

**IN THE NATIONAL CONSUMER TRIBUNAL
SITUATED IN CENTURION**

Case Number: **NCT/264659/2023/73(2)(b)**

In the matter between:

NATIONAL CONSUMER COMMISSION

APPLICANT

and

BEREA MOTORS CC

FIRST RESPONDENT

WESBANK, A DIVISION OF FIRSTRAND BANK LIMITED

SECOND RESPONDENT

Coram:

Ms N Maseti - Presiding Tribunal member

Dr A Potwana - Tribunal member

Mr S Mbhele - Tribunal member

Date of hearing: 16 February 2024 (via a technology link)

CONSENT ORDER RULING

THE PARTIES

1. The applicant is the National Consumer Commission, an organ of state within the public administration of the Republic of South Africa, but an institution outside the public service. On the day of the hearing, the applicant was represented by Ms Imrhan Magoro (Ms Magoro).
2. The first respondent is Berea Motors CC, a close corporation that is duly incorporated and registered in terms of the company laws of the Republic of South Africa. On the day of the hearing, the first respondent was represented by Mr Jan Andries van Aswegen, an attorney from Theron, Jordaan & Smith Attorneys (Mr van Aswegen).
3. The second respondent is Wesbank, a division of FirstRand Bank Limited. The second respondent did not file any opposing papers, and there was no appearance by the second respondent or its legal representatives on the day of the hearing.

APPLICATION TYPE AND JURISDICTION

4. The applicant seeks various orders against the respondent, including an order declaring that the respondent contravened the following provisions of the Consumer Protection Act 68 of 2008 (CPA):
 - 4.1. section 55(2)(b).
 - 4.2. section 56(2)(b).
 - 4.3. section 13(1)(a) and (b).
5. Among others, the applicant seeks an order declaring that the respondent's contravention of the sections of the CPA mentioned above is prohibited conduct.
6. In terms of section 27(a) of the National Credit Act 34 of 2005 (NCA), the Tribunal has jurisdiction to hear this application.

INTRODUCTION

7. On 23 March 2023, the applicant filed Form Tl.r30A and Form Tl.73(2)(b) CPA with the Tribunal's Registrar (Registrar). The documents were served on the respondents by email. The respondents' consent to be served by email is attached. In "*Part D: Order sought from the Tribunal*" of Form Tl.73(2)(b) CPA, the applicant stated that it was applying for the following orders:
 - 7.1. Declaring that the first respondent contravened the following sections of the CPA:
 - 7.1.1. Section 55(2)(a) to (c).
 - 7.1.2. Section 56(2)(a).
 - 7.1.3. Section 13(1)(a) and/or (b) and 13(2).
 - 7.2. That the first respondent's contravention of the above-cited sections of the CPA be declared prohibited conduct.
 - 7.3. That the first respondent be interdicted from engaging in conduct detailed in paragraphs 7.1 and 7.2 above.
 - 7.4. Directing the first respondent to refund the consumer the sum of R28 000.00, being the cost of repairs to the motor vehicle. This amount is to be paid with interest in accordance with the Prescribed Rate of Interest Act 55 of 1975 from 26 June 2021, the date on which it was paid by the consumer for the repairs, to the date of final payment.
 - 7.5. Directing the first respondent to pay the amount mentioned in paragraph 7. 4 above within 15 days of the date of judgment.
 - 7.6. Directing the first respondent to pay an administrative penalty in the amount of R1 000 000 (one million rands).
 - 7.7. Any other appropriate order contemplated in section 4(2)(b)(ii) of the CPA.

FACTS

8. The deponent to the applicant's affidavit in support of the application is Ms Thezi Mabuza, the applicant's Acting Commissioner. Ms Mabuza averred that on 22 April 2021, the applicant received a complaint from Mrs Jure Smit (the complainant). The essence of the complaint is that on 18 September 2020, the consumer purchased a 2014 model Volkswagen Jetta 1.4 TSI Comfortline DSG motor vehicle (motor vehicle) with an odometer reading of approximately 204 400km for an amount of R170 965, 50. This amount included the purchase price, roadside assistance, tracker, and delivery fee. The transaction was financed by the second respondent. After adding service delivery fees, M-Sure Warranty, and other additional charges, the total cost of credit was the sum of R273 353, 76. On four different occasions before taking delivery of the motor vehicle, she asked if all the mechanicals of the motor vehicle had done more than 200,000 km and her husband worked with cars daily. Her husband asked about the engine, turbo, and gearbox specifically, and she was assured that she had a two-year mechanical warranty and if anything went wrong within the two years, it would be fixed by the warranty.
9. On 21 February 2021, the motor vehicle broke down, and she contacted the first respondent telephonically. She was advised that her mechanical warranty should be able to help to fix the motor vehicle. She contacted the insurance company, M-Sure Insurance. She was advised to take the motor vehicle to the Gearbox Company, where it was stripped, and a quotation for the repairs of the gearbox was prepared. The warranty cover of only R7000.00 out of the quoted R44 947, 75 was confirmed. The consumer believes the first respondent does not know what the warranty covers. She unsuccessfully tried to resolve the matter with the first respondent before referring it to the Motor Industry Ombudsman of South Africa (MIOSA). The MIOSA recommended that the first respondent take accountability under section 56(2)(a) of the CPA and have the motor vehicle repaired at no cost to the consumer and claimed from the extended warranty. On the strength of the above, the applicant formed a reasonable suspicion that the first respondent contravened certain provisions of the CPA.
10. The first respondent filed an answering affidavit. The deponent is Mr van Aswegen. He averred that he was duly authorised to depose to the first respondent's answering affidavit and that he had full knowledge of the facts regarding this matter. The essence of the first respondent's defence is that the first respondent pointed out the quality of the motor vehicle and the risks to the complainant. The first respondent also indicated to the consumer that she needed to take the warranty due to the high odometer reading. The consumer accepted the risks and freely and voluntarily chose a service and maintenance plan as part of an extended warranty. The motor vehicle broke down towards the end of February 2021 when the odometer reading was 217 150 km. At no stage during the transaction or when the agreement was entered into did the first respondent foresee that the motor vehicle had any faults. The motor vehicle was in good

working order and was free of any defects. The first respondent argued that an expert report had not been filed to indicate what was wrong with the gearbox and what caused the motor vehicle to break down.

11. The applicant filed a replying affidavit. The deponent is Ms Mabuza. First, the applicant denies that the deponent of the first respondent's answering affidavit has personal knowledge of the facts contained therein. Ms Mabuza further argued that there is no material in the first respondent's answering affidavit to establish the deponent's personal knowledge of the facts contained therein and that the confirmatory affidavit of Gerhardus Johannes Benjamin Coetzer does not assist the deponent to the first respondent's answering affidavit. She submitted that the matter should be decided as though no valid opposing papers have been filed. She further submitted that it is unnecessary for the applicant and the consumer to produce an expert report. The consumer and the applicant's case is based on the fact that within four months of delivery of the motor vehicle to the complainant, the motor vehicle failed. She further stated that the complainant's purchase of an additional extended warranty does not absolve the first respondent of its obligations in terms of the CPA concerning the implied warranty and the consumer's right to return goods.

HEARING

12. On the day of the hearing, the applicant and the first respondent's legal representatives requested an opportunity to discuss settlement and later presented the settlement agreement to the Tribunal. The salient aspects of the settlement agreement are that within 15 days of the date of settlement, the first respondent will pay the consumer, Jurie Smit, the sum of R28 000.00, it being the cost of repairs to the motor vehicle together with interest thereon in accordance with the Prescribed Rate of Interest Act 55 of 1975 from 26 June 2021, the date on which it was paid by the complainant for the repairs, to the date of final payment.
13. During the hearing, Mr van Aswegen confirmed that, as stated in paragraph 12.2 of the first respondent's answering affidavit, the first respondent's correct name is Coewet CC trading as Berea Motors, a Close Corporation with registration number: B1999/024167/23 with its registered address at 19 Viney Street, Potchefstroom, North West Province.

ISSUES TO BE DECIDED

14. The Tribunal considered and confirmed the settlement agreement ex tempore.

THE LAW

15. Section 74 of the CPA states –

- “(1) If a matter has been investigated by the Commission, and the Commission and the respondent agree to the proposed terms of an appropriate order, the Tribunal, or a court, without hearing any evidence, may confirm that agreement as a consent order.
- (2) After hearing a motion for a consent order, the Tribunal or a court must:
- (a) make an order as agreed to and proposed by the Commission and the respondent;
 - (b) indicate any changes that must be made in the draft order before it will make the order; or
 - (c) refuse to make the order.
- (3) With the consent of a complainant, a consent order confirmed in terms of subsection (1) may include an award of damages to the complainant.”

16. Rule 20(1) of the Tribunal Rules states -

“The Tribunal may confirm a resolution or agreement as a consent order:

- (a) on application by the facilitator of that resolution or agreement; and
- (b) without hearing any evidence.”

CONSIDERATION OF THE MERITS

17. In *Eke v Parsons*,¹ the Constitutional Court held that a court must not be mechanical in its adoption of the terms of a settlement agreement, nor is it obligated to accept anything agreed to by the parties and make it an order. The order can only be granted if it is “competent and proper”. This means that the agreement must relate to an issue or litigation between the parties, and the terms of the agreement must be capable of being included in the order, both from a legal and practical point of view. The terms of the agreement must also not be at odds with public policy and must hold some practical and legitimate advantage. Therefore, the Tribunal has a wide discretion in this regard, which must be exercised judicially and in line with the purposes of the NCA.
18. In this instance, the Tribunal, having considered the papers filed, is satisfied that the parties agreed that the terms of their settlement agreement be made a consent order. The settlement agreement relates to an issue of the respondent failing to comply with certain provisions of the CPA, and the terms of the agreement are capable of being confirmed as a consent order, both from a legal and practical point of view. Furthermore, the terms of the agreement are not contrary to public policy. They are legitimately

¹ (CCT214/14) [2015] ZACC 30; 2015 (11) BCLR 1319 (CC); 2016 (3) SA 37 (CC) (29 September 2015), at para 25 - 26.

advantageous to the parties as it will prevent further litigation between them. Therefore, the interests of justice favour confirming the settlement agreement as an order of the Tribunal.

CONCLUSION

19. The Tribunal is persuaded that granting the order sought and confirming the settlement agreement and its terms as a consent order is appropriate.

ORDER

20. Accordingly, the Tribunal makes the following order:

20.1. The settlement agreement concluded by the applicant and the first respondent on 16 February 2024, which is annexed to this ruling and marked as "Annexure A to National Consumer Commission v Berea Motors CC & Another, NCT/264659/2023/73(2)(b)", is confirmed and made an order of the Tribunal in terms of section 74(1) of the CPA.

20.2. Within 15 days of the date of settlement being 16 February 2024, Coewet CC trading as Berea Motors, a Close Corporation with registration number B1999/024167/23 with its registered address at 19 Viney Street, Potchefstroom, North West Province, must pay the sum of R28 000.00 together with interest thereon in accordance with the Prescribed Rate of Interest Act 55 of 1975 from 26 June 2021 to the date of final payment into Jurie Smit's Capitec Bank account whose complete details are specified in the settlement agreement annexed to this ruling.

20.3. There is no cost order.

Thus, done and signed on 16 February 2024.

[signed]

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Dr A Potwana

Tribunal Member

Ms N Maseti (Presiding Tribunal Member) and Mr S Mbhele (Tribunal Member) concur.

Authorised for issue by The National Consumer Tribunal

National Consumer Tribunal

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