

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

**Case Number: NCT/303398/2023/73(2)(b)**

In the matter between:

**NATIONAL CONSUMER COMMISSION**

**APPLICANT**

and

**BRYANSTON EXECUTIVE CARS CC**

**RESPONDENT**

*Coram:*

Mr S Hockey - Presiding Tribunal member

Dr A Potwana - Tribunal member

Mr S Mbhele - Tribunal member

Date of Hearing - 10 June 2024

Date of Judgment - 28 June 2024

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**JUDGMENT AND REASONS**

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**THE PARTIES**

1. The applicant is the National Consumer Commission (the applicant or the NCC), an organ of the state established in terms of section 85(1) of the Consumer Protection Act, 2008 (the CPA). At the hearing, the applicant was represented by Mr Eric Jabulani Mbeje, the NCC's divisional head of legal services.

2. The respondent is Bryanston Executive Cars CC, a close corporation incorporated under the company laws of the Republic of South Africa and a supplier as defined in section 1 of the CPA. At the hearing, Ms Adele le Roux (Ms Le Roux), an attorney from A le Roux Attorneys, represented the respondent.

## **TERMINOLOGY**

3. A reference to a section in this ruling refers to a section of the CPA, and a reference to a rule refers to the Rules of the National Consumer Tribunal (the Rules)<sup>1</sup>.

## **APPLICATION TYPE AND JURISDICTION**

4. This is an application in terms of section 73(2)(b). This section authorises the NCC to refer a matter to the National Consumer Tribunal (the Tribunal) after the conclusion of an investigation of a complaint it received from a consumer if it believes that a person has engaged in prohibited conduct.
5. On 5 August 2021, the NCC received a complaint against the respondent from a consumer, Mr Robert Eric Ridout (the consumer or the complainant). The complaint was investigated, and the investigation report revealed that the respondent allegedly contravened provisions of the CPA, as will be discussed below.

## **BACKGROUND**

6. On 29 October 2020, the consumer purchased a 2013 Audi Q7 (the vehicle) with 141 713km on the odometer from the respondent for R315 639.80. The vehicle

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<sup>1</sup> GN 789 of 28 August 2007: Regulations for matters relating to the functions of the Tribunal and Rules for the conduct of matters before the National Consumer Tribunal, 2007 (Government Gazette No. 30225).

broke down on 16 December 2020 while the consumer drove it to Cape Town.

7. The parties are at loggerheads as to whether the respondent should be held liable for the alleged defective vehicle and whether the provisions of the CPA are applicable, given that they were purportedly excluded by the conditions of the sale of the vehicle. The parties' submissions on the above will be separately discussed below.

### **THE APPLICANT'S SUBMISSIONS**

8. The submissions of the NCC are based on the investigation it authorised and the resultant investigation report, as follows:
  - 8.1. Whilst the consumer drove the vehicle to Cape Town on 16 December 2020, it went into limp mode without any prior warning and came to a standstill. The consumer tried to restart the vehicle to no avail, and as a result, he arranged for the vehicle to be towed to a B&B in Bloemfontein. The following day, the vehicle was towed to JJ Motors in Bloemfontein, where the consumer was informed that the breakdown was due to a piston failure and that the engine needed to be replaced.
  - 8.2. On 17 December 2020, the consumer contacted the respondent and spoke to a salesperson, informing him of the breakdown. The salesperson promised a manager would call him, but this never happened.
  - 8.3. Thereafter, the consumer contacted Warranty Solutions, with whom a warranty on the vehicle was taken out. Warranty Solutions told the consumer that he had to find an RMI mechanic to do a full assessment of the engine at the consumer's cost.
  - 8.4. The consumer then referred the matter to the Motor Industry Ombudsman of South Africa (MIOSA), who recommended that the

respondent collect the vehicle at its own risk and expense for assessment and repairs. The respondent did not heed this recommendation.

- 8.5. Thereafter, the consumer arranged for the vehicle to be towed to Mike's Engine, Gearbox, and Diff (Mike's), where a full diagnosis was conducted, and a report was produced at the cost of R4 450.00.
- 8.6. The diagnostic report recorded that the diagnostic scan showed no present fault codes, as it was probably previously deleted. It was also recorded that at least three bolts to secure the engine and transmission on the bellhousing were missing.
- 8.7. On the stripping of the engine, one of the injectors was found to be loose, and the copper washer at the bottom of the injector nozzle was totally burnt and disintegrated. The rest of the injectors showed evidence of an internal water leak.
- 8.8. The diagnostic report concluded, amongst others, that:
  - 8.8.1. an internal water leak indicates that the engine suffered from severe overheating, causing a blow of the head gasket and/or a cracked head;
  - 8.8.2. the excessive sump compression and extreme heat caused the carbon build-up on the tapped covers and the exhaust manifold;  
and
  - 8.8.3. The engine had to be removed and stripped to assess the full extent of the damage.
- 8.9. On the same day of receipt of the diagnostic report, the consumer informed the respondent thereof, but the latter refused to cover the cost

of repairing the vehicle. As a result, the consumer referred its complaint to the NCC.

- 8.10. The vehicle remained at Mike's ever since then.
- 8.11. It was concluded in the investigation report that the respondent contravened section 56(2)(a) read with section 55(2)(b) and (c), section 48 relating to the marketing and supply of goods, and section 51(1)(b)(i) and/or (ii).
- 8.12. As a result of the above, the NCC asks that the Tribunal declare that the respondent contravened the aforementioned sections and that such contraventions be declared prohibited conduct. The NCC also asked for an interdict against the respondent from engaging in similar prohibited conduct and for an order that the respondent repair or replace the defective engine of the vehicle. Furthermore, the NCC asks that an administrative fine be imposed on the respondent.

## **THE RESPONDENT'S SUBMISSIONS**

9. The respondent's answering affidavit is deposed to by its member, Luis de Abreu who makes the following contentions:
  - 9.1. The respondent does not know about the NCC's investigation, alternatively submits that no proper investigation has been concluded.
  - 9.2. The respondent goes to exhaustive lengths to ensure that when a consumer buys a second-hand vehicle from it, the consumer knows precisely what they are buying.
  - 9.3. In the present instance, the respondent repeatedly brought to the consumer's attention that the vehicle was used and not new and that the respondent was its original owner. The consumer insisted on an

inspection, which he conducted “*with a fine toothcomb*”. Furthermore, he signed the respondent’s documents stating that the vehicle was pre-owned and that the respondent could not vouch for anything.

- 9.4. The consumer took out a policy from Warranty Solutions to safeguard himself against unforeseen problems with the vehicle.
- 9.5. It defies logic that the NCC expects the respondent to have intimate knowledge of each used vehicle brought for sale, as the respondent would not know the vehicle's use before it landed on its shop floor.
- 9.6. It is pointed out that the consumer had been driving the vehicle for two months before the issues with the vehicle manifested.
- 9.7. It is argued that section 55(6) excludes the application of section 55(2) when it comes to used vehicles. It is further alleged that the NCC woefully interprets the provisions of the CPA inaccurately.
- 9.8. The respondent denies that there is evidence of a modification of the engine, that it persisted that it did not work on fuel lines while knowing that it did and that the water pump was replaced or that the respondent replaced it or knew that it was replaced.

10. At the hearing of the matter, Ms Le Roux raised several points *in limine*, and for the sake of expediency, will be considered and dealt with below:

**Affidavits not properly commissioned**

- 10.1. It is alleged that the applicant’s affidavits are not commissioned correctly in terms of the relevant regulations for administering an oath in that there is no statement by the proponents whether they have an objection to the prescribed oath or whether the prescribed oath is binding on the conscience.

- 10.2. This point *in limine* is without merit. Many years ago, in *S v Munn*<sup>2</sup> the High Court confirmed that the regulations are directory only, and non-compliance would not invalidate an affidavit if there were substantial compliance with the formalities in such a way as to give effect to the purpose of obtaining the deponent's signature on an affidavit.
- 10.3. The commissioner of oaths confirmed that a deponent acknowledged and knows the content of the affidavit and that the relevant regulations relating to the administering of an oath have been complied with. Ironically, the respondent's affidavits have been administered in the same manner as those of the NCC.

#### **Hearsay evidence**

- 10.4. The respondent alleges that the cause of action does not fall within the personal knowledge of the deponent to the founding affidavit, who states that she deposed to the affidavit "*pursuant to me having studied the investigation report*". It is alleged that the deponent's contentions in the founding affidavit are hearsay evidence.
- 10.5. The respondent did not explain why Ms Mabuza could not rely on the investigation report of the inspector who conducted the investigation and compiled the said report. The investigation report itself is in the form of an affidavit<sup>3</sup>.
- 10.6. This point *in limine* is also meritless. The deponent of the founding affidavit clearly states that she studied the investigation report, and the allegations she makes are based on that report. The investigation report is in the form of an affidavit.

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<sup>2</sup> 1973 (3) SA 734 (NC).

<sup>3</sup> Section 3(1)(b) of the Law of Evidence Amendment Act 45 of 1988 requires that for hearsay evidence to be admitted, the person upon whose credibility the probative value of such evidence depends must testify at such proceedings.

### **Locus standi**

- 10.7. The respondent alleges that the deponents to the NCC's affidavits have no *locus standi* to bring this application before the Tribunal as their authority to "*fill the shoes of the Commissioner*" does not extend to them being the actual persons deposing to affidavits.
- 10.8. In addition to the above, in raising this point *in limine*, Ms Le Roux had no regard for section 87(6)(b), in terms of which the Minister must designate a Deputy Commissioner to fulfil the functions of the Commissioner if the latter is for any reason unable to perform his or her functions.

### **Non-joinder**

- 10.9. It is further contended that the consumer should have been joined in these proceedings as a person who has a direct and substantial interest in the outcome of the matter.
- 10.10. Section 73(1)(c)(iii), read with section 73(2)(b), authorises the NCC to refer allegations of prohibited conduct to the Tribunal if it believes that a person has engaged in prohibited conduct.
- 10.11. The NCC has important enforcement functions ascribed to it under the CPA. This includes the referral of matters to the Tribunal, as discussed above. In *Bernado v National Consumer Commission and Others*<sup>4</sup> (*Bernado*), the High Court summarised the enforcement functions of the NCC as follows:

*"[27] On the enforcement function of the NCC, any of the persons listed in section 4(1) (a) – (e) ('a listed person') may, in the manner provided for in the CPA, approach a court, the National Consumer Tribunal (NCT) or the NCC*

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<sup>4</sup> [2021] ZAGPPHC 531 (26 August 2021).



*alleging that a consumer's rights in terms of the Act have been infringed, impaired or threatened, or that prohibited conduct has occurred or is occurring. The NCC's enforcement functions are listed in section 99(b) and (d)–(i). The enumeration of functions in section 99 essentially comprises a summary of the NCC's functions. As an administrative agency, the NCC is primarily an investigative and enforcement body. It is responsible for enforcing the Act by:*

- 28.1 Initiating see section 71(2) or receiving section 71(1) complaints concerning alleged prohibited conduct or offences, and dealing with those complaints in accordance with Part B of Chapter 3 (sections 72–75);*
- 28.2 referring complaints for dispute resolution section 72(1) (b);*
- 28.3 referring complaints to another regulatory authority section 72 (1) (c);*
- 28.4 investigating and evaluating alleged prohibited conduct and offences section 99 (d) and complaints section 72 (1)(d);*
- 28.5 conducting interrogations section 102 and searches section 103-105 of the Act;*
- 28.6 issuing and enforcing compliance notices section 99(e); 73 (1) (c) 9(iv);*
- 28.7 negotiating and concluding undertakings and consent orders contemplated in sections 73(1)(c)(ii) and 74(1);*
- 28.8 appearing before the NCT as permitted or required in terms of the provisions of section 99(h);*
- 28.9 referring alleged offences in terms of the Act to the National Prosecuting Authority;*

28.10 *proposing draft consent orders in terms of section 74 section 73 (1) (c)(ii) or*

28.11 *making referrals to the NCT section 73(2) (b) or to the consumer court of the province in which the supplier has its principal place of business in the Republic section 73(2) (a). The NCC may only refer a matter to the consumer court if there is a consumer court in that province and it believes that the issues raised by the complaint can be dealt with expeditiously and fully by such referral section 73(2) (a) (i)-(ii) of the Act.”*

10.12. In Bernado, the court required the NCC to comply with its statutory obligation by ordering it to, amongst others, refer the matter (i.e. the consumer’s complaint) to the Tribunal and to deal with it in terms of sections 73(2) and 99(h). In terms of section 99(h), the NCC has a duty to refer matters to the Tribunal and appear before it as permitted or required in terms of the CPA.

10.13. In light of the NCC’s duties outlined above, whether it was necessary to have joined the complainant in these proceedings must be considered. The test for joinder is well settled. In *Bowring NO v Vrededorp Properties CC*,<sup>5</sup> the Supreme Court of Appeal (SCA) held that “*the enquiry relating to non-joinder remains one of substance rather than the form of the claim.*” And further, “[t]he substantial test is whether the party that is alleged to be a necessary party for purposes of joinder, has a legal interest in the subject matter of the litigation, which may be affected prejudicially by the judgment of the court in the proceedings concerned”.

10.14. In *Klaase and Another v Van der Merwe NO*<sup>6</sup>, the Constitutional Court

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<sup>5</sup> [2007] ZACSA 80; 2007 (5) SA 391 (SCA).

<sup>6</sup> 2016 (9) BCLR 1187 (CC); 2016 (6) SA 131 (CC).

confirmed the above test and confirmed that the overriding consideration is whether it is in the interest of justice for a party to intervene in litigation<sup>7</sup>.

10.15. In *Judicial Service Commission and Another v Cape Bar Council and Another*<sup>8</sup>, the SCA held that:

*“it has now become settled law that the joinder of a party is only required as a matter of necessity - as opposed to a matter of convenience - if that party has a direct and substantial interest which may be affected prejudicially by the judgement of the court in the proceedings concerned . . .”*<sup>9</sup>.

10.16. In the present matter, the complainant referred his complaint to the NCC, who exercised its duties in terms of the CPA, including investigating the complaint and referring the matter to the Tribunal in terms of section 73(2)(b) as discussed above. The application was served on the complainant as required by the rules, so he is aware of the proceedings. Furthermore, the complainant deposed to a confirmatory affidavit, thereby confirming his support for the steps taken by the NCC. There is no prejudice that the complainant may suffer if the relief sought herein is granted. On the contrary, the complainant stands to benefit from the relief sought. As stated in *Anglo Platinum Management Services (Pty) Ltd and Others v Minister of Safety and Security and Others*<sup>10</sup>, the objection is laid to rest by the operation of the waiver of the right to demand the joinder. In the present matter, the complainant can be said to have waived his right to be joined in the circumstances where he approved the course of action taken by the NCC and by deposing to a confirmatory affidavit.

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<sup>7</sup> Ibid at para [45].

<sup>8</sup> 2013 (1) SA (SCA)

<sup>9</sup> Ibid at para [12].

<sup>10</sup> ZAGPHP 61; [2004] 4 All SA 30 (T) at para [16].

10.17. It was not necessary to join the complainant and the non-joinder point in limine is therefore refused.

### **Failure to comply with regulation 6 of Act 7,1996**

10.18. It is alleged that the confirmatory affidavit of the consumer is defective in that he refers to the “*replying affidavit*” of Ms Theza Mabuza<sup>11</sup>. It is worth noting that the founding and supporting affidavits were signed on the same day, 13 December 2023. There was, therefore, no replying affidavit in existence then. Thus, the consumer’s reference to Ms Thezi Mabuza's replying affidavit is clearly an error. The reference to the replying affidavit should be a reference to the founding affidavit. The context speaks for itself. The Tribunal is of the view that this point in limine is raised pointlessly and warrants no further attention.

### **Premature relief**

10.19. The respondent refers to part D of the notice of referral and alleges that the NCC acted without authority to declare that the respondent contravened sections of the CPA and that it expects the Tribunal to merely rubber-stamp the NCC’s say-so.

10.20. The Tribunal finds it incomprehensible why this point in limine was raised. The referral form is similar to that of a notice of motion in motion proceedings where the relief sought is set out. This point *in limine* is poorly taken and warrants no further attention.

### **No expert evidence.**

10.21. The respondent takes issue that no expert evidence has been presented as a point *in limine*. This is raised in the context of the NCC’s

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<sup>11</sup> i.e. the deputy commissioner would oppose the founding affidavit.

allegation that the vehicle's water pump was allegedly previously replaced, indicating a previous problem with the cooling system. The Tribunal is of the view that this is not a legitimate point to raise *in limine* as it goes to the merits of the matter. A point in limine is a technical point that is raised before getting into the merits, often to dispose of the matter or at least part thereof.

### **Ultra vires order sought**

10.22. The respondent states that the applicant seeks an administrative fine but fails to make out a case to justify this “*other than its own premature bad in law determination that the Respondent contravened sections of the CPA.*”

10.23. Again, the above point in limine is badly taken. The applicant is entitled to ask for an administrative fine if the respondent is found to have contravened provisions of the CPA. This point *in limine* also goes to the merits of the matter and is therefore meritless.

### **Failure to comply with section 116(2) of the CPA**

10.24. Section 116(2) precludes the referral of a complaint in terms of the CPA to the Tribunal or a consumer court against a person who has been the respondent under another section of the CPA relating substantially to the same conduct.

10.25. The respondent submits that it has already appeared before this Tribunal on 21 January 2022. The Tribunal's judgment in that matter is attached to the papers.

10.26. The matter for which the respondent appeared before the Tribunal on 21 January 2022 is an entirely different matter from the present one. It is in respect of different conduct, relating to a different consumer. The

raising of this point in limine represents a poor reflection of the respondent's understanding of section 116(2) and stands to be dismissed.

## THE RELEVANT LEGAL PROVISIONS

11. The respondent is alleged to have contravened sections 56(2)(a) read with section 55(2)(b) and/or (c); 48(1)(a)(ii), alternatively 48(1)(b), 48(1)(b) and/or (c)(i) and/or (ii) and/or (iii); and 51(1)(b)(i) and/or (ii).
12. Section 56(2)(a) provides that a consumer may, within six months after delivery of any goods to it, return the goods to the supplier without penalty and at the supplier's risk and expense if the goods fail to satisfy the requirements and standards contemplated in section 55. The supplier must then, at the direction of the consumer, either repair or replace the failed, unsafe, or defective goods. Subsection (b) provides for the option by the consumer to require a refund of the purchase price paid by the consumer for the goods.
13. Section 55(2)(b) and (c) provides that, except to the extent contemplated in subsection (6), the consumer has a right to receive goods that are of good quality, in good working order, and free of any defects and will be usable and durable for a reasonable period of time, having regard to the use to which they would normally be put and all the surrounding circumstances of the supply. Subsection (6) provides that subsections (2)(a) and (b) do not apply to a transaction if the consumer has (a) been expressly informed that particular goods were offered in a specific condition and (b) expressly agreed to accept the goods in that condition or knowingly acted in a manner consistent with accepting the goods in that condition.
14. Section 48 falls under Part G, headed "*Right to fair, just and reasonable terms and conditions*" of Chapter 2<sup>12</sup> of the CPA. Section 48(1) provides as follows:

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<sup>12</sup> Chapter deals with and is headed "FUNDAMENTAL CONSUMER RIGHTS".

**“48. (1) A supplier must not—**

*(a) offer to supply, supply, or enter into an agreement to supply, any goods or services—*

- (i) at a price that is unfair, unreasonable or unjust; or*
- (ii) on terms that are unfair, unreasonable or unjust;*

*(b) market any goods or services, or negotiate, enter into or administer a transaction or an agreement for the supply of any goods or services, in a manner that is unfair, unreasonable, or unjust; or*

*(c) require a consumer, or other person to whom any goods or services are supplied at the direction of the consumer—*

- (i) to waive any rights;*
- (ii) assume any obligation; or*
- (iii) waive any liability of the supplier,*

*on terms that are unfair, unreasonable or unjust, or impose any such terms as a condition of entering into a transaction.”*

15. Section 51(1)(i) and (ii) prohibits a supplier from making a transaction or agreement subject to terms that directly or indirectly purport to (i) waive or deprive a consumer’s right in terms of the CPA or (ii) avoid the supplier’s obligation or duty in terms of the CPA.

## **ANALYSIS**

16. The cornerstone of the respondent’s defence in this matter (other than the points in limine, which were all badly taken) is that it made it clear to the complainant that the vehicle was second-hand, that the complainant inspected the vehicle and that it agreed that the sale was subject to sections 55(6)(a) and (b).

17. The respondent relies on documentation signed by the complainant wherein it is alleged that he acknowledged that the vehicle was sold with specific conditions which exculpate the respondent from responsibility for any defects in the vehicle.

18. For the above reason, it is important to consider our law concerning the interpretation of documents. In this regard, the law is well-settled. In *Natal Joint Municipal Pension Fund v Endumeni Municipality*<sup>13</sup>, the Supreme Court of Appeal restated the approach to interpretation and explained that interpretation is the objective process of attributing meaning to words. The court explained that the process of interpretation entails a simultaneous consideration of:

- (i) the language used in the light of the ordinary rules of grammar and syntax;
- (ii) the context in which the provision appears; and
- (iii) the apparent purpose to which it was directed<sup>14</sup>.

19. In a document attached as “BEC 3” to the respondent’s answering affidavit, the complainant, by signing the document, acknowledged that he purchased a second-hand vehicle. The document also states that the purchaser (i.e. the complainant) accepts the risk of buying a used product that might not be in its original state as the previous owner may have modified it or there may be accident damage. In the answering affidavit, the respondent submits that by signing BEC 3, the complainant agreed that he checked the vehicle and found it to be in order.

20. The document titled “*SPECIFIC CONDITIONS OFFER TO PURCHASE*”<sup>15</sup>, which was signed by the complainant and the respondent, provides for the recordal of known faults, leaks, vehicle spray work done, known previous accident damage, or any other defects brought to the buyer's attention. Thereunder, several items are listed, including engine, battery, cooling and heating system, etcetera (there are 36 items in total). Next to these items, it is written by hand, “*As per Inspection*”,

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<sup>13</sup> 2012 (4) SA 593 (SCA).

<sup>14</sup> *Ibid* para 18.

<sup>15</sup> See page 138 of the record.



but no fault or issue in respect of any of these items is specifically mentioned. The document further records as follows:

*“The BUYER acknowledges that he has inspected the vehicle, conducted a road test (if applicable) and that the conditions are set out above was expressly disclosed and stipulated by the SELLER.*

*The BUYER hereby accepts the vehicle in this condition and expressly confirms that the SELLER offers no warranty on the vehicle in respect of mechanical failure [or] any defect or any material imperfection.”*

21. The problem with the respondent’s submissions is that they ignore section 55(5), which clarifies that it is irrelevant whether a product failure or defect was latent or patent or whether a consumer could have detected it before taking delivery of goods. Furthermore, the Tribunal is of the view that the legislature could never have intended that suppliers would escape liability by simply making consumers sign a declaration that they were informed that goods were sold as used goods. If this were so, in the case of every sale of used goods, a supplier would be able to successfully rely on section 55(6) on the basis that a consumer would have purchased the goods knowingly that they were used and accepted the goods in that condition.
22. BEC 3, which contains an inspection sheet, does not indicate the specific conditions in which the vehicle was sold relating to the alleged issues that the consumer experienced with the vehicle after the sale. The respondent, therefore, cannot successfully rely on section 55(6) in the Tribunal’s view.
23. It is worth pointing out that section 55(6) only excludes subsections (2)(a) and (2)(b), and not subsection (2)(c), namely the right of a consumer to receive goods that will be usable and durable for a reasonable period of time, having regard to the use to which they would normally be put and all the surrounding circumstances of the supply. Therefore, the application of the whole of section 55 is not excluded

by any specific condition that the consumer might have been expressly informed of, even if he expressly agreed to accept the vehicle in that condition.

24. This takes us to the implied warranty of quality, which is dealt with under section 56. It cannot be disputed that the vehicle broke down within the six-month period of its delivery, as contemplated in section 56(2). This is a result of a material defect. The subsequent diagnostic report obtained by the complainant indicates an internal water leak, which caused severe engine overheating, causing a blow to the head gasket or a cracked engine head. It further indicates that the carbon build-up on the tapped covers and exhaust manifold was caused by excessive pump compression and extreme heat.
25. The vehicle was, as a result of the above, not usable and durable for a reasonable period of time as contemplated in section 55(2)(c), and it, therefore, failed to satisfy the requirements and standards contemplated in section 55 as provided for in section 56(2).
26. Since the vehicle failed to satisfy the requirements and standards contemplated in section 55, the consumer elected to have the vehicle's engine repaired, which the respondent has failed to comply with to date. An order in this regard is, therefore, appropriate.
27. As regards the alleged contraventions of sections 48 and 51, there seems to be an overlap regarding the allegations in this regard as well as in the provisions of the sections. The Tribunal finds that by purporting to exclude the rights of the complainant provided for in sections 55 and 56, the respondent, by way of the agreement of sale and related documents, purported to waive or deprive the complainant of his rights in terms of the CPA and purported to avoid its obligations or duty in terms of the CPA. The respondent therefore contravened sections 51(1)(b)(i) and (ii).

## ADMINISTRATIVE FINE

28. The NCC requests that an administrative fine be imposed on the respondent in terms of section 112, which empowers the Tribunal to impose such fine in respect of prohibited or required conduct in terms of the CPA. Such fine may not exceed the greater of 10% of the respondent's annual turnover during the preceding financial year, or R1 000 000.00.
29. The Tribunal has a discretion whether to impose a fine or not. The Tribunal has already concluded that the respondent contravened the provisions of the CPA. These contraventions are considered serious and a disregard for the provisions of the CPA. It follows that the transgression should be declared prohibited conduct. The Tribunal notes that the respondent has shown a disregard for consumer rights. As a result, the Tribunal is of the view that an administrative fine would be appropriate.
30. Section 112(3) outlines seven factors the Tribunal must consider when determining an appropriate administrative fine. These factors will be considered below:

30.1. The nature, duration, gravity, and extent of the contravention

The respondent sold a vehicle to the consumer and disregarded the consumer's rights under the CPA. The vehicle was sold in October 2020, and various attempts were made to resolve the matter, with the respondent failing or refusing to co-operate. Instead, the respondent raised every conceivable technical point to resist the consumer and the NCC's case.

30.2. Any loss or damage suffered as a result of the contravention

As a result of the respondent's action, the consumer has been unable to use the vehicle since October 2020 and has not been able to derive any benefit from its use. The complainant also incurred costs in obtaining a diagnostic

report (for R4 450.00) and had to incur towing costs after the vehicle broke down. After the breakdown in Bloemfontein, the consumer also had to transport his family to Cape Town at his own cost.

30.3. The behaviour of the respondent

The respondent has shown little regard for the complainant's rights under the CPA. It refused to co-operate with MIOSA and raised numerous technical points in limine that are meritless and ill-advised.

30.4. The market circumstances in which the contravention took place

Consumers in the South African market are generally vulnerable to suppliers, which is why the CPA affords protection to consumers. In the present matter, the respondent sought to deprive the consumer of his rights under the CPA.

30.5. The level of profit derived from the contravention

The Tribunal is not in a position to make a finding concerning the level of profit derived from the contraventions by the respondent.

30.6. The degree to which the respondent cooperated with the NCC

The respondent cooperated with the NCC's investigation to an extent but insisted it was not liable under the CPA.

30.7. Whether the respondent has previously been found in contravention of the CPA

There is no evidence that the respondent previously contravened the provisions of the CPA.

31. After careful consideration of the factors outlined above, the Tribunal is of the view that an administrative fine of R100 000.00 would be appropriate.

## **CONCLUSION**

32. The Tribunal already outlined the sections of the CPA which the respondent contravened. In addition, the NCC asked that these contraventions be declared prohibited conduct and that the respondent be interdicted from engaging in similar conduct in the future. In *Shoprite Investment Limited v The National Credit Regulator*<sup>16</sup>, a full bench of the High Court of South Africa (Gauteng Division, Pretoria) stated that, given the provisions of the NCA, such an order would not serve any purpose and set aside the Tribunal's order.

## **THE ORDER**

33. In the result, the following order is made:

33.1. It is declared that the respondent contravened:

33.1.1. Section 56(2) read with section 55(2)(c); and

33.1.2. Section 51(1)(b)(i) and (ii).

33.2. The aforesaid contraventions are declared to be prohibited conduct.

33.3. The respondent shall replace or repair the vehicle's engine or cause it to be replaced or repaired at its own cost within 30 business days from the date of the issuing of this order.

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<sup>16</sup> [2019] ZAGPPHC 956 (18 December 2019).

33.4. The respondent shall pay an administrative fine of R100 000.00 (one hundred and fifty thousand rand) within 30 ordinary days of the issuing of this order into the bank account of the National Revenue Fund, the details of which are as follows:

Bank: The Standard Bank of South Africa  
Account holder: Department of Trade and Industry  
Branch name: Sunnyside Branch code: 010645  
Account number: 370650026  
Reference: NCT/303398/2023/73(2)(b) and name of the person or business making the payment.

33.5. There is no order as to costs.

*(signed)*

S Hockey (Presiding Tribunal member)

Tribunal members Dr A Potwana and Mr S Mbhele concur.

