

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

**Case number: NCT/241194/2022/73(2)(b)**

In the matter between:

**NATIONAL CONSUMER COMMISSION**

APPLICANT

And

**WINGFIELD MOTORS (PTY) LTD T/A  
BEST PRICE FOR MY CAR**

1<sup>ST</sup> RESPONDENT

**WESBANK A DIVISION OF FIRSTRAND BANK LTD**

2<sup>ND</sup> RESPONDENT

Coram:

Dr M Peenze - Presiding Tribunal member

Ms N Maseti - Tribunal member

Ms Z Ntuli - Tribunal member

Date of hearing - 20 May 2024 via the Microsoft Teams digital platform

Date of judgment - 23 May 2024

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**JUDGMENT AND REASONS**

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**THE PARTIES AND APPLICATION TYPE**

1. The applicant is the National Consumer Commission (the applicant), an organ of the state established under section 85(1) of the Consumer Protection Act, 2008 (the CPA). At the hearing, the applicant was represented by Ms Imrhan Magoro, an employee in the applicant's legal department.

2. The 1<sup>st</sup> respondent is Wingfield Motors (Pty) Ltd, trading as Best Price For My Car (the 1<sup>st</sup> respondent), 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, the 1<sup>st</sup> respondent was represented by Adv Alton Samuels.
3. The second respondent is Wesbank, a Division of FirstRand Bank Limited (the 2<sup>nd</sup> respondent), a company duly registered in terms of the company laws of the Republic of South Africa and defined as a credit provider in section 1 of the National Credit Act, 34 of 2005 (the NCA). The 2<sup>nd</sup> respondent did not oppose the application but extended a watching brief to Adv Albé Jacobsz, who attended the hearing.
4. In terms of rule 13(5) of the Tribunal's rules<sup>1</sup>, any fact or allegation in the application or referral not specifically denied or admitted in an answering affidavit will be deemed to have been admitted. As the 2<sup>nd</sup> respondent did not file an answering affidavit, the Tribunal considered the evidence presented by the applicant on an unopposed basis concerning the 2<sup>nd</sup> respondent.
5. This is an application under section 73 (2) (b) of the CPA. This section authorises the applicant to refer a matter to the National Consumer Tribunal (the Tribunal) after its investigation.
6. On 10 August 2021, the applicant received a complaint against the 1<sup>st</sup> respondent from a consumer, Mr Shad Maritz (the complainant or consumer, depending on the context). The complaint was investigated, and the report alleged that the 1<sup>st</sup> respondent contravened the CPA's provisions, as discussed below.

## **TERMINOLOGY**

7. A reference to a section in this ruling refers to a section of the CPA. A reference to a rule refers to the rules of the National Consumer Tribunal<sup>2</sup> (the rules).

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<sup>1</sup> See footnote 3 below.

<sup>2</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).

## BACKGROUND

8. These proceedings relate to a complaint lodged by the consumer after he purchased a second-hand Ford Focus RS 2.3 Ecoboost AWD 5Dr 2017 (the vehicle), with 41,214 kilometres reflecting on the odometer. The purchase was concluded on 22 January 2021, and the consumer took delivery of the vehicle on the same day.
9. The total selling price was R568,000.00. This amount included a Wingfield Motor Warranty (Warranty Wing Cover 2), a Wingfield Power Up Booster plan (Warranty Mech Prestige), services and delivery, VAT, licence, and registration.<sup>3</sup>
10. After paying a deposit of R20,000.00 to the 1<sup>st</sup> respondent, the consumer obtained finance from the 2<sup>nd</sup> respondent, as facilitated by the 1<sup>st</sup> respondent. Subsequently, the consumer and the 2<sup>nd</sup> respondent entered into a 73-month instalment loan agreement on 21 January 2021 under account number 85317070855. Regarding the instalment loan agreement, the total principal debt, VAT inclusive, was R788,936.40. This amount included an initiation fee and finance charges. Per the instalment agreement, the 2<sup>nd</sup> respondent paid a commission of R24,260.94 to the 1<sup>st</sup> respondent for the costs incurred for the origination and administration of the credit agreement.<sup>4</sup> The 2<sup>nd</sup> respondent also became the vehicle owner and would remain so until the consumer has paid all the amounts due under the agreement.<sup>5</sup>
11. The consumer was required to repay this amount in instalments of R8,500,51 over 71 months with a balloon payment of R190,000.00. The instalment sale agreement calculated the total amount deferred, including VAT, as R788,936.40. The total interest payable over the term of the agreement was calculated as R239,728.90.<sup>6</sup> At the time the applicant brought the application in this matter, the consumer had made repayments amounting to R171,767.18 to

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<sup>3</sup> See page 46 of the Tribunal bundle.

<sup>4</sup> See page 158 of the Tribunal bundle.

<sup>5</sup> See page 163, para 4.1 of the Tribunal bundle.

<sup>6</sup> See page 157 of the Tribunal bundle.

the 2<sup>nd</sup> respondent, and the amount outstanding as of 1 August 2022 was R637,169.22.<sup>7</sup>

12. The relationship between the 1<sup>st</sup> and 2<sup>nd</sup> respondent is not apparent from the papers, save that the terms and conditions applicable to the instalment sale agreement refer to the term “supplier” as the party from whom the consumer procured the goods.<sup>8</sup>
13. Apart from the commission referred to above, none of the parties presented evidence of the actual amount paid by the 2<sup>nd</sup> respondent to the 1<sup>st</sup> respondent. However, it is not disputed that the 1<sup>st</sup> respondent received R568,000.00, the vehicle's purchase price.<sup>9</sup>
14. On 25 January 2021, the consumer discovered a burning smell from the rear wheel, and the clutch did not feel correct. Consequently, he informed the 1<sup>st</sup> respondent thereof. The 1<sup>st</sup> respondent informed the consumer that the warranty still covered the vehicle and that he should take it to Ford N1 City.
15. The service advisor at Ford N1 City advised the consumer that for the vehicle to be adequately assessed, it had to be stripped, and the warranty did not cover the cost. The 1<sup>st</sup> respondent agreed to pay the cost of dismantling, and the vehicle was subsequently assessed on 2 March 2021. The findings were that the vehicle's flywheel had a burnt spot, and the clutch was damaged. As the flywheel and clutch were classified as wear and tear components, the warranty did not cover the defects. Ford N1 City issued a quotation of R62,218.19 to repair the defects.<sup>10</sup>
16. As the consumer only drove the vehicle for three days (200 km) and expected it to be in good condition for a reasonable period, he expected the 1<sup>st</sup> respondent to cover the expenses necessitated by discovering the defects. After considering the photos as communicated by the consumer, the 1<sup>st</sup>

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<sup>7</sup> See page 30-31 of the founding affidavit and Annexure 01-16.

<sup>8</sup> Clause 1.15. See page 163 of the Tribunal bundle.

<sup>9</sup> See Annexure A9 of the 1<sup>st</sup> respondent's answering affidavit.

<sup>10</sup> See Annexure C4 to the 1<sup>st</sup> respondent's answering affidavit.

respondent refused to cover the repair costs. In its correspondence of 12 March 2021, the 1<sup>st</sup> respondent disputed the seriousness of the defects and outlined that the DEKRA report did not comment on any slipping, shuddering or smell. On 31 March 2021, the consumer approached the 1<sup>st</sup> respondent to cancel the agreement and refund him the purchase price.<sup>11</sup> The 1<sup>st</sup> respondent refused, and the complaint was referred to the Motor Industry Ombudsman of South Africa (MIOSA). The mediation was unsuccessful, and MIOSA advised the consumer to file a complaint with the NCC.

17. Based on the above, the applicant formed a reasonable suspicion that the respondent had committed contraventions of the CPA and investigated the complaint.
18. According to the 1<sup>st</sup> respondent, the vehicle was not advertised as “brand new”, and the consumer had test-driven it twice before purchasing it. The 1<sup>st</sup> respondent further submits that a second-hand vehicle is subject to wear and tear and is, by nature, not comparable to a new vehicle. The vehicle also did not present any defects on the purchase date, and the consumer added 200 km within three days after purchase before complaining of any defects.

### **TRANSGRESSION OF THE CPA**

19. The NCC seeks a declaratory order that the 1<sup>st</sup> respondent contravened various sections of the CPA and that such contraventions be declared prohibited conduct. The sections are:
  - (a) section 55(2)(a) to (c); and
  - (b) section 56(2)(a) and (b).
20. In its founding papers, the NCC also sought a declaratory order that the 1<sup>st</sup> respondent contravened section 13(1)(a) and (b).
21. During the hearing, the applicant abandoned that part of the order it sought concerning section 13 (1) (a) and (b).

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<sup>11</sup> See page 93 of the Tribunal bundle, Annexure A57 of the founding affidavit.

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

### *The CPA*

22. 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.
23. In the context of goods, section 53(1)(a) defines a defect as follows:
  - 23.1. Any material imperfection in the manufactured goods that renders the goods less acceptable than persons generally would be reasonably entitled to expect; or
  - 23.2. 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.

### *Submissions*

24. The applicant submitted that the vehicle became defective within three days after purchase. The vehicle could not drive properly due to the defective flywheel and clutch. As a result, the vehicle was not functioning properly and became unsafe.
25. The 1<sup>st</sup> respondent argued that the vehicle was sold in good condition and that the defective flywheel and clutch were caused by normal wear and tear. The 1<sup>st</sup> respondent outlined that the consumer added 2,346 km to the odometer between the date of complaining of the defects and the date of assessment by Ford N1 City and that the odometer reading in May 2022 was 50,500.
26. The 1<sup>st</sup> respondent also argued that a driven vehicle could not have the severe defects as alleged. In addition, the 1<sup>st</sup> respondent submitted that the evidence provided by the applicant was inadequate to prove that the defects were material. According to the 1<sup>st</sup> respondent, the mileage added also depreciated the vehicle.

### *Consideration*

27. The Tribunal has regard to the nature of section 55(2). In *Motus Corporation (Pty) Ltd t/a Zambezi Multi Franchise (Renault) South Africa v Abigail Wentzel*<sup>12</sup> (the Motus matter), the Supreme Court of Appeal affirmed that a right afforded to a consumer in terms of section 55(2) exists, irrespective of whether it is contractually warranted. It exists by operation of law and is protected by section 56. A consumer may enforce it in terms of the CPA or in terms of an agreement. In this matter, the consumer intends to enforce his right in terms of section 55 against the 1<sup>st</sup> respondent as the supplier of the vehicle, irrespective of the warranty and maintenance plan.
28. The common cause facts include the consumer's expectation to purchase a high-performance vehicle, his knowledge that the vehicle was second-hand and had approximately 44,000 km on the odometer, that it was approaching the end of its motor plan, and his awareness that any repairs after the expiry of the motor plan and warranty would be for his account.
29. The applicant's version that the vehicle was defective at the time of purchase is accepted by the Tribunal as true and correct. The Tribunal took note of the undisputed fact that the flywheel and clutch experienced problems within three days after purchase, and a burning smell was present. Apart from alleging normal wear and tear, the first respondent did not provide any acceptable answer to such an incident.
30. The applicant persuaded the Tribunal that the defects amounted to defects as defined in section 53(1). The Tribunal accepts the applicant's version that clutches and flywheels would, in normal circumstances, be required to be replaced at around 100,000 to 120,000 kilometres. Even if they were replaceable after a shorter mileage, the Tribunal is persuaded that the wearing on these parts could not have been due to driver error and was so severely impacted during the three days (200 km) after the consumer bought the vehicle. The more plausible deduction is that the defects were already present on the

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<sup>12</sup> [2021] ZASCA 40.

date of purchase. Furthermore, if any driver error caused such defects, the driver error could have occurred before the purchase date.

31. On the evidence presented, the Tribunal holds that the defects identified by Ford N1 City do not amount to minor faults but indicate faults that rendered the vehicle less useful than reasonably expected of a high-performance vehicle. The Tribunal also considered that the defects presented within three days of purchase, which timeframe is less than the reasonable time the vehicle would have expected to be durable. The Tribunal finds that the mileage added after the defects were discovered is irrelevant for determining whether defects presented themselves three days after purchase. It is not disputed that the vehicle was driveable. Still, due to the defects, the vehicle could not perform as a high-performance vehicle, as expected by the consumer. The Tribunal accepts that a functional flywheel and clutch are important components in a high-performance vehicle, and a dysfunctional flywheel and clutch would render the vehicle less useful, practicable or safe than persons generally would be reasonably entitled to expect of a high-performance vehicle.
32. Also, the 1<sup>st</sup> respondent failed to present any evidence that the defaults about the flywheel or clutch were explained to the consumer before purchase and that the consumer accepted such defaults in writing. Also, the absence of defects mentioned in a DEKRA report does not exonerate a supplier from accountability if defects were discovered after purchase.
33. The 1<sup>st</sup> respondent was adequately offered an opportunity to pay for the vehicle's repair, and on 31 March 2021, within six months after the purchase, the consumer communicated to the first respondent his decision to cancel the purchase.
34. As the vehicle was not reasonably suitable for the high-performance purpose for which it is generally intended, the Tribunal finds a transgression of section 55(2)(a).
35. Further, the flywheel and clutch were not of good quality, in good working order and free of any defects. The Tribunal, therefore, finds a transgression of section 55(2)(b).



36. Regarding the alleged transgression of section 55(2)(c), the Tribunal considered the application of section 55(6), which qualifies a consumer's rights as envisaged in section 55(2). This is to be found in section 55(2), which states that every consumer has the right to receive goods except to the extent contemplated in subsection (6).
37. The extent of the qualification in subsection (6) appears to confine its application to the consumer rights afforded in subsections (2)(a) and (b) only. Subsection (6) is silent on qualifying 55(2)(c). Subsection 55(2)(c) has its built-in limitation of "*reasonable time....*".<sup>13</sup>
38. The Tribunal finds that the consumer possessed a right to goods supplied to him in terms of section 55(2)(c). In terms of subsection (c), the right, by its limitation, operates as a 'type and shadow' of a qualified continuing warranty for a limited period. Its operation is not confined to the date of purchase of goods but continues after delivery. This explains why subsection (6) does not qualify the consumer right in terms of Section 55(2)(c). It follows that a supplier cannot rely on the mere fact that the consumer was cognisant of the second-hand status of the vehicle. Further, the reasonable period for which the vehicle should be usable and durable cannot be limited to the vehicle's state at the delivery date. The vehicle is expected to be in a condition that it will remain usable and durable for a reasonable period. In the Tribunal's view, such a reasonable period will extend beyond three days.
39. Section 55 qualifies each right separately. This is apparent in sections 55(3)-(6) and subsection (4), which refer to such rights in the alternative by using the conjunction "or." Any of these transgressions would give the consumer the right to request a refund in terms of section 56(2).
40. To the extent that the evidence before the Tribunal confirms that the vehicle was not durable and usable as a high-performance vehicle beyond three days

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<sup>13</sup> Section 55(2)(c) requires that the goods must be "*useable and durable for a reasonable period of time, having regard to the use which they would normally be put and to all the surrounding circumstances of their supply*". This is a new right not recognised under the common law.

after purchase, the Tribunal finds that the consumer's rights in terms of section 55(2)(c) were infringed.

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

### *The CPA*

41. 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.

### *Consideration*

42. The evidence before the Tribunal confirms that the consumer obtained a quotation from a third party to repair the vehicle and that he requested the 1<sup>st</sup> respondent to pay the third party on his behalf. The applicant did not persuade the Tribunal that the consumer at any point requested the 1<sup>st</sup> respondent to repair the vehicle as directed in section 56(2)(a). Accordingly, the Tribunal finds no transgression of section 56(2)(a).
43. However, undisputed before the Tribunal is the consumer's direction to refund him the price paid for the goods. In terms of section 56(1), the implied warranty of quality is an implied provision in any transaction or agreement about the supply of goods to a consumer. Furthermore, that implied provision places an obligation on the producer or importer, the distributor and the retailer of the goods. The implied warranty of quality is that the goods themselves will comply with the requirements and standards contemplated in section 55, with certain exceptions.
44. It follows that the supplier envisaged in terms of a transaction about the supply of the goods, whether as a producer, importer, distributor, or retailer, is the supplier intended in section 56(2) and (3). Applying the definitions in the CPA of "retailer" being the person who supplies the goods, the 1<sup>st</sup> respondent is a retailer.

45. Both sections 56(2) and (3) have safeguard time limits within which a consumer may seek a remedy, namely six months after purchase. The 1<sup>st</sup> respondent's submission that a reasonable deduction based on depreciation should be considered is misplaced. Section 20 regulates a scenario additional to sections 55 and 56 and serves, at best, as a guide to the relief requested in terms of section 56.
46. The 1<sup>st</sup> respondent failed to deal with section 56(1), and sections 56(2) and (3). The obligation imposed by section 56 is on the 1<sup>st</sup> respondent as the supplier and retailer of the vehicle. Furthermore, the implied warranty operates as of law, irrespective of any other contractual agreements (i.e., a warranty and maintenance plan).
47. After the defects were identified and the vehicle failed to satisfy the requirements and standards contemplated in section 55, as referred to in terms of section 56(2), the quote for the repair was provided to the 1<sup>st</sup> respondent. Following the 1<sup>st</sup> respondent's refusal to pay the quoted amount, the consumer tendered the return of the vehicle and requested a refund of the price paid for the goods. Compliance with the provisions of section 56(2) triggers an obligation on the supplier to act in accordance with section 56(2)(a) or (b), as elected by the consumer. The 1<sup>st</sup> respondent was expected to honour the consumer's decision and accept the vehicle's return. The 1<sup>st</sup> respondent chose not to do that.
48. The Tribunal finds that the 1<sup>st</sup> respondent contravened section 56(2)(b) by failing to comply with its obligations implementing the refund remedy in favour of the consumer.

## **CONCLUSION**

49. Based on the evidence before it, the Tribunal finds that the only inference to be drawn was that the vehicle's defects and other damages must have been present at the time of its purchase from the 1<sup>st</sup> respondent.

50. According to the evidence before the Tribunal, the defects in the vehicle are material. They constitute a defect within the meaning of section 53(1)(a). In the Tribunal's view, the vehicle did not satisfy the requirements of section 55(2) because the vehicle was not suitable for its intended purpose; was neither of good quality nor in good working order and free of defects; and 'plainly' not safe and usable for a reasonable time. Therefore, the consumer was entitled in terms of section 56 (2) (b) to return the vehicle at the first respondent's expense for a refund.
51. By failing to respect the consumer's rights to return the vehicle at the supplier's expense and to be refunded, the 1<sup>st</sup> respondent committed prohibited conduct as defined in the CPA.<sup>14</sup> It also infringed on the complainant's right to fair consumer practices and his right to safe, good-quality goods. This continuous conduct is alarming.
52. The Tribunal is satisfied that the complainant tendered the return of the vehicle to the 1<sup>st</sup> respondent. However, since the 1<sup>st</sup> respondent refused to accept the return of the vehicle at its expense it follows that the 1<sup>st</sup> respondent seriously infringed upon the complainant's right to a refund of the purchase price. As outlined above, section 56(4) intends to provide the consumer additional statutory protection in the form of an implied warranty. This statutory implied warranty will apply in instances like this, where the consumer's right to return faulty goods must be respected irrespective of any other warranty that may also exist, such as maintenance insurance or any other implied condition.
53. Due to the 1<sup>st</sup> respondent's refusal, the complainant does not have to account for the vehicle's use, depletion, or deterioration over time. By failing to take possession of the vehicle and refund the consumer as requested, the vehicle's risk shifted to the 1<sup>st</sup> respondent.
54. Suppliers should understand that they remain responsible for delivering safe and quality goods. It is the suppliers' responsibility to repair goods that do not comply with the expected standard, and the consumer should not be required to use any of their own means to ensure such repair. Similarly, such a request must be honoured when the consumer elects a refund. The responsibility

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<sup>14</sup> Section 1 of the CPA defines prohibited conduct as "an act or omission in contravention of this Act".

remains that of the 1<sup>st</sup> respondent, as the supplier, to respect the inherent statutory warranty, accept the return of the vehicle, and refund or replace the vehicle as requested by the consumer.

55. The Tribunal wishes to express disappointment in how the 1<sup>st</sup> respondent treated the complainant as a consumer in this case. Second-hand vehicles are not excluded from the protection of the CPA, and such vehicles are sold with the supplier's accountability and responsibility for repairs or refunds. Therefore, by refusing the refund in terms of section 56(2), the 1<sup>st</sup> respondent's conduct is a clear example of prohibited conduct in terms of the CPA.
56. Given the above, the Tribunal is satisfied that the applicant has proved, on a balance of probabilities, that the 1<sup>st</sup> respondent contravened sections 55(2)(a) – (c) and section 56(2)(b) and, therefore, committed prohibited conduct.

## **RELIEF**

### **Refund**

57. In its founding affidavit, the applicant requested an order directing a refund of the purchase price by:
- 57.1. Refunding the consumer of the deposit paid in the sum of R20,000.00;
  - 57.2. Settling the outstanding balance on the credit agreement between the consumer and the 2<sup>nd</sup> respondent under vehicle finance account number 85317070855; and
  - 57.3. Refunding the consumer all instalments paid towards servicing the credit agreement between the consumer and the 2<sup>nd</sup> respondent under vehicle finance account number 85317070855.
58. During the hearing, the applicant abandoned the two latter parts of the order sought and requested only a refund of the purchase price to the consumer. However, due to the impact on all parties, the Tribunal considered the requested order contained in the founding affidavit within its statutory authority.

59. In the matter of *Coertze and Burger v Young*,<sup>15</sup> it was confirmed that the Tribunal may, in terms of its statutory authority under section 75(4)(b), make any applicable order contemplated in the CPA or section 150 or 151 of the NCA to provide an "*applicable order*."
60. In exercising its statutory power, the Tribunal is competent to award the refund remedy in terms of Section 56(3)(b), which refers to a refund of "...*price paid for the goods*".
61. The Tribunal now considers whether a refund of "...price paid for the goods" would encompass a refund to the consumer of the full outstanding balance and instalments already paid to the 2<sup>nd</sup> respondent.
62. Section 4(2)(b)(ii)(bb) statutorily mandates the Tribunal or a court, as the case may be, to make appropriate orders to give effect to the consumer's rights of access to redress, including, but not limited to, any innovative order that better advances, protects, promotes and assures the realisation by consumers of their rights in terms of the CPA.
63. Section 4 is headed "Realisation of Consumer Rights." Subsection (2) mandates a Tribunal or a court to make appropriate, including innovative, orders that give practical effect to a consumer's access to redress in terms of the NCA, in addition to any order explicitly provided for in the CPA.
64. The question which arises is whether the Tribunal is empowered, in terms of section 4(2)(b)(ii)(bb), to formulate an order in terms of section 56(3)(b) which, effectively expands the statutory remedy which already exists, namely in section 56(3)(b).
65. In the Tribunal's view, the wording of section 56(3)(b) specifically provides a remedy in terms of the CPA, thereby providing access to redress of a consumer's right in terms of section 56. It appears from the wording of the CPA that not all right infringements possess a built-in remedy.

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<sup>15</sup> NCT/7142/2012/73(3) &75(b)&(2)CPA.

66. The Supreme Court of Appeal in the Motus matter stated that the refund remedy in section 56(3) is confined to refunding the purchase price only and, consequently, not the amounts payable to MFC, the financier in that matter. However, it was not asked to deal with, nor did it deal with, the mandatory obligation envisaged in terms of section 4(2)(b)(ii)(bb) on appeal. The reason lies in the factual matrix before it because the facts did not trigger the refund remedy in section 56.
67. Against this backdrop, and as the facts in this matter triggered the refund remedy in section 56, the Tribunal is obliged to apply section 4(2)(b)(ii)(bb) to the refund remedy in terms of section 56(3).
68. The wording of section 4(2)(b)(ii)(bb) in context empowers the Tribunal to ensure that orders given in favour of consumers are practical. Where necessary, the Tribunal must provide innovative orders to ensure that the consumer is afforded effective redress of their rights in terms of the CPA.
69. It further appears that the Tribunal's power to make innovative orders does not attach itself to expanding or altering a consumer right in circumstances where a remedy has already been statutorily provided. The Tribunal's authority is to ensure that orders issued in terms of the CPA are practical and ensure the realisation of the consumer's right. This is echoed in the wording of the heading of section 4.
70. In terms of section 56(3)(b), the consumer's right to a refund remedy is confined to the purchase price of the goods. The task of the Tribunal or a court under section 56(3)(b) is to ensure that the order is as practical as possible to give effect to a consumer's rights to such refund in terms of section 56.
71. Section 4(2)(b)(ii)(bb) does not appear to empower the Tribunal to grant an order that goes beyond the right to the price the consumer paid for the goods. However, by applying the mandate in section 4(2)(b)(ii)(bb), the Tribunal can

readily apply a broader inclusive rather than a distractive interpretation of the CPA as a whole.<sup>16</sup>

72. The definition of 'price' in section 1, when used in relation to the consideration of any transaction, means the total amount paid or payable by a consumer to a supplier in terms of the transaction or agreement, including any amount that the supplier is required to impose, charge or collect in terms of any public regulation. In applying this definition to the case at hand, the total undisputed amount paid to the 1<sup>st</sup> respondent was R568,000. This amount is the amount demonstrated on the papers as the total amount payable for the supply of the vehicle. The parties did not present any evidence that the instalment sale agreement provided for an inflated purchase price.
73. By applying the wording of section 56(3)(b) through the looking glass of section 4(2)(b)(ii)(bb), the Tribunal finds that a refund of the purchase price is, in the circumstances of this matter, the most practical order to give effect to the consumer's rights to such refund in terms of section 56. More particularly, if the 1<sup>st</sup> respondent is ordered to repay R568,000.00 for the supply of the vehicle, the consumer would be in a financial position to settle the outstanding principal debt with the 2<sup>nd</sup> respondent. In so doing, ownership of the vehicle would vest with the consumer. The consumer, having received a refund, is legally able to tender, as he should, the return of the vehicle to the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent would then receive the tendered return of the vehicle at its own risk as envisaged in section 56. The terms of the instalment sale agreement will regulate any balance of debt owed by the consumer to the 2<sup>nd</sup> respondent.
74. The Tribunal is not persuaded that the practical application of sections 56(3) and 4(2)(b)(ii) provides the Tribunal with the authority to grant interest on the amount paid to the 1<sup>st</sup> respondent. The Tribunal finds that any accumulated interest on the vehicle's purchase price would amount to special damages, which the Tribunal cannot grant. Therefore, the outstanding premiums in terms

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<sup>16</sup> Also see *Platinum Wheels (Pty) Ltd v National Consumer Commission and Another* (A261/2021) [2022] ZAGPPHC 831 (2 November 2022) para 83-105



of the instalment sale agreement cannot be considered when determining the amount to be refunded.

75. Given the Tribunal's finding that the respondent committed prohibited conduct, the loss or damages that the applicant claims to have suffered, and the fact that the Tribunal is not statutorily empowered to make the order that the applicant sought in its founding affidavit, the applicant could consider 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. In terms of section 115(2)(b), a person who has instituted an action for damages suffered because of prohibited conduct in a civil court, if such person is entitled to commence such action in a civil court, 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.”

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

77. The 1<sup>st</sup> respondent, in turn, is entitled at its cost to recover the vehicle from the consumer.

### **Administrative fine**

78. The applicant asks that an administrative fine be imposed on the respondent. Regarding section 151(1) of the NCA, an administrative fine may be imposed regarding 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 000 000.00<sup>17</sup>.

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<sup>17</sup> Section 151(2).

79. Section 151(3) outlines the factors the Tribunal must consider when determining an appropriate fine. The Tribunal considers each of these factors under the sub-headings below.

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

80. The nature of the contraventions is serious. A motor vehicle is, in general, an important asset that a consumer will purchase. In this matter, the consumer intended to purchase a high-performance vehicle and was deprived of the proper and safe use of such high-performance features due to the defects identified in the vehicle. Considering the nature of the contraventions and the importance of this issue for consumers, the Tribunal regards a fine as appropriate and justified. The sale of second-hand vehicles is a significant industry in South Africa. This industry impacts consumers daily. A clear message must be sent that non-compliance with the CPA will not be condoned or tolerated.

Any loss or damage suffered as a result of the contravention

81. The consumer lost the sum of R568,000.00 paid to the 1<sup>st</sup> respondent in that he has not had the benefit of the return of the purchase price. In addition, the consumer still needs to settle outstanding instalments in terms of his instalment sale agreement. Although the vehicle is still in his possession, it is unsafe to use. The applicant submitted that being without the high-performance use of his vehicle caused the consumer distress and unnecessary inconvenience.

The behaviour of the 1<sup>st</sup> respondent

82. The 1<sup>st</sup> respondent failed to recognise its responsibilities under the CPA. This behaviour indicates a dismissive attitude towards the rights of consumers, such as the complainant.

The market circumstances in which the contravention took place

83. No specific evidence was provided to the Tribunal. However, based on the types of matters referred to the Tribunal, vehicle-related complaints against

motor vehicle retailers are widespread. For the average consumer, purchasing a vehicle constitutes a highly costly and important transaction.

The level of profit derived from the contravention

84. No specific evidence was provided in this regard. Again, the 1<sup>st</sup> respondent would have derived the significant benefit of having the complainant's purchase amount of R568,000.00 while choosing not to pay for the vehicle's repair or to refund the consumer.

The degree to which the 1<sup>st</sup> respondent co-operated with the applicant and the Tribunal

85. The 1<sup>st</sup> respondent co-operated with the applicant's investigation to some extent but insisted it was not liable under the CPA. The Tribunal also considered the 1<sup>st</sup> respondent's attempts to settle the matter after the complaint was referred to MIOSA.

Whether the 1<sup>st</sup> respondent has previously been found in contravention of this Act.

86. The applicant submitted no record of a previous investigation or finding against the 1<sup>st</sup> respondent.
87. Turning to the amount of the fine, the applicant submitted no evidence of the 1<sup>st</sup> respondent's turnover. The Tribunal can, as stated previously, still impose a fine limited to a maximum of R1 000 000.00 (one million rand).
88. In this matter, the Tribunal is persuaded that a strong message must be sent that second-hand car dealers cannot escape the peremptory provisions of the CPA. Their services must be aligned with the CPA. Consumers must be protected against retailers accepting the purchase amount and not repairing a consumer's vehicle or refunding the consumer when material defects manifest within the prescribed period.
89. The Tribunal must also consider that the fine must not be so punitive as to discourage second-hand car dealers from engaging in necessary and lawful

business. The fine imposed would be for a first offender. Further transgressions would be met with significantly higher penalties.

90. Accordingly, the Club finds that a fine of R50,000.00 is appropriate in this matter.

### **Interdict**

91. The applicant requested that the Tribunal make an order interdicting the 1<sup>st</sup> respondent from engaging in prohibited conduct in the future. Given the CPA's provisions, the interdict will serve no purpose because the 1<sup>st</sup> respondent may not engage in prohibited conduct.<sup>18</sup>

### **THE ORDER**

92. In the result, the Tribunal makes the following order:
- 92.1 The 1<sup>st</sup> respondent has contravened sections 55(2)(a) to (c) and 56(2);
- 92.2 The above contraventions are declared to be prohibited conduct;
- 92.3 The 1<sup>st</sup> respondent is directed to refund the consumer the purchase price paid by the consumer for the vehicle in the sum of R568,000.00. This payment shall be made within 15 business days from the date of the issuance of this order into the bank account selected by the consumer;
- 92.4 The consumer shall make the vehicle available for collection by the 1<sup>st</sup> respondent immediately after the payment referred to in paragraph 93.3 has been effected;
- 92.5 The applicant is directed to ensure the execution of the order for re-payment of the purchase price of the vehicle to the consumer;
- 92.6 The 1<sup>st</sup> respondent shall pay an administrative fine in the sum of R50,000.00 (fifty thousand rand) within 30 business days from the date of the issuance of

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

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/241194/2022/73(2)(b), with the respondent's name used as a reference; and

93.1. There is no order as to costs.

[signed]

**Dr MC Peenze**  
**Presiding Tribunal Member**

With Ms N Maseti (Tribunal member) and Ms Z Ntuli (Tribunal member) concurring.

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

**National Consumer Tribunal**

**Ground Floor, Building B**

**Lakefield Office Park**

**272 West Avenue, Centurion, 0157**

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