

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

**Case number: NCT/277084/2023/73(2)(b)**

In the matter between:

**NATIONAL CONSUMER COMMISSION**

**APPLICANT**

and

**RASAR (PTY) LTD T/A JAMBO MOTORS**

**RESPONDENT**

Coram:

Dr M Peenze - Presiding Tribunal member

Mr S Hockey - Tribunal member

Mr CJ Ntsoane - Tribunal member

Date of hearing - 26 April 2024 via the Microsoft Teams digital platform

Date of judgment - 3 May 2024

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**JUDGMENT AND REASONS**

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**APPLICANT**

1. The applicant is the National Consumer Commission (the NCC), a juristic person established in terms of section 85 of the Consumer Protection Act 68 of 2008 (the CPA).
2. On the day of the hearing, Ms N Ngobeni, the applicant's legal advisor, represented the applicant.

**RESPONDENT**

3. The respondent is Rasar (Pty) Ltd, a private company trading as Jambo Motors. The respondent is a supplier, as defined in section 1 of the CPA.
4. On the day of the hearing, Adv K Naidoo from the Johannesburg Bar represented the respondent.

## **JURISDICTION**

5. Section 27 (1) (a) (ii) of the National Credit Act, 34 of 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.
6. 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**

7. A reference to a section in this judgment refers to a section in the CPA.<sup>1</sup>

## **APPLICATION TYPE**

8. This is an application in terms of section 73(2)(b) in which the applicant alleges that the respondent has contravened certain provisions of the CPA and, in doing so, has engaged in prohibited conduct. The applicant seeks an order to that effect and, further, for the National Consumer Tribunal (the Tribunal) to impose an administrative fine of R1,000,000.00 (one million rand) on the respondent.

## **BACKGROUND**

9. At the hearing on 26 April 2024, the Tribunal allowed argument by both parties relating to the respondent's conduct, the nature of the sales agreement, the allegation that the purchased goods failed to satisfy the requirements of section 55(2) and whether, as a result, the respondent contravened the CPA.
10. Although the matter was heard on an opposed basis, the material facts determining this application were either common cause or not disputed by the parties. The Tribunal sets them out below.
11. On 13 July 2021, Talent Nare (the consumer) filed a complaint with the applicant. The complaint detailed that he bought a used 07 Audi 3.0 TDI V6 Quattro Tip from the respondent on 2 December 2020. The purchase price for the said vehicle was R185,000.00, which included a discount of

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

R29,900.00. Per the purchase agreement, the supplier would not be responsible for any repairs to the vehicle.

12. On 12 February 2021, two months after taking delivery of the vehicle, after driving approximately 8,400km, the consumer experienced a turbo problem with the vehicle. It was losing power, and smoke was exerted from the exhaust. He reported this to the respondent, who reminded him that they were not responsible for any repairs as agreed in the sales agreement. The respondent advised him to take the vehicle to a nearby mechanic for a service. The consumer took the vehicle to Audi Centre in Polokwane (Audi Polokwane) at his own expense. Audi Polokwane diagnosed the vehicle as having the following faults or defects:
  - 12.1. Faulty turbocharger;
  - 12.2. Faulty injector unit;
  - 12.3. The air-bag warning light was on; and
  - 12.4. The vehicle vibrated when driven at a speed from 0-100km/h.
13. He authorised repairs to the vehicle, which amounted to R102,122.42. After collecting the repaired vehicle, the vehicle started “shaking”, and the consumer returned the vehicle to Audi Polokwane for a diagnostic test. Audi Polokwane identified a crankshaft problem. The vehicle needed a complete engine striping, and the consumer was quoted an amount of R138,900.00.
14. According to the respondent, the consumer failed to provide them with a diagnostic report and authorised the repairs by Audi Polokwane without their consent. Further, the consumer did not cancel the sales agreement or return the vehicle to the respondent for a refund or repairs.
15. On 19 February 2021, before the matter was referred to the applicant, the consumer filed a complaint with the Motor Industry Ombudsman of South Africa (MIOSA). On 31 March 2021, MIOSA recommended that the respondent repair the vehicle. The respondent attempted to arrange for the vehicle to be brought to Johannesburg for repair, at which point the consumer confirmed that Audi Polokwane had already repaired the vehicle. Subsequently, MIOSA issued a revised recommendation on 7 April 2021, indicating that the relief requested was not possible and advised the consumer to lodge a complaint with the NCC.
16. On the strength of the above, the applicant formed a reasonable suspicion that the respondent had committed contraventions of the CPA and investigated the complaint.

17. The respondent took issue with the stripping of the motor vehicle by a third party and argued that disassembling the motor vehicle without their permission constituted an intervention by a third party, nullifying the inherent statutory warranty.

## **TRANSGRESSION OF THE CPA**

18. The NCC seeks a declaratory order that the respondent contravened various sections of the CPA and that the contraventions be declared prohibited conduct. The sections are:
  - (a) section 40(1)(c);
  - (b) section 40(2);
  - (c) section 51(1)(a) and (b);
  - (d) section 55(2)(b) to (c); and
  - (e) section 56(2)(a);

### ***Section 40: Unconscionable conduct***

19. Section 40(1)(c) prohibits the use of physical force against a consumer, coercion, undue influence, pressure, duress or harassment, unfair tactics, or any other similar conduct in connection with any negotiation, conclusion, execution or enforcement of an agreement to supply any goods or services to a consumer.
20. Section 40(2) outlines that unconscionable conduct includes taking advantage of the fact that a consumer was substantially unable to protect the consumer's interests because of physical or mental disability, illiteracy, ignorance, inability to understand the language of an agreement, or any other similar factor.
21. The applicant submitted that the respondent deployed an unfair tactic by including a clause exempting themselves from any responsibility for future repairs. The applicant further argued that the consumer was unaware of the conditions attached to the discount and did not understand the language contained in the sales agreement.
22. The respondent submitted that there was no unconscionable conduct, as the consumer requested a discount. According to the respondent, the applicant outlined that returning the vehicle for future repairs would have been challenging because his place of domicile was far away. The respondent argued that the applicant did not raise ignorance of the conditions attached to the discount in its

founding affidavit and failed to file a replying affidavit. In the absence of a replying affidavit, the respondent relied on the Plascon-Evans rule and emphasised that the consumer signed the purchase agreement, which included the conditions attached to the discount.

### *Consideration*

23. Section 40 is headed “unconscionable conduct” and falls under Chapter II<sup>2</sup>, Part F, dealing with the right to fair and honest dealings.
24. Section 1 defines “unconscionable”, when used concerning any conduct, to mean:
  - “(a) having a character contemplated in section 40; or*
  - (b) otherwise, unethical or improper to a degree that would shock the conscience of a reasonable person”.*
25. Subparagraph (a) of the definition is relevant as the NCC alleges that the respondent contravened the provisions under section 40(1).
26. For a finding of unconscionable conduct to be present in the sense of section 40(1), the section requires the presence of one or more of the following jurisdictional factors, namely the use of physical force against the consumer, coercion, undue influence, pressure, duress or harassment, or unfair tactics. This is not a closed list of factors, as the section prohibits “any other similar conduct”. These factors may not be used in connection with any purpose set out in paragraphs (a) to (e) of section 40(1).
27. Subsections (a) to (e) of section 40(1) contain a list of activities in which a supplier may not engage with the use of the factors referred to above. The Tribunal only needs to concern itself with subsection (c), as this is the subsection that the NCC alleges was contravened by the respondent.
28. Before considering the conduct that the NCC alleges falls foul of section 40(1), it is necessary to consider the respondent’s submissions regarding the alleged contraventions. The respondent’s general approach is that unconscionable conduct requires intention on its part. It is submitted that there is nothing inherently unconscionable about negotiating a discount if the consumer requests and agrees on the conditions thereof.

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<sup>2</sup> Chapter II is headed “Fundamental Consumer Rights”.

29. In the Tribunal's view, section 40(1) should be statutorily interpreted. An ordinary interpretation of section 40(1) is that using any factors listed or similar conduct for the purposes listed under (c) is a contravention. This interpretation accords with the purpose of the CPA<sup>3</sup> and the context in which the provision appears. However, the NCC failed to persuade the Tribunal that the respondent intended to utilise unfair tactics.
30. The Tribunal accepts the respondent's version that the consumer requested a discount, whereafter the parties agreed to a reduced purchase price on the condition that the respondent is not liable for future repairs. The applicant failed to persuade the Tribunal that including a clause exempting the respondent from liability for future repairs occurred through physical force against the consumer, coercion, undue influence, pressure, duress or harassment, unfair tactics, or other similar conduct. Consequently, the Tribunal finds no contravention of section 40(1) as pleaded.

***Section 51: Prohibited transactions, agreements, terms, or conditions***

31. Per section 51(1)(a), a supplier must not make a transaction or agreement subject to any term or condition if its general purpose or effect is to:
- 31.1. Defeat the purposes and policy of the CPA;
  - 31.2. Mislead or deceive the consumer; or
  - 31.3. Subject the consumer to fraudulent conduct.
32. Per section 51(1)(b), a supplier must not make an agreement subject to any term or condition if it directly or indirectly purports to:
- 32.1. Waive or deprive a consumer of a right in terms of the CPA;
  - 32.2. Avoid a supplier's obligation or duty in terms of the CPA;
  - 32.3. Set aside or override the effect of any provision of the CPA;
  - 32.4. Authorise the supplier to:
    - 32.4.1. Do anything unlawful in terms of the CPA; or
    - 32.4.2. Fail to do anything that is required in terms of the CPA.
33. When interpreting the CPA, the provisions contained in sections 2, 3, and 4 must be considered. In this regard, section 2(1) provides that the CPA must be interpreted in a manner that gives effect

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<sup>3</sup> The purpose of the CPA is contained in section (3) and includes the promotion of fair business practices and protecting consumers from unconscionable, unfair, unreasonable, unjust, or otherwise improper trade practices.

to the purposes set out in section 3. Section 3(1) provides that the purposes of the CPA are to promote and advance the social and economic welfare of consumers in South Africa by, amongst others, establishing a legal framework for the achievement and maintenance of the consumer market that is fair, accessible, efficient, sustainable, and responsible for the benefits of consumers generally. Section 4(3) provides that if any provision of the CPA, 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 the CPA, and will best improve the realisation and enjoyment of consumer rights.

34. The applicant submitted that the exemption clause in the purchase agreement constitutes prohibited conduct, as a supplier cannot contract out of its statutory obligations.
35. The respondent argued that the exclusion was the result of an arms-length transaction and that the respondent agreed to the clause.

#### *Consideration*

36. According to the evidence before the Tribunal, it is common cause that the purchase agreement contained a clause confirming that: *“Due to huge discount, the Dealer will be not responsible for any future repair on the vehicle and also Reg/Lic/roadworthy to be done by customer himself.”*<sup>4</sup>
37. Section 56 provides for a six-month implied warranty, operative from the vehicle’s purchase date. In terms of section 56(2), the first respondent was obliged to repair the vehicle if the consumer had elected that the vehicle be repaired. By including the above exclusion clause in the purchase agreement, the supplier deprived the consumer of his right in terms of section 56. Further, this condition failed to advance the consumer's social and economic welfare, as the required repairs far exceeded the discount amount approved by the respondent.
38. Despite the agreement between the parties that the supplier would not be responsible for future repairs to the vehicle, the Tribunal finds that the respondent was statutorily prohibited from providing consent to such exclusion. To the extent that parties conclude an agreement where a consumer's statutory right is infringed upon, such agreement contravenes the CPA. Similarly, to

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<sup>4</sup> See page 51 of the Tribunal bundle.

the extent that such a clause would have the general effect of defeating the purpose of the CPA, such an agreement contravenes the CPA.

39. Consequently, the Tribunal finds that the condition under which the respondent agreed to provide a discount to the consumer was a blatant attempt to defeat the purposes of the CPA. This is clear evidence that the vehicle was sold to the applicant on unfair, unreasonable, and unjust terms, all aimed at getting the applicant to waive his consumer rights and the respondent's liability. The intention was clearly to get the applicant to assume an obligation to repair defects and absolve the respondent from doing so. These are serious contraventions that the Tribunal must discourage.

*Section 55: Consumer's right to safe, good quality goods*

40. 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.
41. In the context of goods, section 53 (1) (a) defines a defect as follows:
- 41.1. Any material imperfection in the manufactured goods that renders the goods less acceptable than persons generally would be reasonably entitled to expect; or
- 41.2. Alternatively, any characteristic of the goods or components that renders them less useful, practicable or safe than persons generally would be reasonably entitled to expect.
42. The applicant submitted that the vehicle became defective within three months after purchase. The vehicle could not drive properly due to the defective injector and turbo. As a result, the vehicle was not functioning properly and became unsafe.
43. The respondent argued that the vehicle was sold in good condition and that the defective injector and turbo were caused by normal wear and tear. The respondent outlined that the vehicle had 11000 km on the odometer on the date of sale. Hereafter, the consumer drove more than 8000 km within two months. According to the respondent, the strenuous mileage added within such a short period could have caused the injector and turbo to deteriorate faster. This should be considered when deciding what would constitute a reasonable period for the vehicle to remain free of defects and useable.



### Consideration

44. The applicant failed to persuade the Tribunal that the defective injector and turbo were present at the date of purchase. The applicant further failed to persuade the Tribunal that the defects amounted to defects as defined in section 53(1). In *Motus v Wentzel*<sup>5</sup> (*Motus*), the court held that not every small fault amounts to a defect as defined in the CPA. The consumer confirmed during oral testimony that the defects appeared two months after purchase after he had driven 8000 km. He also confirmed that the vehicle could drive but lost power, and acceleration did not “pick up.”
45. The Tribunal finds that for a vehicle of the age and mileage of the consumer’s vehicle, a reasonable period to be usable and free of defects would be 30,000 km over 12 months. In the absence of evidence that the vehicle was sold with defects and evidence that the consumer added extensive mileage within the first two months after purchase, the Tribunal finds that the defective injector and turbo were caused by normal wear and tear, which cannot be attributed to the respondent. On the applicant’s version, as substantiated by Audi Polokwane's report, the vehicle's state could also have resulted from an engine that ran with old oil for some time, incorrect oil grade used, or poor workmanship unknown to Audi Polokwane.<sup>6</sup>
46. The Tribunal finds that a faulty turbocharger and injector unit could constitute material defects and be expensive to repair. The problem for the consumer is that we cannot find that the vehicle was purchased with these defects as it was subsequently driven for more than 8000 km over a short period, and no proper diagnostic was done as to the cause of the defects. The breakdown could be ascribed to fair wear and tear for a vehicle of this age, having been driven for more than 8000 km over a relatively short period.

### **Section 56: Implied warranty quality**

47. Section 56(2) gives the consumer the right to return the goods to the supplier within six months after delivery if the goods do not meet the requirements and standards contemplated in section 55. The supplier must, *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.

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<sup>5</sup> *Motus Corporation (Pty) Ltd and Another v Wentzel* (Case no 1272/2019) [2021] ZASCA 40 (13 April 2021) para 41.

<sup>6</sup> See page 98 of the Tribunal bundle.

### *Consideration*

48. The applicant did not persuade the Tribunal that the vehicle was defective at the date of purchase. The Tribunal also found that the vehicle was safe and usable for a reasonable period. During the hearing, the applicant also waived the request for repair in terms of section 56, as the consumer opted to have the vehicle repaired by a third party without the respondent's consent.
49. As the consumer never made an election or direction as prescribed by section 56(2) of the CPA and chose to have the vehicle repaired by a third party, the statutory warranty in section 56 was forfeited.

### **CONCLUSION**

50. Given the above, we are satisfied that the applicant has proved, on a balance of probabilities, that the respondent contravened sections 51(1)(a)(i) and 51(1)(b)(i). An act or omission contravening a provision of the CPA constitutes prohibited conduct.

### **RELIEF**

51. We now turn to consider the relief sought.

### ***Refund***

52. During the hearing, the applicant requested the Tribunal to order a refund as an innovative order in terms of section 150(i) of the National Credit Act, No 34 of 2005.
53. Unlike the provisions of section 56(2)(b), which empower this Tribunal to order, among other things, a refund of the purchase price for defective goods, no CPA provision empowers the Tribunal to order a refund of payments made to a third party. Also, we are mindful that the applicant has made further repairs over the last two years and has had possession of the vehicle during this period. Moreover, this prayer amounts to a civil damages claim, which should be brought before a civil court.
54. Given the Tribunal's finding that the respondent committed prohibited conduct and the absence of a specific remedy under the CPA for the prohibited conduct committed, the loss or damages that

the applicant claims the consumer has suffered, and the fact that the Tribunal is not statutorily empowered to make the order that the applicant seeks, consideration should be given to applying for a certificate of prohibited conduct from the Chairperson of the Tribunal and instituting a claim for the assessment and awarding of damages in a civil court. Section 115(2)(b) provides that when instituting such proceedings, a person must file with the registrar or clerk of the court a notice from the Chairperson of the Tribunal in the prescribed form–

- “(i) certifying whether the conduct constituting the basis for the action has been found to be prohibited or required conduct in terms of [the CPA];
- (ii) stating the date of the Tribunal’s finding, if any; and
- (iii) setting out the section of [the CPA] in terms of which the Tribunal made its finding, if any.”

56. The certificate referred to in section 115(2)(b) is sufficient proof of its contents.

### **Consideration of an administrative fine**

57. The applicant requested that the Tribunal impose an administrative fine on the respondent. The applicant made submissions concerning the factors listed in section 112(3) that the Tribunal must consider.

58. Bearing in mind the respondent’s offer to repair the vehicle at its own cost following the MIOSA ruling and the absence of proven mala fides, the Tribunal is not persuaded that a fine is appropriate and justified in the circumstances.

### **Interdict**

59. The applicant requested that the Tribunal make 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**

60. Accordingly, the Tribunal makes the following order:

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<sup>7</sup> *Shoprite Investments Ltd v The National Credit Regulator* (509/2017) dated 18 December 2019).

- 60.1. The respondent has contravened sections 51(1)(a)(i) and 51(1)(b)(i) of the CPA;
- 60.2. The respondent's contraventions are declared prohibited conduct;
- 60.3. The applicant or consumer may approach the Chairperson of the Tribunal for a certificate in terms of section 115(2)(b) of the CPA to claim the related damages in a civil court; and
- 60.4. There is no order as to costs.

[signed]

**Dr MC Peenze**  
**Presiding Tribunal member**

Tribunal members Mr S Hockey and Mr CJ Ntsoane concur.

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

**National Consumer Tribunal**

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