

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

Case number: **NCT/340381/2024/73(2)(b)**

In the matter between:

NATIONAL CONSUMER COMMISSION

APPLICANT

and

AVURA MOTORS T/A AVURA EXECUTIVE AUTO

RESPONDENT

Coram:

Ms N Maseti - Presiding Tribunal member

Dr MC Peenze - Tribunal member

Adv C Sassman - Tribunal member

Date of hearing - 25 September 2024

Date of Judgment - 8 January 2025

JUDGMENT AND REASONS

THE PARTIES

1. The applicant is the National Consumer Commission (the applicant), a juristic person established in terms of section 85(1) of the Consumer Protection Act 68 of 2008 (CPA). The applicant is responsible for enforcing the CPA by monitoring the consumer market to ensure prohibited conduct and offences are prevented or detected and prosecuted.
2. At the hearing, the applicant was represented by Ms Imrhan Magoro, the applicant's legal advisor.
3. The respondent is Avura Motors, trading as Avura Executive Auto (the respondent). The respondent is a private company registered in terms of the company laws of the Republic of South Africa, with registration number 2010/019422/07 and is defined as a supplier in section 1 of the CPA.

4. At the hearing, the respondent was represented by Shawn Van Niekerk, an attorney employed by Du Plessis & Van Der Westhuizen Incorporated.

TERMINOLOGY

5. A reference to a section in this judgment refers to a section of the CPA unless stated otherwise.

APPLICATION TYPE

6. This is an application in terms of section 73(2)(b) in which the applicant alleges that the respondent has contravened certain provisions of the CPA and, in doing so, has engaged in prohibited conduct.

BACKGROUND

7. On 15 July 2022, Vukani Colimear Muthaki (the consumer) purchased a pre-owned 2014 Mazda vehicle from the respondent for R288 577.50 (two hundred and eighty-eight thousand five hundred and seventy-seven rand and fifty cents). The applicant alleges that the vehicle presented certain problems and became inoperable within the first twenty-eight days of the sale. The consumer informed the respondent of the vehicle's condition and requested the vehicle's repair, but the respondent denied any liability and maintained that the vehicle was sold in good condition without any defects. The consumer was quoted a cost of R106 088.28 (one hundred and six thousand and eighty-eight rand and twenty-eight cents) for repairing the vehicle.
8. The consumer filed a claim under his mechanical warranty with his insurer, Innovation Group.¹ His insurer assessed the vehicle and concluded it had overheated and required engine reconditioning. The insurer paid R75 000.00 (seventy-five thousand rand) towards the cost of the repairs, and the consumer paid the balance of R31 088.28 (thirty-one thousand and eighty-eight rand and twenty-eight cents) himself.
9. On 5 September 2022, the consumer filed a complaint with the Motor Industry Ombudsman of South Africa (MIOSA). On 18 November 2022, MIOSA concluded that since the repairs had already been done and paid for, it did not have the requisite jurisdiction to recommend a claim for damages, a refund, or compensation.

¹ Claim number 659375.

10. On 28 November 2022, the consumer filed a complaint with the applicant for relief. Based on the above, the applicant formed a reasonable suspicion that the respondent had committed contraventions of the CPA and investigated the complaint. The applicant's investigation concluded that the respondent had contravened section 56(2) read with section 55(2). The applicant seeks an order confirming the contraventions, declaring that they amount to prohibited conduct and other further relief.

THE APPLICANT'S SUBMISSIONS

11. At the hearing and in its papers, the applicant submitted that the respondent's actions amount to a contravention of section 56(2) read with section 55(2) since the vehicle sold to the consumer was defective and the respondent refused to repair the defects when requested to do so.
12. The applicant further submitted that the respondent's reason for refusing to repair the vehicle was that the vehicle was sold with a 1000km or 30-day warranty. The respondent denied any liability for repairing the vehicle since the consumer had already driven more than 1000km.
13. The applicant requests the Tribunal to declare the respondent's contraventions prohibited conduct and impose an administrative fine of R1 000 000.00 (one million rand) on the respondent. It further seeks a certificate in terms of section 115(2) for the consumer to claim damages in a civil court and an interdict preventing the respondent from engaging in the same or similar conduct in the future.

THE RESPONDENT'S SUBMISSIONS

14. The respondent opposes the application and denies that it contravened any provision of the CPA. The respondent had the vehicle serviced on 17 May 2022, approximately two months before it was sold to the consumer. The service included a check of the cooling system, and no faults were reported.
15. The respondent referred the Tribunal to the consumer's insurer's assessor report detailing the assessment conducted on the vehicle on 16 September 2022. The assessor recorded the damage to the vehicle as a blown cylinder head gasket due to overheating. The assessor's report confirmed that the cause of the overheating was difficult to establish but was likely due to water loss since all the cooling system components were corroded and contaminated with rust due to prolonged operation with insufficient coolant mixture.

16. The respondent submitted that the consumer drove approximately 4000km after taking possession of the vehicle and contends that it was the consumer's responsibility to maintain the vehicle and that his own negligence and failure to do so resulted in the vehicle overheating. The consumer cannot rely on the implied warranty provided under the CPA, and the application should be dismissed.

APPLICABLE SECTIONS OF THE ACT

17. Section 73(2)(b) states that if the applicant believes that a person has engaged in prohibited conduct, the applicant may refer the matter to the Tribunal for adjudication.

18. Section 55(2) (a-d) states that consumers have the right to receive goods that are reasonably suitable for their intended purposes. They have a right to goods that are of good quality and in good working order. The goods must be free of any defects and be useable and durable for a reasonable time. The goods must also comply with any applicable standards set under the Standards Act 29 of 1993 or any other public regulation.

19. Section 56(2) states that within six months after the delivery of goods to a consumer, the consumer may return the goods to the supplier, without penalty and at the supplier's risk and expense, if the goods fail to satisfy 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 OF THE EVIDENCE

20. Neither party disputes the consumer's insurer's assessor report and the damage to the vehicle indicated in it. However, the respondent maintains that the damage was caused by the consumer's own negligence in not sufficiently maintaining the vehicle while using it. In contrast, the applicant alleges that the cause of the damage was a latent defect present at the time of the sale of the vehicle that only manifested some twenty-eight days later.

21. In terms of section 117, the standard of proof in proceedings before the Tribunal is on a balance of probabilities. In this respect, the Tribunal is persuaded that the assessor's finding that damage to the vehicle was likely caused by water loss due to the corrosion and rust contamination of all the cooling system components cannot be attributed to the consumer's negligence. The Tribunal is not convinced that the relatively short period in

which the applicant drove the vehicle can account for the assessor's finding that there was a prolonged operation of the vehicle with insufficient cooling mixture, leading to possible water loss, rust and corrosion of all the cooling components. On a balance of probabilities, the Tribunal is inclined to agree with the applicant that this type of corrosion and rust contamination was a latent defect in the vehicle at the time of its sale.

22. No evidence before the Tribunal suggests that the damage was caused by the consumer's negligence or normal wear and tear while the consumer had the vehicle. By the respondent's own admission during the hearing, the consumer was not required to service the vehicle between the time he took possession of it and the time it overheated. Further, there is no evidence that the consumer ignored any warning signals that the vehicle needed to be checked or that it was overheating. There is, therefore, no evidence of any misuse of the vehicle by the consumer or any failure to take reasonable steps required to maintain the vehicle within the period of usage.
23. The evidence before the Tribunal indicates that the vehicle was defective when sold and that the defect only manifested itself later. The evidence further indicates that the respondent refused to repair the vehicle when the consumer requested it be repaired. Therefore, the respondent's conduct amounts to a contravention of sections 55(2) and 56(2)(a). The contraventions are serious and amount to prohibited conduct.
24. The applicant has not requested a refund for the amount paid for repairs by the consumer or his insurer. Instead, it requests that the consumer be issued a certificate in terms of section 115(2) to claim his damages in a civil court. The fact that the consumer could claim a portion of the cost of repairing the vehicle from his insurer cannot absolve the respondent of its statutory obligations under section 56(2)(a) to repair the vehicle at its own expense. The respondent must be held accountable for these costs.
25. The rights afforded to consumers under the CPA are there to protect consumers, and an infringement of these rights can have serious financial consequences for consumers. Section 4(2)(b)(ii) requires the Tribunal to make appropriate orders to give practical effect to a consumer's right of access to redress, which includes making any innovative order that better advances, protects, promotes and assures the realisation by consumers of their rights in terms of the CPA. Section 150(i) of the National Credit Act 34 of 2005 (NCA) further empowers the Tribunal to make any appropriate order required to give effect to a consumer's right in terms of the NCA or CPA when making a finding of prohibited conduct.

26. Since the consumer elected to have the vehicle repaired, the vehicle's repair cost was for the respondent's account. The Tribunal finds it appropriate for the respondent to refund the consumer and his insurer, respectively, for the amounts each paid to cover the repair costs.
27. The respondent's contraventions of the CPA, constitute prohibited conduct and warrant the imposition of an interdict in terms of section 150(b) of the NCA. It further warrants the imposition of an administrative fine in terms of sections 150(c) of the NCA.

ADMINISTRATIVE FINE

28. The applicant requested the Tribunal to impose an administrative fine on the respondent. The Tribunal is satisfied that the nature of the respondent's 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 respondent are undoubtedly the type of conduct the CPA seeks to prohibit. Once it finds the respondent has engaged in prohibited conduct, the Tribunal has a duty to exercise its powers by sending a clear and strong message to suppliers that such conduct will not be permitted.
29. 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

The evidence shows that the contraventions are serious, displaying a total disregard for the CPA and the consumer's rights. There is no evidence before the Tribunal that the contraventions are continuous or repeated. However, the nature and extent of the contraventions warrant serious action against the respondent.

Any loss or damage suffered as a result of the contravention

The consumer was exploited by the sale of a vehicle which was not of good quality. After purchasing the vehicle, he could not enjoy its full use and benefits. The purchase resulted in an inconvenience and financial prejudice to the consumer.

The behaviour of the respondent

The respondent completely disregarded consumer rights and did not attempt to resolve the matter. Despite evidence to the contrary, it remains steadfast in its belief that it has not contravened the CPA.

The market circumstances in which the contravention took place

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

The level of profit derived from the contravention

The respondent benefited from the purchase price paid by the consumer.

The degree to which the respondent has co-operated with the applicant and the Tribunal

The respondent co-operated with the applicant's inspector during the investigation and provided a comprehensive answer to the applicant's allegations made to the Tribunal.

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

There is no evidence that any prior investigations or enforcement action was instituted against the respondent.

30. 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 respondent. 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 (one million rand). 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 (one million rand).
31. The respondent's conduct has displayed little or no regard for the spirit and purpose of the CPA, and therefore, the Tribunal finds that a fine of R100 000.00 (one hundred thousand rand) will be appropriate.

CONCLUSION

32. The respondent contravened sections 55(2)(a) – (d) and 56(2)(a). On this basis, the respondent is found to have engaged in prohibited conduct. The Tribunal finds that an administrative fine is appropriate as a punitive measure in this instance. The respondent

must further be held accountable for refunding the costs of repairing the vehicle and be prohibited from engaging in the same or similar conduct in the future through an interdict.

ORDER

33. Accordingly, the Tribunal makes the following order:

- 33.1 The respondent contravened section 55(2)(a) – (d) of the CPA;
- 33.2 The respondent has further contravened section 56(2)(a) of the CPA;
- 33.3 The respondent's contravention of sections 55(2)(a) – (d) and 56(2)(a) of the CPA is declared prohibited conduct;
- 33.4 An interdict is granted prohibiting the respondent from engaging in the same or similar prohibited conduct in future;
- 33.5 The respondent is ordered to refund the consumer, Vukani Colimear Muthaki, R31 088.28 (thirty-one thousand and eighty-eight rand and twenty-eight cents) within 30 (thirty) business days of this judgment being issued;
- 33.6 The respondent is ordered to refund the consumer's insurer, Innovation Group, R75 000.00 (seventy-five thousand rand) within 30 (thirty) business days of this judgment being issued;
- 33.7 The respondent must, within 60 (sixty) business days of this judgment being issued, pay an administrative fine of R100 000.00 (one hundred thousand rand) into the National Revenue Fund referred to in section 213 of the Constitution² using the following bank account details:

Bank: Nedbank Limited

Account holder: Department of Trade, Industry and Competition

Account type: Current account

Account number: 126 884 7941

Branch name: Telecoms and Fiscal

Branch code: 198765

Reference: NCT/340381/2024/73(2)(b) and the name of the person or business making the payment; and

² Constitution of the Republic of South Africa, Act 108 of 1996.

33.8 There is no cost order.

Adv C Sassman
Tribunal member

Presiding Tribunal member Ms N Maseti and Tribunal member Dr MC Peenze concur.

Authorised for issue by The National Consumer Tribunal

National Consumer Tribunal

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