

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

Case Number: NCT/271838/2023/73(2)(b)

In the matter between:

NATIONAL CONSUMER COMMISSION

APPLICANT

and

SANDTON REPO CARS (PTY) LTD

RESPONDENT

Coram:

Dr A Potwana - Presiding Tribunal member
Mr S Hockey - Tribunal member
Dr S Mbhele - Tribunal member

Date of Hearing - 10 June 2024

JUDGMENT AND REASONS

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 Imrhan Magoro, a legal advisor in the applicant's employ (Ms Magoro).
2. The respondent is Sandton Repo Cars (Pty) Ltd, a private company duly incorporated in terms of the company laws of the Republic of South Africa and a supplier as defined in section 1 of the CPA. At the hearing, Ms Natalie France, a candidate attorney from the respondent's attorneys, KG Tserkezis Inc., represented the respondent (Ms France).

3. This is an application in terms of section 73 (2) (b) of the CPA. This section authorises the applicant to refer a matter to the National Consumer Tribunal (the Tribunal) after it investigates a consumer complaint.

INTRODUCTION

4. On 22 October 2020, the applicant received a complaint against the respondent from a consumer, Ms Erika Moulton (the complainant). It investigated the complaint and concluded that the respondent contravened various provisions of the CPA, as will be discussed below.
5. On 22 May 2023, the applicant filed the prescribed form for referring complaints to the Tribunal, Form TI.73(2)(b) CPA, with the Tribunal's Registrar (Registrar). In "Part D: Order sought from the Tribunal" of the said Form TI.73(2)(b) CPA, the applicant stated that it seeks the following orders:
 - 5.1. Declaring that the respondent's contravention of the following sections of the CPA be declared prohibited conduct:
 - 5.1.1. section 51(1)(b);
 - 5.1.2. section 55(2)(a) to (c); and
 - 5.1.3. section 56(2)(a) to (b).
 - 5.2. Interdicting the respondent from engaging in conduct detailed in paragraphs 5.1 above.
 - 5.3. Directing the respondent to cancel the transaction and collect a 2018 Volkswagen TSI Golf-R motor vehicle from the complainant at the respondent's own cost and expense.
 - 5.4. Directing the respondent to refund the complainant the sum of R459 900.00, being the purchase price paid by the complainant for the vehicle in 2020, together with interest thereon in accordance with the Prescribed Rate of Interest Act, 1975 from the date on which it was paid to the respondent to the date of final payment.
 - 5.5. Directing the respondent to pay an administrative penalty in the sum of R1 000 000.00 (One Million Rands).
 - 5.6. Any other appropriate order contemplated in section 4(2)(b)(ii) of the CPA.

FACTS

6. Mr Jabulani Eric Mbeje (Mr Mbeje) deposed to the applicant's founding affidavit. He averred that he deposed to the affidavit pursuant to having studied the investigation report authored by Mr Velaphi Mabuza (Mr Mabuza). A copy of Mr Mabuza's report is attached to Mr Mbeje's affidavit. In addition, a copy of the complainant's confirmatory affidavit is attached.

7. The applicant's case is that, on 13 May 2020, the complainant bought a 2018 Volkswagen Golf VII (the vehicle) from the respondent for a cash price of R459 900.00. At the time of purchase, the vehicle had travelled just over 9420 km. When she bought the vehicle, the complainant was told that the vehicle had never been involved in an accident. The respondent made the complainant sign a document titled Mechanical Breakdown Warranty Refusal Notification that formed part of the sale agreement.
8. A few days after collecting the vehicle, on 18 May 2020, the complainant noticed an oil leak that had not been disclosed to her when she collected the vehicle. On 5 October 2020, the applicant obtained proof from Volkswagen (VW) Tableview indicating that the vehicle had been involved in an accident and was not safe to drive. Citing the non-existence of a warranty, the VW dealership refused to work on the vehicle. The vehicle has stood still since April 2021.
9. The complainant employed the services of an attorney to assist her with the cancellation of the transaction. On 8 October 2020, the complainant's lawyers wrote a letter to the respondent informing them of their client's intention to cancel the transaction and be refunded the purchase price of R495 900.00. Perceiving that the supplier was not prepared to resolve the matter, the complainant referred the matter to the Motor Industry Ombudsman of South Africa (MIOSA). As redress, the complainant wants the respondent to collect the vehicle, cancel the transaction, and refund the purchase price of R495,900.00
10. Based on the above, the applicant formed a reasonable suspicion that the respondent contravened the CPA and directed an inspector to investigate the complaint.
11. The respondent filed a special plea on the basis that any claim by the complainant against it has prescribed in terms of the Prescription Act, 1969 because, on the applicant's version, the complainant became aware of an oil leak on or around 18 May 2023. Therefore, the applicant ought to have been served with the application documents on or before 17 May 2023 to avoid prescription.
12. In addition to the special plea, the respondent filed an answering affidavit. First, it reiterated that the application was filed out of time. It argued that even though the applicant's legal advisor deposed to an affidavit on 18 May 2023, and averred that proceedings were instituted on 12 May 2023. In Annexure "A" attached thereto, on 15 May 2023, the Registrar clearly stated that the

submitted application did not meet the requirements prescribed in the Tribunal's Rules, that the file was closed, and that a new application needed to be brought. It argued that prescription cannot be paused upon service of defective documents. The time to issue and serve the application in this matter lapsed on 17 May 2023. The prescribed form, Form TI. 73(2)(b), for initiating proceedings before this Tribunal was only signed on 18 May 2023. This means that this form was issued and served on or after 18 May 2023. The respondent argues that the applicant was not exempt from the law in respect of prescription.

13. Concerning the merits, besides numerous bare denials, the respondent argued that in the purchase agreement, the complainant confirmed that she bore all the risks to the vehicle upon delivery and that the respondent could not provide any further guarantee on the vehicle as the respondent was not the manufacturer. It denied that it engaged in any prohibited conduct.
14. The applicant filed a replying affidavit. It stated that the respondent's affidavit in response to the complaint does not satisfy the requirements of rule 13(4) of the Tribunal Rules. Therefore, all the facts and allegations in the applicant's founding papers that are not specifically denied are deemed to be admitted. It further argues that the initial filing of the application, which was done on 12 May 2023, was done within the prescribed timeframe. A copy of the application documents filed by the applicant is annexed to the applicant's replying affidavit.

THE LAW

15. Section 51(1)(b) of the CPA states –

“A supplier must not make a transaction or agreement subject to any term or condition if it directly or indirectly purports to –

- (i) waive or deprive a consumer of a right in terms of this Act;
- (ii) avoid a supplier's obligation or duty in terms of this Act;
- (iii) set aside or override the effect of any provision of this Act; or
- (iv) authorise the supplier to -
 - (aa) do anything that is unlawful in terms of this Act; or
 - (bb) fail to do anything that is required in terms of this Act.”

16. Section 55(2)(a) to (c) of the CPA states –

“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; [and]
- (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.”

17. Section 56(2)(a) and (b) of the CPA states –

“Within six months after the delivery of any goods to a consumer, the consumer may return the goods to the supplier, without penalty and at the supplier’s risk and expense, if the goods fail to satisfy the requirements and standards contemplated in section 55, and the supplier must, at the direction of the consumer, either –

- (a) repair or replace the failed, unsafe, or defective goods.
- (b) refund to the consumer the price paid by the consumer, for the goods.”

18. Rule 8 of the Tribunal Rules states –

“(1) If an application does not satisfy the requirements of the rules -

- (a) the Registrar may notify the Applicant and the other parties of the defect;
and
- (b) the Applicant may within a time permitted by the Registrar -
 - (i) complete the application; and
 - (ii) if required to do so, serve additional documents or information on the parties.

(2) The application shall lapse if the Applicant does not take any further steps in completing the application within the time permitted by the Registrar as contemplated in subrule (1)(b).”

ASSESSMENT OF THE EVIDENCE

Respondent's special plea

19. Annexure "A" to Ms Magoro's affidavit shows that the Acting Registrar advised the applicant that its filing of 12 May 2023 did not meet the requirements of Table 2 of the Tribunal Rules. The Acting Registrar stated that the applicant's file was closed and advised the applicant to resubmit a new application if it wished to do so. The Acting Registrar cited two reasons, namely, that the recipient of the applicant's application documents was supposed to indicate his or her designation and that some of the annexures were unclear.
20. It is our view that the application filed on 12 May 2023 did not lapse because the Acting Registrar did not specify a time within which the applicant had to comply with this directive. Moreover, it is common cause that the applicant complied with the Acting Registrar's directive by properly reserving the application documents on the respondent on 22 May 2023. This cured this defect in the application filed by the applicant on 12 May 2023.
21. In addition, although the applicant mentioned the oil leak that occurred on 12 May 2020, the evidence before this Tribunal shows that the complainant instructed her lawyers to cancel the purchase agreement after she received proof that the vehicle had been involved in an accident and was not safe to drive on 5 October 2020. The act that is the complainant's cause of complaint is the respondent's refusal to refund the complainant the purchase price after the complainant's lawyers wrote a letter informing the respondent of their client's intention to cancel the transaction and be refunded the purchase price of R495 900.00 on 8 October 2020. In the result, we find that the filing of the application on 22 May 2023 fell within three years from the date of the discovery of the defects that form the basis of the complainant's cause of complaint.
22. Concerning the legibility of some of the annexures to the applicant's founding papers that was raised by the Acting Registrar, we note that the respondent did not allege that any annexures to the applicant's founding papers were illegible and that it was prejudiced in any way by the illegibility of any annexures to the applicant's founding papers. As the respondent did not raise this issue, save to state that the Tribunal's Rules do not regulate this aspect, we will not make any determination in this regard.
23. In the result, we find no merit in the respondent's special plea and dismiss it accordingly.

Alleged contravention of section 51(1)(b) of the CPA

24. In his affidavit, to prove that the respondent contravened section 51(1)(b) of the CPA, Mr Mbeje referred the Tribunal to Annexure “A4 – 5” of the applicant’s founding affidavit.¹ These pages are pages 4 and 5 of the prescribed form for filing complaints with the applicant.² Unsurprisingly, these documents do not contain evidence of any contravention. However, this issue does not end here and is dealt with further under paragraph 29 below.

Alleged contravention of section 55(2)(a) to (c).

25. Annexure “D3” to the applicant’s investigation report dated 5 October 2020 shows that VW Tableview found several defects in the complainant’s vehicle. Among others, VW Tableview observed that the vehicle’s safety system was compromised. It stated that it also found extensive undercarriage damage and welding to the gearbox casing and extensive oil leak at the engine. The front suspension also has an excessive knocking noise. It concluded that the vehicle was a huge safety risk to the complainant as it was not safe to drive, as it sounded like it was ready to fail when going over road bumps.
26. In view of the above, we are satisfied that the applicant has proved, on a balance of probabilities, that the respondent contravened 55(2)(a) to (c) of the CPA by supplying the complainant with a vehicle that was not reasonably suitable for the purposes for which it was generally intended, not of good quality, in good working order, free from defects and would be useable and durable for a reasonable period of time having regard to the use to which it would normally be put and to all the surrounding circumstances of its supply.

Alleged contravention of section 56(2)(a) and (b) of the CPA

27. As stated above, within six months of purchase, VW Tableview found that the vehicle did not meet the standards prescribed in section 55 of the CPA. On 8 October 2020, the complainant’s attorneys, Laubscher & Hattingh, sent a letter to the respondent notifying it that it sold a defective vehicle to the complainant and that the complainant cancelled the purchase agreement, tendered the return of the vehicle, and demanded payment of the purchase price of R459 900.00 within 7 days. In response to this demand, the respondent’s attorneys, Nourse Incorporated, denied all

¹ In paragraph 8.1.2 of the applicant’s founding affidavit.

² Pages 30 and 31 of the paginated bundle.

allegations. In the main, the respondent's attorneys stated that the complainant was satisfied with the condition of the vehicle after she instructed a third party, Louis Fourie (Fourie), to inspect the vehicle. The complainant was informed of the risks and acknowledged that she would be responsible for repairs due to any mechanical failure after delivery. Most importantly, the respondent denied that the complainant had a right to cancel the purchase agreement.

28. Since we have found that the vehicle failed to meet the standards prescribed in section 55 of the CPA within six months of purchase, the complainant was entitled to cancel the purchase agreement, return the vehicle to the respondent at the latter's risk and expense and demand a refund of the purchase price. By refusing to cancel the purchase agreement, the respondent contravened section 56(2)(b) of the CPA.
29. The respondent's arguments that the complainant was informed of the risks and acknowledged that she would be responsible for repairs due to any mechanical failure after delivery are totally misplaced. In fact, the respondent's arguments in this regard prove that it contravened section 51(b) of the CPA, which specifically prohibits suppliers from making transactions or agreements subject to any term or condition if that term directly or indirectly purports to waive or deprive a consumer of a right in terms of the CPA, avoid a supplier's obligation or duty in terms of the CPA, set aside or override the effect of any provision of the CPA, or authorise the supplier to do anything that is unlawful in terms of the CPA or fail to do anything that is required in terms of the CPA. Accordingly, we find that the applicant has proved, on a balance of probabilities, that the respondent contravened section 51(1)(b) of the CPA.
30. The Tribunal is satisfied that the applicant has proved, on a balance of probabilities, that the respondent committed prohibited conduct by contravening sections 51(1)(b), 55(2)(a) to (c), and 56(2)(b) of the CPA.

ADMINISTRATIVE FINE

31. The NCC wants an administrative fine to be imposed on the respondent. In terms of section 151(1) of the National Credit Act, 2005 (the NCA), an administrative fine may be imposed in respect of prohibited or required conduct in terms of the CPA. Such a fine may not exceed the greater of 10% of the respondent's annual turnover during the preceding financial year or R1 000 000.00³.

³ Section 151(2).

32. Section 151(3) of the NCA outlines the factors the Tribunal must consider when determining an appropriate fine. The Tribunal shall deal with each of these factors under the sub-headings below.

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

The applicant alleges that the respondent's conduct is serious because it disregarded various provisions of the CPA and severely prejudiced consumers. The complainant has not been able to drive her vehicle since 2020. She has been deprived of her right to receive goods that are of good quality, in good working condition, and free of defects. Although there is only one complaint, the respondent has shown a blatant disregard for the provisions of the CPA.

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

The applicant submitted that the complainant was not able to enjoy using her vehicle despite paying a monthly instalment of R5 969.68 for its purchase. According to the respondent, it had been more than willing to assist the complainant.

32.3. The behaviour of the respondent

The applicant alleged that the respondent refused to co-operate with the MIOSA. The respondent submitted that although it denied liability, it was willing to assist the complainant and invited her to bring the vehicle for assessment. The complainant hampered progress by refusing to bring the vehicle to the respondent.

32.4. The level of profit derived from the contravention

The respondent benefitted from the purchase price paid by the complainant. The respondent stated that when it was made aware of the alleged problems, the complainant had been in possession of the vehicle for about five months which made it impossible for the respondent to investigate the real cause for the complaint.

32.5. The degree to which the respondent co-operated with the NCC

The applicant stated that whilst the respondent co-operated with the NCC's investigation, it has not done anything to resolve the matter.

32.6. 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.

33. The respondent's conduct is egregious. It not only supplied a vehicle that did not meet the standards prescribed under section 55(2)(a) to (c) of the CPA but pre-emptively made the purchase agreement subject to terms that were aimed at depriving the complainant of her rights whilst avoiding its obligations under the CPA. To make matters worse, it instructed its lawyers, Nourse Incorporated, to use the unlawful terms to vigorously resist the complainant's claim and undermine her consumer rights. For approximately three years, the complainant has not enjoyed the use of her vehicle while paying huge monthly instalments for it. The administrative fine that must be imposed on the respondent must deter the respondent and other suppliers from undermining the CPA and the rights of consumers enshrined therein.
34. Based on a conspectus of all the evidence presented to us and having considered the parties' submissions on all the factors prescribed in section 151(3) of the NCA, the Tribunal finds that an administrative fine of R100 000.00 (One Hundred Thousand Rands) is appropriate.

ORDER

35. The Tribunal makes the following order:
- 35.1. The respondent has contravened sections 51(1)(b), 55(2)(a) to (c), and 56(2)(b) of the CPA.
- 35.2. The above contraventions are declared as prohibited conduct.
- 35.3. Within 30 (thirty) ordinary days of the issuing of this order, the respondent must refund the complainant, Ms Erika Mouton, the sum of R459 900.00 by paying this amount into the bank account elected by her.
- 35.4. The respondent must collect the vehicle from Ms Erika Mouton at its own risk and expense immediately after effecting the payment referred to in paragraph 35.3.
- 35.5. The respondent must pay an administrative fine in the sum of R100 000.00 (One Hundred Thousand Rands) within 60 business days from the date of the issuance 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/271838/2023/73(2)(b).

35.6. There is no order as to costs.

Thus, done and dated 18 June 2024.

[Signed]

Dr A Potwana
Presiding Tribunal Member

Tribunal members Mr S Hockey and Mr S Mbhele concur.

Authorised for issue by The National Consumer Tribunal

National Consumer Tribunal

Ground Floor, Building B

Lakefield Office Park

272 West Avenue, Centurion, 0157

www.thenct.org.za

