

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

Case Number: NCT/299966/2023/73(2)(b)

In the matter between:

NATIONAL CONSUMER COMMISSION

APPLICANT

AND

**DELPORT GEARBOX &
DIFF SPECIALIST (PTY) LTD**

RESPONDENT

Coram:

Ms P Manzi-Ntshingila	-	Presiding Tribunal Member
Mr S Hockey	-	Tribunal Member
Mr S Mbhele	-	Tribunal Member

Date of hearing	-	06 February 2024
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Date of ruling	-	21 February 2024
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JUDGMENT AND REASONS

THE PARTIES and REPRESENTATION

1. The applicant is the National Consumer Commission (the NCC), an organ of state established in terms of section 85(1) of the Consumer Protection Act, 2008. At the hearing of this matter, the NCC was represented by Mr Eric Jabulani Mbeje, the Divisional Head of Legal Services of the NCC.

2. The respondent is Delport Gearbox and Diff Specialist (Pty) Ltd (the respondent), a supplier as defined in section 1 of the CPA. This matter was set down on an unopposed basis, but at the hearing, Mr Quentin Deport appeared. He informed the Tribunal's presiding officer that his appearance was to observe the proceedings as it affected his business.

TERMINOLOGY

3. A reference to a section in this ruling refers to a section of the CPA, and a reference to a rule refers to the Rules of the National Consumer Tribunal (the Rules)¹.

APPLICATION TYPE AND JURISDICTION

4. This is an application in terms of section 75(1)(b). This section authorises the NCC to refer a matter to the National Consumer Tribunal (the Tribunal) after it investigated a complaint it received from a consumer.
5. The NCC received a complaint against the respondent from a consumer, Mr Jaime Ulrich Webber (the consumer), on 5 August 2021. The complaint was investigated, and it was alleged in the investigation report that the respondent contravened provisions of the CPA, as will be discussed below.

CONSIDERATION OF THE EVIDENCE ON AN UNOPPOSED BASIS

6. The NCC served the application papers on the respondent at its place of business on 24 November 2023, where it was received and signed for by one of the respondent's employees, named François².

¹ 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).

² See page 4 of the record.

7. In Form TI.73(2)(b), which is part of the application papers, the respondent was informed that it could oppose the application by serving an answer to the application within 15 business days of receipt of the application.
8. On 28 November 2023, the registrar of the Tribunal issued a notice of filing indicating that the application complies with the requirements of the Tribunal's rules. The respondent was again reminded that it may oppose the application by filing an answer within 15 business days from the date of receipt of the application.
9. The respondent failed to file an answering affidavit, and the matter was set down for hearing on 6 February 2024.
10. As the respondent failed to file an answering affidavit, the matter was considered on an unopposed basis.
11. In terms of rule 13(5), 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.

BACKGROUND

12. In its founding affidavit, the NCC states that between September and October 2020, the consumer entered into a verbal agreement with the respondent, in terms of which the respondent undertook to recondition an automatic gearbox for the consumer's vehicle.
13. The gearbox was sent to the respondent by a courier service on 20 October 2020 and was delivered the following day.
14. On 27 October 2020, upon completion of the repairs on the gearbox, the respondent sent the consumer an invoice for R35 017,50. The invoice indicated a warranty on the repairs for six months or 10 000 kilometres.

15. The consumer duly paid the R35 017,50 and arranged that the gearbox be delivered by courier to Algoa Toyota, Port Elizabeth (Algoa Toyota), to be fitted to the consumer's vehicle.
16. On 26 November 2020, Algoa Toyota informed the consumer that the gearbox had been fitted but was still leaking oil and gears were slipping when it was test-driven. On the same day, the consumer informed the respondent about these defects and asked the latter to contact Algoa Toyota to arrange a repair or refund, as the vehicle was unfit to be driven due to the unsatisfactory repair work done to the gearbox.
17. On 1 December 2020, the consumer received an email from the respondent requesting him to provide the respondent with pictures and video clips of the leaking oil, torque converter, gearbox, engine belt and, flexplate and torque converter bolts.
18. Algoa Toyota informed the consumer that taking the photos and video clips, as requested by the respondent, was a major exercise and that great expenses would have to be incurred to remove the gearbox and, thereafter, remove a lot of parts thereof.
19. The respondent obtained advice from various gearbox specialists and was informed that pictures and video clips cannot be used to diagnose the defects in the gearbox. Instead, a full diagnostic test was required.

THE APPLICANT'S SUBMISSIONS AND ANALYSIS

Regarding section 57(1)

20. The NCC submits that the respondent contravened section 57(1). This section provides for a warranty by a service provider for any new or reconditioned part installed during any repair or maintenance work and the labour required to install it

for a period of three months after the date of installation or such longer period as the supplier may specify in writing.

21. In support of the above submission, the NCC referred the Tribunal to the respondent's warranty terms and what was stated on its invoice. The latter document is dated 27 October 2020 and confirms the respondent's guarantee of six months or 10,000 kilometres. It further states that there is no guarantee on labour, amongst others.
22. Section 57(1) requires a warranty for the installation of any new or reconditioned part installed during any repair or maintenance work. It does not require a warranty on labour costs, as argued for by the NCC. In any event, the installation of the reconditioned gearbox was not done by the respondent but by Algoa Toyota.
23. In the circumstances of the above, the Tribunal does not agree that the respondent contravened section 57(1) as argued for by the respondent.

Regarding section 48(1)(c)(i) and (iii).

24. Section 48(1)(c) states that a supplier must not:

“(c) require a consumer, or other person to whom any goods or services are supplied at the direction of the consumer—
(i) to waive any rights;
(ii) assume any obligation; or
(iii) waive any liability of the supplier,
on terms that are unfair, unreasonable or unjust, or impose any such terms as a condition of entering into a transaction.”

25. The NCC submits that the respondent transgressed the aforesaid section in that it excluded a warranty on labour. As such, the respondent's action resulted in the waiver of the consumer's right in terms of section 57(1). It is further argued that the

exclusion of warranty on labour constitutes a waiver that is unfair, unreasonable or unjust.

26. As discussed under the alleged contravention of section 57(1) above, the right to a warranty in respect of labour is provided for only in relation to the installation of a new or reconditioned part installed during any repair or maintenance work. Other than this, there is no right to a warranty on labour, which the respondent can be said to have transgressed.

27. In the result, the Tribunal does not agree that the respondent contravened the provisions of section 48(1)(c)(i) and (iii) as alleged.

Regarding section 48(1)(a)(ii).

28. Section 48(1)(a)(ii) prohibits a supplier from offering to supply, supply or enter into an agreement to supply any goods or services on terms that are unfair, unreasonable or unjust. Section 48(2)(a) states that a transaction or agreement, a term or condition thereof is unfair, unreasonable or unjust if it is excessively one-sided in favour of any person other than the consumer or other person to whom goods or services are to be supplied.

29. The NCC submits that the respondent contravened section 48(a)(ii) by having included the following clause in its warranty:

“Delport Gearbox & Diff Specialists is the sole judge of what constitute a valid claim or other cause of a fault.”

30. The Tribunal agrees with the NCC that the above clause is excessively one-sided in favour of the respondent. The clause purports to make the respondent the sole clincher of what constitutes a valid claim or any cause of a fault. If such a clause is to stand, it would prevent a consumer from obtaining an independent expert opinion as to what a cause of a fault or a valid claim may be.

31. By inserting the aforementioned clause in its warranty, the respondent has contravened section 48(1)(a)(ii).

Regarding sections 54(1)(b) and (c) read with section 54(2).

32. The NCC submits that the respondent contravened section 54(1)(b) and (c) read with section 54(2). Section 54(1)(b) and (c) provides:

“When a supplier undertakes to perform any services for or on behalf of a consumer, the consumer has a right to—

(a) ...

(b) the performance of the services in a manner and quality that persons are generally entitled to expect;

(c) the use, delivery or installation of goods that are free of defects and of a quality that persons are generally entitled to expect, if any such goods are required for performance of the services”.

33. Section 54(2) provides that if a supplier fails to perform a service to the standards contemplated in section 54(1), the consumer may require the supplier to either remedy any defect in the quality of the service performed or goods supplied or a refund to the consumer a reasonable portion of the price paid for the services performed or goods supplied, having regard to the extent of the failure.

34. The service that the respondent was required to perform was to recondition the gearbox of the consumer’s vehicle. In terms of section 54(1)(b), the consumer was entitled to a performance of this service in a manner and quality that persons are generally entitled to expect. In this instance, the consumer was entitled to expect the service to result in a gearbox that was in a good working condition.

35. The reconditioned gearbox, however, was anything but in good working condition. It was leaking oil, and the gears were slipping. In terms of the aforementioned section read with section 54(2), therefore, the consumer was entitled to a refund of a reasonable proportion of the price paid for the services or to have the defect

remedied. The consumer requested these in the alternative, but neither was forthcoming. Instead, the respondent requested photographs and video clips which, according to the evidence on record, could only be taken at great expense to the consumer.

36. As for the alleged transgression of the consumer's right contained in 54(1)(c), this matter does not concern the use, delivery or installation of goods that are required for the performance of a service. This subsection is, therefore, not applicable to the circumstances of the current matter.

37. The consumer requested a repair or refund from the respondent on 26 November 2020. When the consumer referred his complaint to the NCR in July 2021, he requested a reimbursement of the price he paid for the defective repairs. The respondent was, therefore, aware of the consumer's request for a refund.

38. Section 54(2)(b) entitles the consumer to a reasonable portion of the price paid for the services performed, having regard to the extent of the failure. The gearbox remains in a state of disrepair and cannot be used by the consumer. The NCC, therefore, argues that the Tribunal orders a refund of the full price paid by the consumer for the services performed. Taking these factors into consideration and the constraints contained in section 54(2)(b), the Tribunal is of the view that a refund of R34 000,00 is appropriate.

ADMINISTRATIVE FINE

39. The NCC requests an administrative fine of R100 000,00 be imposed on the respondent.

40. Section 112 empowers the Tribunal to impose an administrative fine in respect of prohibited or required conduct. Such fine may not exceed the greater of 10% of the respondent's annual turnover during the preceding financial year, or R1 000 000,00.

41. The Tribunal has a discretion whether to impose a penalty or not. The Tribunal has already concluded that the respondent contravened provisions of the CPA. These contraventions are considered serious and a disregard for the consumer's rights under the CPA. It follows that the transgression should be declared prohibited conduct, and the Tribunal is of the view that that an administrative fine would be appropriate.

42. Section 112(3) outlines seven factors the Tribunal must consider when determining an appropriate administrative fine. These factors will be considered below:

42.1. The nature, duration, gravity and extent of the contraventions.

The consumer paid the respondent to recondition its gearbox, which remains in disrepair. The matter has been ongoing for almost three years. The respondent sought to enter into the agreement with the consumer in an unacceptable, one-sided manner and contrary to the provisions of the CPA.

42.2. Any loss or damage suffered as a result of the contraventions.

Besides payments made to the respondent, the consumer also had to pay the costs to courier the gearbox to and from the respondent's premises and for the installation by Algoa Toyota of R24 650,25.

42.3. The behaviour of the respondent.

The respondent disregarded the consumer's rights under the CPA and was slow to respond to any queries from the NCC.

42.4. The market circumstances in which the contraventions took place.

We live in a society where consumers such as the present have weak bargaining power and are open to exploitation. These are the very reasons why the CPA seeks to protect such consumers.

42.5. The level of profit derived from the contraventions

The consumer paid the respondent over R35 000,00. It is, however, impossible to determine the level of profit derived from the respondent's contraventions.

42.6. The degree to which the respondent has cooperated with the commission and the Tribunal.

The respondent cooperated with the NCC's investigation but was slow in responding to the latter's queries.

42.7. Whether the respondent has previously been found in contravention of the CPA.

42.8. There is no evidence to suggest that the respondent had previously contravened provisions of the CPA.

43. After carefully considering the above factors, the Tribunal finds that an administrative fine of R15 000.00 would be appropriate.

THE ORDER

44. In the result, the Tribunal makes the following order:

44.1. It is declared that the respondent contravened;

44.1.1. Section 48(1)(a)(ii).

44.1.2. Section 54(1)(b) read with section 54(2).

44.2. The contraventions listed above are declared to be prohibited conduct.

45. The respondent shall refund the consumer R34 000,00 as a reasonable portion of the price paid by the consumer for the services performed by the respondent. This amount shall be paid into a bank account elected by the consumer within 15 days of the issuing of this order.

46. The respondent shall pay an administrative fine of R15 000.00 within one month of the issuing 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/299966/2023/73(2)(b) and name of the person or business making the payment.

47. There is no order as to costs.

S Hockey (Tribunal member)

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

Authorised for issue by The National Consumer Tribunal

National Consumer Tribunal

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