

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

Case Number: NCT/318778/2023/73(2)(b)

In the matter between:

NATIONAL CONSUMER COMMISSION

APPLICANT

and

WYNBERG USED CARS (PTY) LTD

RESPONDENT

Coram:

Mr S Hockey - Presiding Tribunal member

Dr A Potwana - Tribunal member

Mr S Mbhele - Tribunal member

Date of Hearing - 19 June 2024

Date of Judgment - 2 July 2024

JUDGMENT

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 Ms Nstako Ngobeni a legal advisor in the employ of the NCC.
2. The respondent is Wynberg Used Cars (Pty) Ltd, a company incorporated under the company laws of the Republic of South Africa and a supplier as defined in section 1 of the CPA. The respondent did not appear at the hearing of this matter.

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)¹.

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 20 August 2021, the NCC received a complaint against the respondent from a consumer, Mr Dwayne Williams (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.
6. Accordingly, the Tribunal has jurisdiction in terms of section 73(2)(b) and section 27(a)(ii)² of the National Credit Act 34 of 2005 (the NCA) to consider this application.

HEARING OF THE MATTER ON AN UNOPPOSED BASIS

7. The applicant filed this application and served it on the respondent on 19 March 2024. The application was served on the respondent by email after the respondent consented to service by email in this manner.

¹ 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).

² This section provides that the Tribunal or a member of the Tribunal acting alone in accordance with the NCA or the CPA may adjudicate in relation to any allegations of prohibited conduct.

8. In terms of rules 13(1) and (2), a respondent to an application or referral to the Tribunal may oppose the matter by filing an answering affidavit within 15 business days of receipt of the application or referral.
9. The respondent failed to file an answering affidavit within the prescribed period or at all, and the matter was accordingly set down for hearing on an unopposed basis.
10. In terms of rule 13(5), any fact or allegation in an application or referral not specifically denied or admitted in an answering affidavit will be deemed to have been admitted. Since no answering affidavit has been filed, the allegations by the applicant must be deemed to have been admitted by the respondent.

BACKGROUND

11. On 4 February 2021, the complainant purchased a used Honda Accord (the vehicle) from the respondent for R99 995. The vehicle had an odometer reading of 171 496 kilometres.
12. On 15 February 2021, less than two weeks after the purchase of the vehicle, the complainant discovered certain alleged defects, which are recorded in the investigation report verbatim as follows:
 - “(a) Brush touch all-round;*
 - (b) All four wheels brakes;*
 - (c) Leaks on the steering rack;*
 - (d) Front Lights and front bumper alignment; and*
 - (e) Low Springs and tyre replacement.”*
13. On 15 February 2021, the complainant took the vehicle to the respondent for repairs. The respondent's Mr Khan wrote down the defects that needed repair. On the same day, the complainant sent a WhatsApp message to the respondent

stating that a plastic cover below the engine was hanging and requested that it be added to the list of items that needed repair.

14. On 16 February 2021, the respondent took the vehicle to a third party (referred to as Duffy) for repairs. Duffy only repaired the brakes and brushes.
15. On 23 February 2021, the vehicle was returned to the complainant, who, thereafter, notified the respondent of defects which are listed in the investigation report verbatim as follows:

“(a) There was something wrong with the exhaust;

(b) The power steering fluid was leaking;

(c) He requested a new battery for the vehicle;

(d) There are three different makes of tyres;

(e) The steering wheel must be centred;

(f) The coolant for the radiator had to be fixed;

(g) There is a problem with a windscreen;

(h) There is a rust in the brackets of the exhaust;

(i) Battery terminal is broken;

(j) There was a sound in the gearbox;

(k) The rubbers of exhaust need to be replaced;

(l) The exhaust burned the bumper, brakes are rusted and rubbers need to be replaced;

(m) There is a tear on a passenger seat”.

16. It is noted in the investigation report that the consumer took the vehicle back to the respondent as more issues had been identified. On 10 March 2021, the respondent advised that the vehicle would be ready for collection on 12 March 2021. When the consumer collected the vehicle on 12 March 2021, he was informed that it had to be returned on 15 March 2021 for further repairs. The consumer, however, could not return the vehicle on that date as he was on holiday. He returned the vehicle to the respondent on 15 April 2021.
17. As a result of the above, the NCC submits that further defects were discovered within three months from the date after the vehicle was repaired, which were reported within three months after their discovery.
18. The evidence on record shows that the respondent repaired some but not all of the alleged defects that the consumer identified. Exactly which repairs and when they were done are not precise.

THE RELEVANT LEGAL CONSIDERATIONS

19. The NCC alleges that the respondent contravened section 55(2)(a) to (c) read with section 56(3).
20. Section 55(2)(a) to (c) reads as follows:

“Except to the extent contemplated in subsection (6)³, every consumer has a right to receive goods that -

(a) are reasonably suitable for the purposes for which they are generally intended;

³ Subsection (6) excludes subsection 2(a) and (b) to a transaction if the consumer has been expressly informed that particular cultural a specific condition and has expressly agreed to accept the goods in that condition or knowingly acted in a manner consistent with the exception the coaching the condition.

(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”.

21. Section 56(3) provides:

“If a supplier repairs any particular goods or any component of any such goods, and within three months after that repair, the failure, defect or unsafe feature has not been remedied, or a further failure, defect or unsafe feature is discovered, the supplier must –

(a) replace the goods; or

(b) refund to the consumer the price paid by the consumer for the goods.”

22. Regard must also be had to section 53, where the concept of a “defect” is defined. Section 53(1)(a) defines defect, when used with respect to any goods, component of any goods or service, as:

“(i) any material imperfection in the manufacture of goods or component, or in performance of the services, that renders the goods or results of the service less acceptable than persons generally would be reasonably entitled to expect in the circumstances; or

(ii) any characteristic of the goods or components that renders the goods or components less useful, practicable or safe than persons generally would be reasonably entitled to expect in the circumstances.”

DISCUSSION

23. None of the defects complained about rendered the vehicle undrivable. The NCC nevertheless submits that the alleged defects are serious defects, as defined in section 53. For this, the NCC asks that the respondent refund the consumer R63 530.69.
24. In support of the proposed refund, the applicant obtained quotations from various service providers that would cover the costs of repairing the alleged defects. These quotations⁴ were obtained in August 2022.
25. It is apparent from the quotations that they do not all relate to alleged defects which the consumer complained about from February to April 2021. A quotation from Dent Maestro, for example, quotes repairs for, amongst others, room dome blemishes, boot lid paint blemish, right side roof rail blemish, door edges and fender edges. These are not defects that the applicant relied on and, in any event, do not constitute defects as defined in the CPA. A blemish is defined as a mark or flaw that spoils the appearance of something⁵ and can hardly be said to constitute a defect as defined.
26. A further quotation obtained from Musical Cars relates to repairs needed to a rear door motor and roof lining that needs replacement. The only item dealt with in this quotation seems to be what is recorded as the replacement of a leather panel. It may relate to the tear in the passenger seat complained about, but even if so, it does not constitute a defect as defined in section 53.
27. The Tribunal is mindful of what was said by the Supreme Court of Appeal in *Motus Corporation (Pty) Ltd v Wentzel*⁶ (Motus), namely:

“It must be accepted on the facts that are common cause that her vehicle did have certain issues, which she [the consumer] brought to the attention of Renault. It is more difficult to determine whether they

⁴ The quotations can be found on pages 90 to 94 of the record.

⁵ Oxford Languages.

⁶ [2021] ZACSA 40; [2021] 3 All SA 98 (SCA) (13 April 2021).

amounted to defects as defined in the statute. Not every small fault is a defect as defined. It must either render the goods less acceptable than people generally would be reasonably entitled to expect from goods of that type, or it must render the goods less useful, practicable or safe for the purpose for which they were purchased.” (Underlining for emphasis).

28. The only defects, as provided for in terms of the CPA, which the NCC alleged and seems to have persisted when the various quotations were obtained in August 2022, are the ones relating to the defective steering wheel and the windscreen. The Tribunal is of the view that the defects to the steering wheel and windscreen are defects and they pose a hazard⁷ as defined in section 53. The respondent failed or refused to repair these items and therefore contravened section 56(2)(a) read with section 55(2)(a) to (c).
29. The NCC, however, asks for an order to declare that the respondent contravened section 56(3) instead of the provisions of section 56(2) as mentioned above. From the evidence presented, the consumer required the respondent to repair the steering wheel and windscreen. As a result, it is competent for the Tribunal to find that the respondent contravened section 56(2)(a) by having failed or refused to repair these defects. The Tribunal is empowered to make an order other than what the NCC asked in terms of section 4(2)(b)(ii)⁸.
30. As for the consumer's redress, the NCC asks what amounts to damages for the costs of repairs in respect of the alleged defects. The Tribunal is not empowered to make such orders.
31. In terms of section 115(2)(b), a person who has suffered loss or damage as a result of prohibited conduct or a dereliction of required conduct, if entitled to institute the proceedings in a civil court, must, when instituting proceedings, file

⁷ “Hazard” is defined in section 53 as a characteristic that presents a significant risk of personal injury to any person or damage to property when the goods are utilised.

⁸ This section empowers the Tribunal appropriate orders to give practical effect that the consumer's right of access to redress, including but not limited to any order provided for in the CPA and any other innovative order that better advances, protects, promotes and assures the realisation by consumers of their rights in terms of the CPA.

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 a prohibited or required conduct in terms of this Act;

(ii) stating the date of the Tribunal’s finding, if any; and

(iii) setting out the section of this Act in terms of which the Tribunal made its finding, if any.”

32. In terms of section 115(3), a certificate as referred to in section 115(2)(b) is sufficient proof of its contents.
33. In addition to the prayer for an order of contraventions of sections of the CPA as discussed above and for such contraventions to be declared prohibited conduct, the NCC also asks that the respondent be interdicted from engaging in conduct in future. In *Shoprite Investment Limited v The National Credit Regulator*⁹, a full bench of the High Court of South Africa (Gauteng Division, Pretoria), the court supported a concession that a restraining order would serve no purpose and set aside the Tribunal’s order. In the present matter, an interdict will similarly not serve any purpose, in the Tribunal’s view.
34. As for the imposition of an administrative fine, it is noted that section 112 affords the Tribunal the discretion to impose such a fine or not. The respondent did attend to repairs to the vehicle despite many of them not falling within the parameters of defects as defined in the CPA. The Tribunal is of the view that the circumstances of this matter are far from persuasive to require the imposition of an administrative fine.

THE ORDER

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

⁹ [2019] ZAGPPHC 956 (18 December 2019).

- 35.1. It is declared that the respondent contravened section 56(2)(a) read with section 55(2)(a) to (c).
- 35.2. The aforesaid contraventions are declared to be prohibited conduct.
- 35.3. It is recorded that the consumer may request a certificate from the Chairperson of the Tribunal in terms of section 115 in respect of the above contraventions and only in respect of the vehicle's windscreen and steering wheel.
- 35.4. There is no order as to costs.

S Hockey (Presiding Tribunal member)

Tribunal members Dr A Potwana and Mr S Mbhele concur.

Authorised for issue by The National Consumer Tribunal

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