

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

**Case number: NCT/322185/2024/73(2)(b)**

In the matter between:

**NATIONAL CONSUMER COMMISSION**

**APPLICANT**

and

**OMAR ISMAIL FERHAAD N.O.**

**FIRST RESPONDENT**

**EBRAHIM JALALPOR HAVABIBI N.O.**

**SECOND RESPONDENT**

**OMAR ISMAIL IRSHAD N.O.**

**THIRD RESPONDENT**

**FARHAD OMAR ISMAIL TRADING TRUST T/A SQUAD CARS**

**FOURTH RESPONDENT**

Coram:

Dr M Peenze - Presiding Tribunal member

Adv C Sassman - Tribunal member

Dr A Potwana - Tribunal member

Date of hearing - 15 July 2024 via the Microsoft Teams digital platform

Date of judgment - 18 July 2024

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**JUDGMENT AND REASONS**

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**APPLICANT**

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

**RESPONDENTS**

3. The first respondent is Omar Ismail Ferhaad, Nomine Officii, an adult male cited herein as trustee of Farhad Omar Ismail Trading Trust, Master's Office registration number IT 6005/94.

4. The second respondent is Ebrahim Jalalpor Havabibi Nomine Officii, an adult male cited herein as trustee of Farhad Omar Ismail Trading Trust, Master's Office registration number IT 6005/94.
5. The third respondent is Omar Ismail Irshad, an adult male cited herein as trustee of Farhad Omar Ismail Trading Trust, Master's Office registration number IT 6005/94.
6. The fourth respondent is Farhad Omar Ismail Trading Trust (Master's Office registration number IT 6005/94), situated at the Corner of Boom & Paul Kruger Streets, Pretoria Central. Farhad Omar Ismail Trading Trust is a Trust as defined in the Trust Property Control Act<sup>1</sup>, the assets and liabilities of which vest in the first to third respondents as trustees. Farhad Omar Ismail Trading Trust also trades as "Squad Cars". The fourth respondent is a supplier, as defined in section 1 of the CPA.
7. The first to fourth respondents are collectively referred to as "the respondents". On the day of the hearing, Adv Ruan Potas, instructed by NM Aboo Attorneys, represented the respondents.

## **JURISDICTION**

8. Section 27 (1) (a) (ii) of the National Credit Act, 34 of 2005 (the NCA) empowers the National Consumer Tribunal (the Tribunal) or a Tribunal member acting alone to adjudicate allegations of prohibited conduct by determining whether prohibited conduct has occurred and, if so, by imposing a remedy provided in the NCA.
9. Section 150 of the NCA empowers the Tribunal to make an appropriate order concerning prohibited or required conduct under the NCA or the CPA. The Tribunal, therefore, has jurisdiction to hear this application.

## **TERMINOLOGY**

10. A reference to a section in this judgment refers to a section in the CPA, and a reference to a regulation refers to the CPA Regulations.<sup>2</sup>
11. A reference to a form refers to a form as prescribed in the regulations, and a reference to a rule refers to the Rules of the National Consumer Tribunal.<sup>3</sup>

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<sup>1</sup> Act 57 of 1988.

<sup>2</sup> Published under Government Notice R293 in Government Gazette 34180 of 1 April 2011.

<sup>3</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).

## APPLICATION TYPE

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

## CITING AND ACCOUNTABILITY OF TRUSTEES

13. At the hearing, the respondents' legal representative confirmed that the answering affidavit filed by the second respondent was filed on behalf of the Farhad Omar Ismail Trading Trust (the Trust or Squad Cars), duly authorised by a resolution of the Trust.
14. As the Trust was not specifically cited in the pleadings, the Tribunal allowed the parties to present argument whether to join it as a respondent. All parties consented to join the Trust as a further respondent, and the Tribunal ruled, in terms of section 16(1) of the Rules, that the Trust is joined as the fourth respondent to the proceedings.<sup>4</sup>

### Analysis

15. I deal firstly with the law relating to the nature of a Trust and the duties of trustees. It is trite that a Trust is not a legal person. In its strict technical sense, the Trust is a legal institution sui generis.<sup>5</sup>
16. As outlined in *Braun v Blann and Botha NNO & another*:

*"The trustee is the owner of the Trust property for purposes of administration of the Trust but qua trustee he has no beneficial interests therein."*<sup>6</sup>

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<sup>4</sup> Per Rule 16 (1), the Tribunal may, of its own accord or on application by a party, combine any number of persons, either jointly, jointly and severally, separately, or in the alternative, as parties in the same proceedings, if their rights to relief depend on the determination of substantially the same questions of law or fact.

<sup>5</sup> Per section 1 of the Trust Property Control Act, Act 57 of 1988, "trust" means the arrangement through which the ownership in property of one person is by virtue of a trust instrument made over or bequeathed-

- (a) to another person, the trustee, in whole or in part, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument; or
- (b) to the beneficiaries designated in the trust instrument, which property is placed under the control of another person, the trustee, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument.

<sup>6</sup> See in this regard: *Braun v Blann and Botha NNO & another* [1984] ZASCA 19; 1984 (2) SA 850 (A) at 859D-H; *Commissioner for Inland Revenue v Friedman & others NNO* [1992] ZASCA 190; 1993 (1) SA 353 (A) at 370D-H).

17. In *Land and Agricultural Bank of South Africa v Parker and others*<sup>7</sup>, Cameron JA elaborated (para 10):
- “ . . . [A Trust] is an accumulation of assets and liabilities. These constitute the Trust estate, which is a separate entity. However, though separate, the accumulation of rights and obligations comprising the Trust estate does not have a legal personality. It vests in the trustees and must be administered by them — and it is only through the trustees, specified as in the Trust instrument, that the Trust can act...”*
18. In *Lupacchini NO & another v Minister of Safety and Security*<sup>8</sup>, Nugent JA took this theme further and observed that (para 1):
- “ . . . A Trust that is established by a Trust deed is not a legal person — it is a legal relationship of a special kind that is described by the authors of Honoré’s South African Law of Trusts as a legal institution in which a person, the trustee, subject to public supervision, holds or administers property separately from his or her own, for the benefit of another person or persons or for the furtherance of a charitable or other purpose.”*
19. Where more than one trustee has been specified in the Trust deed, they share a common fiduciary obligation towards fulfilling the objects of the Trust and must act jointly.<sup>9</sup> Section 9(1) of the Trust Property Control Act reads as follows:
- “9. Care, diligence and skill required of trustee —*
- (1) A trustee shall, in the performance of his duties and the exercise of his powers, act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another.”*
20. In *Sackville West v Nourse & another*<sup>10</sup>, Kotze JA stated the position relating to the fiduciary duties of trustees as follows (at 534):
- “The effect of this authority is that a tutor must invest the property of his ward with diligence and safety. It is also said that a tutor must observe greater care in dealing with his ward’s money than he does with his own, for, while a man may act as he pleases with his own property, he is not at liberty to do so with that of his ward. The standard of care to be observed is accordingly not that which an ordinary man generally observes in the management of his own affairs, but that of the prudent and careful man; or, to use the technical expression of the Roman law, that of the bonus et diligens paterfamilias . . .”*
21. The learned judge of appeal continued (at 535):
- “We may accordingly conclude that the rule of our law is that a person in a fiduciary position, like a*

<sup>7</sup> *Land and Agricultural Bank of South Africa v Parker and others* [2004] ZASCA 56; 2005 (2) SA 77.

<sup>8</sup> *Lupacchini NO & another v Minister of Safety and Security* [2010] ZASCA 108; 2010 (6) SA 457 (SCA).

<sup>9</sup> Compare: *Hoosen & others v Deedat & others* [1999] ZASCA 49; 1999 (4) SA 425 (SCA) paras 23, 24 and 26.

<sup>10</sup> *Sackville West v Nourse & another* 1925 AD 516.

*trustee, is obliged, in dealing with . . . the money of the beneficiary, to observe due care and diligence, and not to expose it in any way to any business risks.”*

22. This principle was elaborated upon in *Administrators, Estate Richards v Nichol & another*<sup>11</sup>, where the following was stated (at 557D-F):

*“. . . [T]he standard was higher than that which an ordinary person might generally observe in the management of his or her own affairs. Such a person, it was pointed out, was free to do what he liked with his property and not infrequently selected investments which were of a speculative nature, particularly when the potential profits were high. A person in a fiduciary position such as a trustee, on the other hand, was obliged to adopt the standard of the prudent and careful person, that is to say the standard of the bonus et diligens paterfamilias of Roman law, and was accordingly, as Kotze JA concluded at 535, “obliged, in dealing with and investing the money of the beneficiary, to observe due care and diligence, and not to expose it in any way to any business risks”. The need to avoid risks was emphasised in the judgments of both Solomon ACJ and Kotze JA.”*

23. The governance responsibilities of a Trust are summarised as follows by Schoeman:

*“The governance of a Trust is completely in the hands of its trustees and all assets, liabilities, rights and duties of the Trust reside in them. Consequently, an appointment as a trustee is a position that comes with a substantial amount of responsibility and, therefore, it is an appointment not to be taken lightly. More specifically, the trustees have a greater standard of care than normal people, actually similar to that of a director of a company, and can be sued by the Trust beneficiaries if they do not honour their fiduciary duties or are negligent in any way.”<sup>12</sup>*

24. In line with the above, the trustees of a Trust are responsible for its proper management and administration. They are also responsible for the Trust's conduct and its compliance with legislation. More particularly, if a Trust operates as a supplier, the trustees are expected to comply with all statutory responsibilities of a supplier, as outlined in the CPA.

25. It follows that trustees are personally liable for any debts properly incurred in administering the Trust.<sup>13</sup> Accordingly, if prohibited conduct occurred, a consumer's primary claim is against the trustees personally, not the Trust assets. Consumers or an entity, such as the applicant, may recover from the trustees directly if the trustees have sufficient assets other than assets held in trust. However, if a trustee has few or no assets available to satisfy any debt, the creditor must look to the Trust property through subrogation.<sup>14</sup>

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<sup>11</sup> *Administrators, Estate Richards v Nichol & another* [1998] ZASCA 82; 1999 (1) SA 551 (SCA).

<sup>12</sup> Arinda Truter | Schoeman Law Inc 2016. <https://www.schoemanlaw.co.za/wp-content/uploads/2016/09/The-General-Duties-and-Obligations-of-Trustees.pdf>.

<sup>13</sup> *Levin v Ikiua* [2010] 1 NZLR 400 (HC) at [120].

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

## Findings

26. As outlined above, it is trite that a Trust is generally not a juristic person and that its assets vest in the trustees in their capacities as such. As it is not in dispute that the first to third respondents are the trustees of the Trust, and the Trust was still registered with the Master at the time of the hearing, these fiduciary responsibilities pertain to the first to third respondents. All trustees were correctly joined in this matter, ensuring that the trustees could protect and enforce the Trust's rights and the Trust's obligations.
27. However, the CPA outlines that a juristic person includes a Trust.<sup>15</sup> Therefore, to bridge any inconsistency between the provisions of the CPA and the provisions of the Trust Property Control Act, the Tribunal applied the provisions of both Acts concurrently by joining the Trust as a fourth respondent. This ensured greater protection for the consumer.
28. The Tribunal considered that a Trust functions through its appointed trustees, and the Trust's legal personality requires that all trustees act together for and on behalf of the Trust.<sup>16</sup> Accordingly, the trustees are before the Tribunal *eo nomine* (by or under that name), and the Tribunal has acknowledged the Trust properly before the Tribunal, represented by its trustees. As a result, the first to third respondents, as trustees of the Trust, will be personally liable for all liabilities incurred in performing the Trust activities<sup>17</sup>, including liabilities resulting from prohibited conduct towards the consumer. By citing both the Trust and the trustees, such liability will rest on the Trust and the trustees individually and collectively.

## BACKGROUND

29. At the hearing on 15 July 2024, the Tribunal allowed parties to argue about the respondent's conduct, the nature of the sales agreement, the allegation that the purchased goods failed to satisfy the requirements of section 55(2), and whether, as a result, the respondents contravened the CPA.
30. The applicant received a complaint from Mrs Mmapule Motshabi Maria Mosete (the consumer). The complaint detailed that she bought a used 2014 BMW 316i vehicle (the vehicle) with an odometer reading of 74 375km from Squad Cars on 7 September 2021. The purchase price for the said vehicle was R200,000.00. Per the purchase agreement, the supplier would not be liable for any vehicle damage after purchase.

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<sup>15</sup> Per section 1 of the CPA "juristic person" includes—

(a) a body corporate;

(b) a partnership or association; or

(c) a trust as defined in the Trust Property Act, 1988 (Act No. 57 of 1988).

<sup>16</sup> Steyn and Others NNO v Blockpave (Pty) Ltd 2011 (FB).

<sup>17</sup> Also see Octavo Investments Pty Ltd v Knight (1979) 144 CLR 360 (HCA) at 367.

31. On 9 October 2021, the vehicle overheated with the coolant and fan running properly, and a warning light on the cluster illuminated, indicating that she must stop the vehicle. The consumer informed the supplier of the mechanical problem and enquired about their warranty but did not explicitly request the supplier to repair the vehicle. As the supplier outlined in the conditions of sale that the vehicle could have been in an accident and reconditioned, the consumer was led to believe that the supplier would not be liable for any repairs.
32. The consumer took the vehicle to Dada Motors (a BMW dealership), where it was confirmed that the top gasket had blown. The thermostat and coolant were also damaged. On opening the engine, Dada Motors suspected that the engine had been previously opened. The cylinder head was warped, and they suspected it had been removed previously, as the cylinder head gasket fitted in the vehicle was not a genuine BMW part.
33. The consumer lodged a complaint with Motor Industry Ombudsman of South Africa (MIOSA). They could not assist her because she had taken her vehicle to a third party for repairs. MIOSA issued a recommendation indicating that the relief requested was impossible and advised the consumer to file a complaint with the NCC.
34. Based on the above, the NCC formed a reasonable suspicion that Squad Cars had contravened the CPA and investigated the complaint.
35. According to the respondents, there is no evidence of a defect at the date of purchase, and the engine failure could have resulted from driver error. The respondents took issue with the stripping of the motor vehicle by a third party. They argued that disassembling the motor vehicle without their permission constituted an intervention by a third party, nullifying the inherent statutory warranty. The respondents outlined that the consumer drove 2979 km within one month and continued to drive the vehicle without water in the cooling system. Further, the consumer did not cancel the sale agreement or return the vehicle to the supplier for a refund or repairs. The respondents also argued that the contractual terms did not attempt to circumvent the supplier's responsibilities in terms of the CPA but that such terms were lawful and standard clauses in the industry.

## **THE HEARING**

36. During the hearing, the consumer gave oral evidence that she requested repairs from the respondent. This allegation was not contained in the consumer's founding affidavit. The Tribunal cautioned the NCC that it could not supplement evidence through oral testimony during the hearing, but it insisted on leading such evidence. The Tribunal disregarded the consumer's testimony to the extent that it supplemented

the papers filed before the Tribunal. Further, the consumer's testimony contradicted substantial documentary evidence concerning how the consumer drove the vehicle to the point of breaking down. She testified that she stopped the vehicle immediately when the warning light came on and did not drive further until the tow truck arrived. However, according to the WhatsApp messages filed as annexures to the applicant's founding affidavit, the consumer drove the vehicle between breakdowns up to the point that it refused to start:

*"I have a problem with the car bro .... yesterday t was towed .... .it was overheating n I had to stop .... each five minutes drive so ultimately it refuses to start when the towing truck arrives ... .I really don't know what is the problem coz the coolant was fine, fan running well.. ... it seems as if the engine is broken or blasted top head gasket coz it won't start anymore."*<sup>18</sup>

37. As the Tribunal found the witness unreliable, her testimony was disregarded.

### **TRANSGRESSIONS OF THE CPA**

38. The NCC seeks a declaratory order that the respondents contravened various sections of the CPA and that the contraventions be declared prohibited conduct. During the hearing, the NCC abandoned some of the alleged transgressions and confirmed that it only sought a declaratory order for the alleged contravention of the following sections:

- (a) section 48(1)(a)(ii) and (c); and
- (b) section 55(2)(b).

39. The applicant further abandoned its plea for a refund of the purchase price and sought the following relief:

- (a) Directing the respondents to refund the consumer the costs incurred in an attempt to repair the vehicle in the sum of R73,977.78.
- (b) Directing the respondents to pay an administrative fine in the amount of R1,000,000.00; and
- (c) Any other appropriate order contemplated in section 4(2) (b) (ii).

### **Section 48: Unfair, unreasonable or unjust contract terms**

40. Per section 48(1)(a)(ii), a supplier must not offer to supply, supply, or enter into an agreement to supply any goods or services on terms that are unfair, unreasonable or unjust. Per section 48(1)(c), a supplier

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<sup>18</sup> See page 50 of the Tribunal bundle.



must not require a consumer or other person to whom any goods or services are supplied at the direction of the consumer –

- (a) to waive any rights;
- (b) assume any obligation; or
- (c) waive any liability of the supplier,

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

41. The provisions in sections 2, 3, and 4 must be considered when interpreting the CPA. In this regard, section 2(1) provides that the CPA must be interpreted in a manner that gives effect to the purposes set out in section 3. Section 3(1) provides that the purposes of the CPA are to promote and advance the social and economic welfare of consumers in South Africa by, amongst others, establishing a legal framework for the achievement and maintenance of the consumer market that is fair, accessible, efficient, sustainable, and responsible for the benefits of consumers generally. Section 4(3) provides that if any provision of the CPA, read in its context, can reasonably be construed to have more than one meaning, the Tribunal or court must prefer the meaning that best promotes the spirit and purposes of the CPA, and will best improve the realisation and enjoyment of consumer rights.
42. The NCC submitted that the supplier entered into an agreement with the consumer on terms and conditions that waived the consumer's right to fair, reasonable, and just terms. According to the applicant, the exemption clause in the purchase agreement also constitutes prohibited conduct, as a supplier cannot contract out of its statutory obligations. According to the respondent, the purchase agreement's terms and conditions are fair and standard industry terms and conditions. The respondents argued that the exclusion was the result of an arms-length transaction and that the consumer agreed to the clause.

### *Consideration*

43. According to the evidence before the Tribunal, it is common cause that the purchase agreement contained the following clauses:
- “(a) Squad Cars does not issue any warranty/ies whatsoever to any purchaser;*
  - (b) There shall be an option to Purchase a warranty from Squad Cars on purchaser's own account....;<sup>19</sup> and*

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<sup>19</sup> See the pre-delivery form on page 85 of the Tribunal bundle.

(c) *The consumer indemnifies and holds Squad Cars harmless against any liability and in respect of any losses, damages and/or latent and patent defects which may arise or surface during, with or after the purchase of the Motor Vehicle. The consumer confirms that it shall not be entitled to institute any claims of whatsoever nature which may arise in relation to the purchase and sale of the Motor Vehicle, being either civil or criminal against Squad Cars.*<sup>20</sup>

44. Section 56 provides for a six-month implied warranty, operative from the vehicle's purchase date. In terms of section 56(2), the supplier was obliged to repair the vehicle if the consumer had elected that the vehicle be repaired. By including the above exclusion clause in the purchase agreement, the supplier deprived the consumer of his right in terms of section 56. Further, this condition failed to advance the consumer's social and economic welfare, as the required repairs far exceeded the discount amount approved by the respondent.
45. Despite the agreement between the parties that the supplier would not be responsible for future repairs to the vehicle, the Tribunal finds that the respondents were statutorily prohibited from providing consent to such exclusion. To the extent that parties conclude an agreement where a consumer's statutory right is infringed upon, such agreement contravenes the CPA. Similarly, to the extent that such a clause would have the general effect of defeating the purpose of the CPA, such an agreement contravenes the CPA.
46. Consequently, the Tribunal finds that including the above clauses in the purchase agreement was a blatant attempt to defeat the purposes of the CPA. This is clear evidence that the vehicle was sold to the consumer on unfair, unreasonable, and unjust terms, all aimed at getting the consumer to waive her consumer rights and the respondents' liability. The intention was clearly to get the consumer to assume an obligation to repair defects and absolve the respondents from doing so. These are serious contraventions that the Tribunal must discourage.
47. Further, the supplier's inclusion of a clause outlining that the vehicle could have been in an accident, in which event the consumer confirms that such damage had been adequately repaired, is similarly discouraged:

*"I/We also understand that the vehicle might have been involved in an accident as vehicles are bought from various institutions and persons, or traded in. I also acknowledge that the damaged vehicle was repaired to my satisfaction (if applicable)."*<sup>21</sup>

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<sup>20</sup> See the over-allowance declaration by the consumer on page 87 of the Tribunal bundle.

<sup>21</sup> See page 84 of the Tribunal bundle.

48. Section 55(6) envisages that a supplier must outline a specific defect if such a defect is intended to be excluded.<sup>22</sup> A supplier cannot equate general statements such as the vehicle “could have been involved in an accident” or “was repaired to my satisfaction (if applicable)” to a specific condition as intended by section 55(6). A general statement does not cover a specific condition.
49. The Tribunal, therefore, finds that the respondents contravened sections 48(1)(a)(ii) and 48(1)(c).

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

50. Section 55(2)(b) states that consumers have the right to receive goods of good quality, in good working order, and free of any defects.
51. In the context of goods, section 53(1)(a) defines a defect as follows:
- (a) Any material imperfection in the manufactured goods that renders the goods less acceptable than persons generally would be reasonably entitled to expect; or
  - (b) 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.
52. The NCC submitted that the vehicle became defective within one month of purchase. A seized engine prevented the vehicle from driving properly, making it unsafe.

*Consideration*

53. The applicant failed to persuade the Tribunal that the defective cooling system was present at the date of purchase. On the evidence before the Tribunal, the consumer contributed to the engine seizing by not immediately heeding the caution light once illuminated and failing to add water as required. Although the Tribunal is persuaded that the cooling system could have been faulty before the breakdown, the applicant provided insufficient evidence to persuade the Tribunal that such fault on its own amounted to a defect, as defined in section 53(1). In *Motus v Wentzel*<sup>23</sup> (*Motus*), the court held that not every small fault amounts to a defect as defined in the CPA. Where a consumer does not provide evidence of a defect and

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<sup>22</sup> Section 55(6) determines that section 55(2)(b) will not be applicable if the consumer has been expressly informed that particular goods were offered in a specific condition; and has expressly agreed to accept the goods in that condition, or knowingly acted in a manner consistent with accepting the goods in that condition.

<sup>23</sup> *Motus Corporation (Pty) Ltd and Another v Wentzel* (Case no 1272/2019) [2021] ZASCA 40 (13 April 2021) para 41.

circumstantial evidence casts reasonable doubt on the nature and seriousness of a fault, such a fault would not constitute a defect per section 53(1).

54. The evidence further confirms that the faulty cooling system appeared one month after purchase and after the consumer had driven almost 3000 km. The Tribunal is persuaded that, in the absence of expert evidence of the expected mileage a vehicle could drive without water, the seizing of the engine cannot be attributed to the supplier.
55. The comments by Dada Motors that the cylinder head was damaged and that they suspected the cylinder head of being removed previously similarly do not amount to evidence that the cylinder head was defective at the date of purchase. The vehicle's state could also have resulted from an engine that ran without water for some time. The diagnosis by Dada Motors is perceived as the opinion of a third party that performed services without the supplier's consent.
56. The Tribunal finds that a faulty cooling system could constitute a material defect and be expensive to repair. The problem for the consumer is that we cannot find that the vehicle was purchased with these defects as it was subsequently driven for almost 3000 km over a short period, and no proper diagnostic was done as to the cause of the defects. The breakdown could be ascribed to driver error or negligence to ensure that the vehicle's cooling system had sufficient water when it was driven for almost 3000 km over a relatively short period.
57. Given the above, we are not satisfied that the applicant has proved, on a balance of probabilities, that the supplier contravened section 55(2)(b).

## **RELIEF**

58. We now turn to consider the relief sought.

## **Refund**

59. During the hearing, the applicant requested the Tribunal to order a refund of expenses as an innovative order in terms of section 150(i) of the NCA.
60. Unlike the provisions of section 56(2)(b), which empower this Tribunal to order, among other things, a refund of the purchase price for defective goods, there is no CPA provision that empowers the Tribunal to order a refund of payments made to a third party. Also, we are mindful that the consumer has made

further repairs over the last two years and has had possession of the vehicle during this period. Moreover, this prayer amounts to a civil damages claim, which should be brought before a civil court.

61. Given the Tribunal's finding that the respondents committed prohibited conduct through its contravention of section 48(1)(a)(ii) and section 48(1)(c), the loss or damages that the NCC claims the consumer has suffered, and the fact that the Tribunal is not statutorily empowered to make the order sought, consideration should be given to applying for a certificate of prohibited conduct from the Chairperson of the Tribunal and instituting a claim for the assessment and awarding of damages in a civil court. Section 115(2)(b) provides that when instituting such proceedings, a person must file with the registrar or clerk of the court a notice from the Chairperson of the Tribunal in the prescribed form–
- “(i) certifying whether the conduct constituting the basis for the action has been found to be prohibited or required conduct in terms of [the CPA];
  - (ii) stating the date of the Tribunal's finding, if any; and
  - (iii) setting out the section of [the CPA] in terms of which the Tribunal made its finding, if any.”
62. The certificate referred to in section 115(2)(b) is sufficient proof of its contents.

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

63. The applicant requested that the Tribunal impose an administrative fine on the respondent. The applicant made submissions concerning the factors listed in section 112(3) that the Tribunal must consider.
64. The Tribunal is satisfied that the nature of the respondents' contraventions and the consequent financial implications for the consumer justify the Tribunal imposing an administrative fine on the respondent. The kind of contraventions perpetrated by the respondents are undoubtedly the type of conduct the CPA seeks to prohibit.
65. Once it finds the respondents have engaged in prohibited conduct, the Tribunal must exercise its powers by sending suppliers a clear and strong message that such conduct will not be permitted.
66. Section 112(3) outlines the factors the Tribunal must consider when determining an appropriate fine. These are listed and discussed under separate sub-headings below.

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

67. The evidence clearly shows that the contraventions are serious, disregarding the CPA and the consumer's rights. The respondents have deliberately included terms and conditions in the agreement

that seek to negate the effect of the CPA. The nature and extent of the contraventions warrant serious action against the respondents.

*Any loss or damage suffered as a result of the contravention*

68. The consumer was exploited by the sale of a vehicle under conditions that deprived her of the right to approach the supplier requesting repair or refund of the vehicle.
69. The purchase resulted in an inconvenience and financial prejudice to the consumer.

*The behaviour of the respondent*

70. The respondents formally co-operated with the investigation. However, the respondents have yet to do anything to resolve the complaint. No prior investigations or enforcement was instituted against the respondents.

*The market circumstances in which the contravention took place*

71. The respondents' conduct illustrates that the market within which the contraventions occurred is one in which consumers rely on the expertise of suppliers like Squad Cars. These consumers are often not fully aware of their rights and are vulnerable to exploitation.

*The level of profit derived from the contravention*

72. The respondents benefited from the purchase price paid by the consumer.
73. Regarding the abovementioned factors, the factual evidence, and the conduct displayed, it is in the interest of justice for an administrative fine to be imposed on the respondents. The purpose of an administrative fine is, in the circumstances of this application, a punitive measure that is warranted. Regarding the quantum of the administrative fine, section 112(2) provides that an administrative fine imposed may not exceed the greater of 10% of the respondent's annual turnover during the preceding financial year or R1,000,000.00. The applicant did not submit any evidence of the respondent's turnover. The Tribunal can, however, still impose a fine limited to a maximum of R1,000,000.00.
74. The respondent's conduct has displayed little or no regard for the spirit and purpose of the CPA.
75. The Tribunal finds that a fine of R100,000.00 will be appropriate.

**ORDER**

76. Accordingly, the Tribunal makes the following order:

- 76.1. The respondents have contravened sections 48(1)(a)(ii) and 48(1)(c) of the CPA.
- 76.2. The respondents' contraventions are declared prohibited conduct.
- 76.3. The respondents brought the consumer industry into disrepute by their contraventions.
- 76.4. The respondents are jointly and severally liable, the one paying the others absolved, to pay an administrative fine of R100.000.00 within 30 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/322185/2024/73(2)(b), with the respondent's name used as a reference.
- 76.5. The applicant or consumer may approach the Chairperson of the Tribunal for a certificate in terms of section 115(2)(b) of the CPA to claim the related damages in a civil court.
- 76.6. There is no order as to costs.

[signed]

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

Tribunal members Dr A Potwana and Adv C Sassman concur.

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

**National Consumer Tribunal**  
**Ground Floor, Building B**  
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