

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

Case number: **NCT/240235/2022/73(2)(b)**

In the matter between:

**NATIONAL CONSUMER COMMISSION
ALISON JANET EVANS**

1ST APPLICANT

2ND APPLICANT

and

UNICITY TRADING T/A CAPE SUV

RESPONDENT

Coram:

Adv C Sassman - Presiding Tribunal member

Mr S Hockey - Tribunal member

Ms P Manzi-Ntshingila - Tribunal member

Date of hearing - 31 January 2024

Date of judgment - 1 February 2024

JUDGMENT AND REASONS

THE PARTIES

1. The first applicant is the National Consumer Commission (the first applicant). The first applicant is an organ of the state established in terms of section 85(1) of the Consumer Protection Act 68 of 2008 (CPA). It is tasked with, among other things, monitoring compliance with the CPA and enforcing consumer protection in the Republic. At the hearing, the first applicant was represented by its Divisional Head for Legal Services, Jabulani Mbeje.
2. The second applicant is Alison Janet Evans (the second applicant). The second applicant is a consumer, as defined in section 1 of the CPA. At the hearing, the second applicant was represented by Advocate Gert Gagiano.

3. The respondent is Unicity Trading, trading as Cape SUV (the respondent). The respondent is a supplier, as defined in section 1 of the CPA. At the hearing, the respondent was represented by Werner Welgemoed, an attorney from Welgemoed Attorneys.

TERMINOLOGY

4. A reference to a section in this judgment refers to a section of the CPA.

APPLICATION TYPE

5. This is an opposed application in terms of section 73(2)(b). In this application, the first applicant, after having investigated a complaint received from the second applicant, has referred the matter to the Tribunal for adjudication.

BACKGROUND

6. On 20 June 2019, the second applicant purchased a 2013 Daihatsu Terios motor vehicle from the respondent for R151 900.00. The vehicle presented with several faults between June 2019 and August 2019, which the second applicant reported to the respondent. The vehicle was returned to the respondent three times for repairs. In each instance, the respondent repaired the vehicle. On 1 September 2019, a day after the vehicle had been repaired for the third time, the second applicant alleges that the vehicle began making a noise while driving. On 4 September 2019, the vehicle broke down with a gearbox failure.
7. On 10 September 2019, the second applicant, through her attorneys, notified the respondent that she wanted to cancel the sale agreement and return the vehicle for a full refund of the purchase price. The respondent did not comply with her request for a refund. The vehicle is still in the second applicant's possession but is not in a driving condition. On 14 October 2020, she lodged a complaint with the first applicant, who investigated the matter in terms of section 72(1)(d). The first applicant concluded that the respondent had contravened the CPA and filed this application with the Tribunal on 2 September 2022. The second applicant then applied to the Tribunal to join the proceedings, and the joinder was granted on 28 July 2023.

THE FIRST APPLICANT'S SUBMISSIONS

8. The first applicant submitted that although the second applicant heard a noise coming from the vehicle on 1 September 2019, the conduct that is the cause of the complaint

occurred on 4 September 2019, when the vehicle broke down due to a gearbox failure. Since the application was filed with the Tribunal on 2 September 2022, the Tribunal is not prevented from adjudicating the matter in terms of section 116(1)(a).

9. The provisions of section 56(3)(b) apply, and the gearbox failure is a further defect discovered after the other repairs had been done. The respondent contravened section 56(3)(b) when it failed to refund the second applicant when requested to do so. There is no evidence to support the respondent's defence that the damage to the vehicle's gearbox was caused due to impaired driving. It is mere speculation. The second applicant has been unable to use this vehicle for more than four years. The first applicant seeks an order for the second applicant to be refunded the purchase price of the vehicle and for the respondent to be issued an administrative fine of R100 000.00.

THE SECOND APPLICANT'S SUBMISSIONS

10. The second applicant submitted that the conduct, which is the cause of the complaint, arose when the second applicant took delivery of the vehicle but that the matter has not prescribed since the respondent's conduct was continuous in terms of section 116(1)(b). The respondent was aware that it was selling a vehicle that had extensive repairs done before it was sold to the second applicant. Yet it was advertised as being in excellent condition. The respondent states that the second applicant sent an email conveying how happy she was with the vehicle after the purchase but omits the part where she mentions her concern that the vehicle vibrates when driving at a high speed. The respondent does not dispute the breakdown due to a gearbox failure but has avoided its liability and the attempts made by the second applicant to resolve the matter amicably. The respondent has even accused the second applicant of causing damage to the vehicle's gearbox herself but provides no evidence to support this claim.
11. It cannot be disputed that the vehicle had many defects. The defects comply with the definition of a defect in terms of section 53. This renders the vehicle inconsistent with the requirements of section 55(2) as it was not of good quality. Therefore, the Tribunal may grant an order for the second applicant to be refunded in terms of section 56(2)(b) or 56(3)(b).
12. The second applicant also seeks a cost order against the respondent and submits that a cost order would be justified since she was forced to appoint legal representatives to enforce her rights under the CPA.

THE RESPONDENT'S SUBMISSIONS

13. The respondent submitted that the vehicle was not sold with any defects. Although repairs had been done to the vehicle previously, it was sold to the second applicant with a roadworthy certificate. The gearbox was replaced before the vehicle was sold, but the respondent has never repaired the gearbox. If there were any problems with the vehicle's gearbox when sold, the second applicant would not have been able to drive approximately 3600 km before it broke down.
14. The second applicant was happy with the purchase of the vehicle, and the respondent could not have predicted the faults that occurred after the sale. In each instance, the respondent repaired the vehicle when it presented with faults. The respondent never avoided their responsibilities. However, the respondent cannot be held liable for damage to the vehicle caused by the second applicant herself. When the respondent inspected the vehicle after the breakdown, it was found that the cross-member bar underneath it was bent. This was not so when the vehicle was sold. A roadworthy certificate would not have been issued if this were the case. The respondent suspects that the vehicle was subjected to impaired driving and possible accident damage resulting in the damage.
15. This matter contains many factual disputes and cannot be adjudicated on the papers before the Tribunal. Furthermore, the matter has prescribed since more than three years have passed since the vehicle was sold to the second applicant or when it was brought in for repairs to the gearbox.

APPLICABLE SECTIONS OF THE CPA

16. Section 116(1) states that a complaint may not be referred or made to the Tribunal more than three years after the act or omission that is the cause of the complaint occurred. It further states that in the case of a course of conduct or continuing practice, the complaint may not be referred or made to the Tribunal more than three years after the conduct or practice ceased.
17. Section 56(3) states that if a supplier repairs any goods and within three months after the repair, the failure, defect, or unsafe feature has not been remedied, or a further failure or defect is discovered, the supplier must replace the goods or refund the consumer the price paid for the goods.

CONSIDERATION OF THE EVIDENCE

18. The Tribunal accepts that the cause of the applicants' complaint occurred on 4 September 2019 when the vehicle broke down after it had been repaired and that the application to the Tribunal was filed within the three years prescribed in section 116(1)(a). Therefore, the application is not time-barred from being adjudicated.
19. From the evidence before the Tribunal, it further accepts that the repairs done on the vehicle by the respondent did not include repairs to the gearbox but that the gearbox failure was a further failure discovered by the second applicant after numerous other faults had been repaired. Therefore, the second applicant is entitled to seek relief in terms of section 56(3)(b).
20. In *Motus v Wentzel*¹ (*Motus*), the court held that for the consumer to be entitled to claim a refund of the purchase price of the vehicle, she had first to show that all the events in section 56(3) had taken place. In other words, the defective parts must have been repaired, and within three months after the repairs, the defects had not been remedied, or a further failure was discovered. In this case, the second applicant discovered a further failure and was entitled to request a refund of the vehicle's purchase price.
21. The Tribunal rejects the respondent's averment that the damage to the vehicle's gearbox was caused by the second applicant's impaired driving as there is no evidence to support this and, by its own submissions, amounts to speculation. In this instance, the legislation provides for the return of goods at the supplier's risk and expense and for the second applicant to be refunded the vehicle's purchase price.
22. The Tribunal notes the first applicant's request for the respondent to be issued an administrative fine. However, in this instance finds that it is not appropriate.
23. The Tribunal further notes the second applicant's request to be awarded costs. However, the Tribunal finds that joining the second applicant in this matter was superfluous and did not advance the application brought by the first applicant. A cost order would not be justified in this instance.

CONCLUSION

24. The Tribunal finds that in failing to comply with the second applicant's request for a refund after she discovered a further defect in the vehicle, the respondent has

¹ *Motus Corporation (Pty) Ltd and Another v Wentzel* (Case no 1272/2019) [2021] ZASCA 40 (13 April 2021) para 41.

contravened section 56(3)(b). The Tribunal further finds that the second applicant is entitled to a full refund of the vehicle's purchase price.

ORDER

25. Accordingly, the Tribunal makes the following order:

25.1 The first respondent has contravened section 56(3)(b) of the CPA;

25.2 The contravention is declared prohibited conduct in terms of section 150(a) of the National Credit Act 34 of 2005;

25.3 The first respondent is ordered to pay the second applicant R151 900.00 (one hundred and fifty-one thousand, nine hundred rand), being the purchase price of the vehicle, within 30 business days after issuing of this judgment;

25.4 The respondent must, at its own cost, collect the Daihatsu Terios vehicle with registration number CY 46125 from an address provided by the second applicant within five business days of issuing this judgment;

25.5 There is no cost order.

Adv C Sassman

Presiding Tribunal member

Tribunal members Mr S Hockey and Ms P Manzi-Ntshingila concur.

Authorised for issue by The National Consumer Tribunal

National Consumer Tribunal

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