to (c).
14. On or about 19 July 2017, the consumer ("the complainant") purchased a second hand 2010 Chevrolet Cruze 1.8 LS ("the vehicle") for an amount of R117,000.00 (one hundred and seventeen thousand rands).
15. At the heart of the complaint is that the vehicle manifested symptoms of a defect during August 2017, in that the complainant noticed that the vehicle's rear left side light was not working. The complainant also noticed the vehicle's temperature gauge moving up and down. Later, the vehicle had difficulties starting. On 3 October 2017, the complainant took the vehicle to Reeds, Cape Town ("Reeds") for a major service. Reeds checked the starter, radiator, heater, air conditioner and lights. On 4 October 2017, Reeds informed the complainant that the vehicle had a blown head gasket and the engine had overheated badly. According to the Applicant's founding affidavit, he instructed Reeds to repair the vehicle's rear tail lamp and bulb.
16. On 6 October 2017, the consumer informed the supplier about the vehicles' defects and submitted the report from Reeds.
17. Between 9 and 11 October 2017, the complainant had telephonic conversations with the Respondent and informed the latter that he "wants his money back" and "will give the motor vehicle back". The Respondent answered by confirming that "it does not work like that".
18. The complainant referred the matter to the Consumer Protector in the Western Cape. During the mediation meeting, parties agreed that the consumer would take the vehicle to the supplier's premises to diagnose it, which occurred subsequently.

19. On 16 November 2017, the Respondent provided the complainant with the diagnostic report from Mr Deon Rademeyer. The report stated that the consumer had ignored the warning signals from the head gauge and continued to drive the vehicle despite the warning. The complainant disagrees with the report and disputed allegations that there were warning signals before the cylinder gasket was destroyed.
20. During a subsequent meeting with the Consumer Protector, the parties agreed to a refund of R65,000.000, conditional on a further assessment by the Respondent. Titan Auto then conducted further diagnoses at its workshop as to the actual damage to the vehicle. According to the Respondent's workshop, the warning signs (temperature gauge) were ignored, causing the vehicle to overheat to such an extent that the cylinder head gasket had failed to act as a seal between the cylinders. This failure resulted in the vehicle overheating to such an extent that the inlet manifolds were melted.
21. Subsequently, the Respondent did not sign the draft settlement order but offered to assist the consumer with repairing the vehicle at a pre-negotiated price. The consumer did not accept the offer. Hereafter, the Consumer Protector informed the consumer that it could not force the Respondent to accept the settlement and advised parties to refer the matter to the Motor Industry Ombudsman of South Africa ("MIOSA").
22. The parties did not provide any supporting documents confirming that the matter was referred to MIOSA. Telephonic conversations between the consumer and the Retail Motor Industry Organisation are undisputed.
23. On 19 October 2018, the consumer referred his complaint to the NCC.
24. As the Applicant formed a reasonable suspicion that the Respondent had contravened the Act's provisions, it appointed Elias Malatji to investigate the matter. Based on the assessment of the information gathered during the investigation of this complaint, the Applicant concluded that the Respondent had contravened section 56 (2) of the CPA in that, within six months of the delivery of goods, the motor vehicle failed to satisfy the requirements and standards contemplated in section 55.² The Applicant submitted that the motor vehicle was diagnosed as having a blown head gasket and the engine poorly overheated within three months from the date of delivery.

² See para 7.3.2 of the Applicant's founding.

25. By failing to refund the consumer the vehicle's purchase price, as elected by the consumer, the Respondent allegedly contravened section 56 (2) of the CPA.

ISSUES TO BE DECIDED

26. The Tribunal is required to consider and decide the following issues:
- 26.1 Matter *in limine*: Whether the complaint is prevented from being referred to the Tribunal in terms of section 116 of the CPA;
 - 26.2 Whether the Applicant has proved a contravention under the CPA; and
 - 26.3 Whether the Applicant is entitled in law to the relief sought, namely the refund of the vehicle's selling price.

THE HEARING

27. During the hearing on 15 November 2021, the Tribunal panel provided an opportunity to both parties to firstly argue the *in limine* matter. Hereafter, the Tribunal deferred the hearing to consider such arguments and give a written judgment on the *in limine* matter. If the Tribunal decides to dismiss the *in limine* matter, the Registrar will place the matter on the roll for the hearing of the application's merits.

The Applicant

28. The Applicant submitted that the complaint is not prevented from being referred to the Tribunal in terms of section 116 of the CPA.
29. According to the Applicant, the consumer has the right to return the vehicle to the Respondent as the supplier within six months after the delivery of the vehicle, without penalty and at the Respondent's risk and expense, because the vehicle has failed to satisfy the requirements and standards as outlined in section 55 of the Act. The Respondent is persisting with this prohibited conduct.
30. The consumer requested a refund within the first six months after purchase, and the Respondent is persisting with its failure to refund the Applicant the purchase price. Hence, the Applicant submitted that the Respondent continues its prohibited conduct, resulting in the complaint not prevented from being referred to the Tribunal in terms of section 116 of the CPA.

31. In its papers, the Applicant argued that section 116 (1) of the CPA “does not bar the Applicant from referring this matter to the National Consumer Tribunal, even after three years, after the act or omission that is the cause of complaint, more especially if one has to consider that the said section uses the word “may not” and not the words “shall not”, as opposed to the wording used in the Prescription Act where the words “shall or shall not” are used.” (*sic in toto*).
32. The Applicant argued that section 116 of the CPA does not create an absolute bar but provides for the exertion of discretion by the Tribunal. However, if section 116 is construed to have two meanings, then an interpretation that enhances the rights of consumers should be used. The Applicant argued in favour of an interpretation that supports a procedural time bar, which is more advantageous to the consumer than an absolute bar.
33. Alternatively, the Applicant argued that the Tribunal has the discretion to make an innovative order to condone the lapse of time. The Applicant did not provide reasons for the approximately two-year period, from October 2018 to April 2021, that lapsed since the consumer referred the matter to the NCC. Irrespective, it confirmed that the matter was in mediation between October 2017 until October 2018.
34. Subsequently, the Applicant submitted that good cause exists to accept its application, irrespective of the long delay, and requested the Tribunal to apply its discretion in dismissing the *in limine* matter.

Respondent

35. The Respondent submitted that the complaint is prevented from being referred to the Tribunal in terms of section 116 of the CPA. The application was served on the Respondent in April 2021, more than three years after the purchase, which is the cause of the complaint and more than three years after the consumer, on his own version, obtained full knowledge of the alleged defects.
36. The Respondent confirmed that the consumer notified the Respondent of the alleged defects on 6 October 2017 when he demanded repayment of the purchase price. The consumer tendered the return of the motor vehicle on the same day.
37. The Respondent argued that the Tribunal does not have the jurisdiction to attend to matters referred to it more than three years after the cause of the complaint. Also, it submitted that insofar

the Applicant alleges a “continued practice”, it has failed to substantiate this averment. According to the Respondent, the Applicant refers to a single transaction being the sale of one specific vehicle dating back to 19 July 2017. The failure to pay back the purchase price is argued not to be a continuing practise constituting prohibited conduct, as it cannot be expected from suppliers to make refunds where a consumer acted negligently and damaged the purchased goods.

ANALYSIS

The Tribunal as a creature of statute

38. The Tribunal is a statutory body established in terms of section 26 of the NCA.
39. The Tribunal, like any other administrative or judicial body, derives its powers and authority from the empowering legislation.³ Subsequently, the Tribunal only has those powers granted to it (expressly or impliedly) by its constitutive statutes and empowering legislation.⁴ The High Court, on the other hand, has inherent jurisdiction. Therefore, it may hear whatever matter it wishes to hear, barring those matters that it is not permitted to entertain (certain constitutional matters are reserved for the Constitutional Court).⁵ The Tribunal can only hear cases authorised to hear in terms of its founding *or other legislation*.

Section 116 of the CPA

40. Section 116 of the CPA states the following –

‘ (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.’

41. Section 116(1)(b) restricts the bringing of a complaint to the Tribunal more than three years after course of conduct or continuing practice ceased.

³ See De Ville JR, *Judicial Review of Administrative Action in South Africa*, 2015, LexisNexis. p 91.

⁴ *FirstRand Bank Ltd v A Ludick A277/2019* High Court of South Africa, Gauteng, Pretoria division, 18 June 2020 (unreported), par 14.

⁵ Also see *Tshisa v Premier of the Free State and Another (A6/2009) [2009] ZAFSHC 119; 2010 (2) SA 153 (FB) (19 November 2009)*, par 16.

Innovative Order

42. A careful analysis of the CPA convinces us that the CPA provides the Tribunal with the authority to make an innovative order.⁶ Section 4 (2) of the CPA determines that the Tribunal must develop the common law as necessary to improve the realisation of consumer rights⁷ and that it must make any innovative order that better advances, protects, promotes and assures the realisation by consumers of their rights in terms of the CPA:⁸ Section 4 (2) and (3) states-

'In any matter brought before the Tribunal or a court **in terms of this Act**—

(b) 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.

(3) 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).'

43. The provisions of section 4 (2) and (3) authorise the Tribunal to make orders that better advance, protect, promote, and assure the realisation of consumers' rights in terms of the CPA. By applying such discretion and making such innovative orders, the Tribunal will not usurp any non-statutory authority that it does not have. It will, in fact, be properly executing its assigned statutory responsibility as prescribed in section 4 of the CPA.
44. The objectives of the CPA support the protection of consumers and the consumer industry from exploitation and abuse. Section 34 of the Bill of Rights states that "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.' In *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others*, Langa DP stated that "*all statutes must be interpreted through the prism of the Bill of Rights*" and that "[T]he Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values."

⁶ Naude T and De Stadler E "'Innovative Orders' under the South African Consumer Protection Act 68 of 2008" PER / PELJ 2019(22) - DOI <http://dx.doi.org/10.17159/1727-3781/2019/v22i0a5108>. p 10

⁷ Section 4(2)(a) of the CPA

⁸ Section 4(2)(b)(ii)(bb) of the CPA

45. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*, Ngcobo J stated:
- “The technique of paying attention to the context in statutory construction is now required by the Constitution, in particular, s 39 (2). As pointed out above, that provision introduces a mandatory requirement to construe every piece of legislation in a manner that promotes the ‘spirit, purport and objects of the Bill of Rights.’”
46. Any other interpretation will render the CPA ineffective to assist consumers in their pursuit of enforcing their rights and will be inconsistent with the Bill of Rights and the *dicta* in the above cited judgements.
47. In *S v Mhlungu and Others*⁹ Sachs J, in quoting Lord Denning, stated that “... *Judges... solve the problem by looking at the design and purpose of the legislature, at the effect, it was sought to achieve. They then interpret the legislation to produce the desired effect.*”¹⁰

Two different scenarios regulated under section 116 of the CPA

48. Section 116 of the CPA defines two different scenarios when a complaint cannot be referred to the Tribunal after the expiry of three years.

Scenario 1: Section 116 (a)

- 48.1 In line with section 116(1)(a) of the CPA, a complaint cannot be referred to the Tribunal after the expiry of three years after a particular act or omission that is the cause of the complaint occurred. Notably, the particular act or omission date must be determined, and the complaint must be based on such act or omission.
- 48.2 Examples of such an act would be the "sale of a defective vehicle".

Scenario 2: Section 116(b)

- 48.3 In line with section 116(1)(b) of the CPA, a complaint cannot be referred to the Tribunal after the expiry of three years **after the date that a course of conduct or continuing**

⁹ 1995 (3) SA 867 (CC) at 916

¹⁰ *Barnado v National Consumer Commission and Others* (47933/17) [2021] ZAGPPHC 531 (26 August 2021)
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practice ceased. This clause is applicable where there is a case of a **course of conduct** or **continuing practice.**

The failure by a supplier to refund a consumer when required to do so in terms of the CPA, may constitute a course of conduct or continuing practice if an applicant can prove, *inter alia*, that the goods did not meet the requirements and standards prescribed under section 55 and that the complainant returned the goods within the prescribed period of six months after delivery. Significantly, the **date** when such conduct or practise had **ceased** must be determined. The respondent's refusal to refund to the purchase price to the consumer constitutes continuing conduct.¹¹

Analysis: Facts of the matter

49. The Applicant brought the complaint in this matter in terms of the CPA. Accordingly, when determining whether the complaint had prescribed, section 116 of the CPA will be considered, as read with section 4 and other applicable clauses of the CPA.

50. According to the Applicant, the Respondent supplied the goods (namely the vehicle) on or around 19 July 2017. After receiving the vehicle, the Applicant realised a fault with the temperature gauge and noticed that the vehicle overheated. Therefore, the Applicant submitted that the Respondent infringed on the Applicant's rights as outlined in section 55 (2) of the CPA. Section 55 (2) outlines as follows:

- "(2) Except to the extent contemplated in subsection (6), every consumer has a right to receive goods 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;*
 - (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 as set under the Standards Act, 1993 (Act 5 No 29 of 1993) or any public regulation.*

51. If a consumer alleges an infringement of section 55, the *dies* can start to run on the date of delivery. Applied to the matter at hand, the cause of action insofar as it relates to the alleged receipt of faulty or poor-quality goods, occurred on 19 July 2017. Section 116 (a) applies to this scenario. As the cause of action arose more than three years before the complaint was referred

¹¹ Also see Paul August Winter v Kove Empire CC t/a Pinetown Vehicles NCT/176395/2021/75(1)(b), par 47.

to the Tribunal, we find that the referral of the complaint that the Respondent contravened section 55 (a), (b), and (c) of the CPA was made after the expiry of three years the act that is alleged to be the cause of the complaint, namely, the delivery of a defective motor vehicle. The Tribunal does not have the requisite jurisdiction to make a finding whether the Respondent committed prohibited conduct in terms of section 55 of the CPA.

52. Regarding section 56, the Applicant argued that the prohibited conduct before the Tribunal is the failure by the Respondent to refund the Applicant the purchase price after the complainant returned the vehicle within the six months statutory warranty period. It is not in dispute that the complainant returned the vehicle to the Respondent and demanded a refund within six months after purchase. It is also not in dispute that the Respondent refused to refund the Applicant.

53. Section 56 (1) of the CPA provides that –

“(1) In any transaction or agreement pertaining to the supply of goods to a consumer there is an implied provision that the producer or importer, the distributor and the retailer each warrant that the goods comply with the requirements and standards contemplated in section 55, except to the extent that those goods have been altered contrary to the instructions, or after leaving the control, of the producer or importer, a distributor or the retailer, as the case may be.”

54. Due to the Applicant’s failure to provide the vehicle to the Respondent before its alteration by a third party, the Respondent was not put in a position to rectify any alleged defect that could have impacted the warranty outlined in section 55. Accordingly, the section 55 warranty and the subsequent responsibility to refund the consumer the purchase price in terms of section 56 had been affected by the Applicant’s failure to return the vehicle to the Respondent before the third party made alterations. 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”*

55. It is imperative to note that the words ‘if the goods fail to satisfy the requirements and standards contemplated in section 55’ prescribe a standard. The relevance of section 55 in section 56 (2) of the CPA proceedings is whether the goods satisfied the requirements mentioned in section 55. There is no specific requirement that the Respondent must first be found guilty of having contravened the provisions of section 55 before a consumer seek to enforce any of the options

prescribed under section 56 (2). In the context of section 56 (2), the reference to section 55 is to prescribe a standard: no more, no less. Put differently, an Applicant is totally at liberty to institute proceedings based on section 56 (2) without seeking an order that a Respondent be found to have contravened any section 55 provision. In such a case, the applicant will be required, among others, to prove that the requirements and standards contemplated in section 55 were not satisfied without being required to allege and prove that non-compliance with those standards constitutes prohibited conduct in terms of section 55. It bears mentioning that it is reasonable to surmise that in most cases, complainants are interested in redress and not necessarily in findings of prohibited conduct. In the present matter, it is beyond doubt that the complainant's interests lie in receiving the refund that he demanded within six months of taking delivery of the motor vehicle.

CONCLUSION

56. We are persuaded that 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 (a), (b), and (d) of the CPA. 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.
57. Concerning the allegation that the Respondent contravened section 56 (2) of the CPA, we find that the Respondent's alleged refusal to refund to the complainant the purchase price constitutes a continuing conduct or practice. If we are in error in finding that the Respondent's alleged refusal to refund to the complainant the purchase price constitutes a continuing conduct or practice, we rely on the provisions of section 4 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 demands that the Tribunal interprets the Respondent's continuing refusal to refund to the complainant the purchase price paid for the vehicle as a continuing conduct or practice that must be resolved by a competent tribunal or court.

FINDING

58. We find that, in view of the provisions of section 116 (1) (a), the Applicant cannot refer the allegations that the Respondent contravened section 55 (2) (a), (b), and (c) to the Tribunal but is

not barred from referring the allegations that the Respondent contravened section 56 (2) (b) of the CPA.

- 59.** For purposes of completion, the Tribunal wishes to confirm that the high court decision in *First Rand Bank Limited v Annet Ludick*,¹² where the high court found, *inter alia*, the Tribunal had overstretched its authority in that matter, is irrelevant to the section 116 (1) (b) finding that the Tribunal has reached in this matter. The *Ludick* decision dealt with credit matters in terms of section 166 of the National Credit Act and not section 116 of the Consumer Protection Act. More particularly, it did not deal with a continuing activity or practice. Further, the wording of the two sections in the two Acts may be the same, but it cannot be interpreted in the same manner because the two pieces of legislation give different directions towards the respective interpretation of the two Acts. The high court's finding in *Ludick* is specific to the way the Tribunal usurped authority in the *Ludick* order. It is not a generalisation or impacting on the Tribunal's authority statutorily assigned when dealing with consumer complaints in terms of the Consumer Protection Act. If the legislator intended that the Tribunal exerts its jurisdiction when dealing with Consumer Protection Act complaints in the same manner as outlined in the National Credit Act, the Consumer Protection Act would not have contained section 4. Then, all applications would have been dealt with in terms of the jurisdiction outlined in the National Credit Act.
- 60.** In the present matter the Tribunal does not need to deal with the issue of "interruption", as the alleged prohibited conduct is a continuing activity. The Applicant requests enforcement of the complainant's right to a refund after he returned the vehicle to the Respondent within six months after purchase, which right is allegedly continuously being infringed upon by the supplier.
- 61.** It would be a grave injustice to consumers if the *Ludick* ruling by the High Court regarding section 166 of the National Credit Act is also interpreted as an absolute bar to consider a continuous form of prohibited conduct or to make innovative orders in terms of the Consumer Protection Act. A consumer, who is already out of pocket and has taken a prescribed legal step to enforce his section 56 (2) (b) right to receive a refund by returning the vehicle to the Respondent within the prescribed period of six months but has still not received a refund as contemplated in that section deserves, at the very least, to have access to means of redress by having his dispute resolved by a competent Tribunal or court as contemplated in section 4 (2) (b) of the CPA.

¹² First Rand Bank Limited v Annet Ludick A 277/2019, handed down 9 June 2020.

ORDER

62. Accordingly, the Tribunal makes the following order:

- 62.1 The Tribunal will not hear the allegations that the Respondent contravened section 55 (2) (a), (b), and (c) of the CPA;
- 62.2 The Tribunal will conduct a hearing on whether the Respondent contravened section 56 (2) (b), of the CPA; and
- 62.3 There is no order as to costs.

DATED ON THIS 20 NOVEMBER 2021

[Signed]

Dr MC Peenze

Presiding member

Mr A Potwana (Tribunal member) concurring.

MINORITY JUDGMENT

- 1. I note my learned colleagues' reasoning and order, but unfortunately, I have to disagree with them. In the interests of brevity, I will only highlight the most glaring issues.
- 2. The Tribunal has issued several recent judgments dealing with the time-bar issue. This matter is very similar to the previous judgments.
- 3. The facts are clear; the complaint arose in October 2017 when the vehicle overheated. Three years from October 2017 is October 2020. The application was only lodged with the Tribunal in April 2021. Section 116 of the CPA¹³ specifically prevents the Tribunal from hearing any matter more

¹³ *Limitations of bringing action*
116.

than three years after the cause of the complaint. The High court has confirmed that the Tribunal does not have any power to interrupt or extend the time bar¹⁴. The High court's judgment binds the Tribunal. Although the judgment referred to section 166 of the NCA, section 166 is identical to section 116 of the CPA.

4. The Applicant's submissions do not provide any basis for the Tribunal to depart from the binding judgment by the High court. The cause of the complaint arose in 2017, when the defect occurred. The Respondent's refusal to refund the Complainant does not constitute a continuing contravention of sections 55 or 56. The Respondent has a right to defend itself against the allegation of prohibited conduct. The High court confirmed that the Tribunal does not have any discretion to extend the time bar. The use of the word "may not" in section 116 does not change this finding. Nothing in the CPA grants the Tribunal any specific or general power to extend the time bar. There is no interpretation conflict in section 116; the wording and intent of the legislature are clear.
5. Sections 55 and 56 of the CPA must be read together, or they would have no effect and meaning. 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. 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. The conduct or practice referred to in section 56(2) can only refer to the continuing supply of defective goods.
6. If I understand my colleagues' reasoning properly, a claim under section 56(2) of the CPA would never be subject to a time bar. If the supplier refuses a demand to refund, repair or replace the goods, this would be regarded as a course of conduct or continuing practice. The consumer may then initiate the enforcement process under section 69 of the CPA at any time. Theoretically, this can be ten, twenty or a hundred years after the allegedly defective goods were returned. This approach would present numerous legal challenges and could never have been the intention of the legislature.

(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.

¹⁴ *First Rand Bank Ltd v Ludick* A 277/2019 High Court of South Africa, Gauteng Division, Pretoria, 18 June 2020 (unreported) at para [16].

7. A supplier has a right to defend itself against a claim under sections 55 and 56. There is no apparent basis for arguing that refusing to pay a claim constitutes a separate act and negates the supplier's right to raise the time bar as a defence. Such an approach would essentially mean that a supplier is effectively forced to refund the consumer, as the alternative would present too great a risk. Suppose the supplier elects not to refund the consumer. In that case, the supplier must take any step necessary to force the consumer to initiate the enforcement processes while it still has the information and evidence to defend itself. This "reverse onus" approach cannot be justified in terms of the CPA.
8. I certainly understand and share my colleagues' frustration with the number of applications brought by the NCC and consumers barred due to the time-lapse. It is most certainly a difficult situation for consumers with legitimate claims. However, the CPA does not provide any basis for the Tribunal to ignore the time bar or extend it. Applications must be lodged in time, or the legislature must see fit to grant the Tribunal the specific power to grant leave for a time-barred application. In my view, manipulating the provisions of the CPA and the resulting unintended consequences is not the desired approach.
9. My conclusion would state that the application was filed outside the three years required by section 116 of the CPA. The Tribunal is unable to consider this application. The point *in limine* is upheld, and the application is dismissed.

Adv J Simpson

Tribunal Member

Authorised for issue by The National Consumer Tribunal

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