

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

Case Number: **NCT/246983/2022/73(2)(b)**

In the matter between:

**NATIONAL CONSUMER COMMISSION**

**APPLICANT**

And

**WP MOTORS SALES (PTY) LTD**

**FIRST RESPONDENT**

**T/A WP MOTORS**

**MFC, A DIVISION OF NEDBANK LTD**

**SECOND RESPONDENT**

*Coram:*

Ms N Maseti - Presiding Tribunal Member

Ms Z Ntuli - Tribunal Member

Dr MC Peenze - Tribunal Member

Date of Hearing - 24 October 2024

Date of Judgment - 17 February 2025

**JUDGMENT AND REASONS**

**THE PARTIES**

1. The applicant is the National Consumer Commission (the applicant), a statutory body established under Section 85(1) of the Consumer Protection Act 68 of 2008 (the CPA). Mr J E Mbeje (Mr Mbeje), the applicant's divisional head of legal services, represented it at the hearing.

2. The first respondent is WP Motors Sales (Pty) Ltd (the first respondent), a private company incorporated under South African law with registration number 2001/030458/07. The first respondent is a supplier, as defined in section 1 of the CPA. Advocate C Fehr of the Pretoria Bar, instructed by GVS Law, a law firm based in Cape Town, represented the applicant at the hearing.
3. The second respondent is Micro Finance Corporation (MFC), a division of Nedbank Limited (the second respondent), a public company incorporated under South African law with registration number 1951/0000009/06. The second respondent is a duly registered credit provider under the National Credit Act 34 of 2005 (the NCA). The second respondent was not represented at the hearing and does not oppose the matter.

## **TERMINOLOGY**

4. A reference to a section in this judgment refers to a section in the CPA. A reference to a rule in this judgment refers to the Rules of the National Consumer Tribunal.<sup>1</sup>

## **JURISDICTION**

5. Section 27(1)(a)(ii) of the NCA empowers the National Consumer Tribunal (the Tribunal) or a Tribunal member acting alone to adjudicate claims of prohibited conduct by determining whether prohibited conduct has occurred and, if so, by imposing a remedy provided for in the NCA.
6. Section 150 of the NCA empowers the Tribunal to make an appropriate order concerning prohibited or required conduct under the NCA or the CPA. Therefore, the Tribunal has jurisdiction to hear this application.

## **APPLICATION TYPE AND THE RELIEF SOUGHT**

7. This is an application in terms of section 73(2)(b). After investigating a complaint, the applicant decided to refer the matter to the Tribunal for adjudication.

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<sup>1</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).

8. According to Form TI.73(2)(b) CPA, the applicant requests the Tribunal to make an order in the following terms:
  - 8.1 The first respondent's contravention of sections 55 (2) (a) and (b), and 56 (2) (b) be declared prohibited conduct;
  - 8.2 The first respondent be interdicted from engaging in conduct fully detailed in paragraph 8.1 above;
  - 8.3 Directing the first respondent to refund to the consumer the purchase price of the 2015 Ford Ranger 2.2 TDCI, XLS D/C (the vehicle), which the consumer purchased from the first respondent, valued at R276 607,49, plus interest thereon at a prescribed interest rate as of 21 January 2020;
  - 8.4 Directing the first respondent to pay amounts mentioned in paragraph 8.3 above, within 15 days of the date of judgment;
  - 8.5 Directing the first respondent to pay an administrative penalty, into the National Revenue Fund referred to in section 213 of the Constitution of the Republic of South Africa of R200 000,00; and
  - 8.6 Any other appropriate order contemplated in section 4(2)(b)(ii).

## **BACKGROUND**

9. The applicant received a complaint on 18 August 2021 from Fernell Waydon Pretorius (the consumer), who allegedly purchased the vehicle from the first respondent on 17 January 2020 for R276,607.49. The second respondent financed the vehicle. The vehicle had a mileage of 115,567 kilometres at the time of purchase. On 19 January 2020, the vehicle suffered engine failure while the consumer's father drove it from Cape Town to Heidelberg. The consumer notified the first respondent, which collected the vehicle on 20 January 2020.
10. On 20 January 2020, the consumer emailed the first respondent indicating his wish to cancel the agreement and get restitution. The first respondent advised that it would

investigate the issue and revert. The consumer followed up by email on 21 January 2020, reiterating the option to cancel the agreement to avoid financial implications. The first respondent refused to cancel the agreement and insisted on repairing the vehicle at its cost, contrary to the consumer's instruction. The first respondent said that driver negligence caused the breakdown without providing any reports to the consumer.

11. This dispute led to the matter being referred to the Motor Industry Ombudsman of South Africa (MIOSA) under reference number 366679 on 6 July 2020. On 22 April 2021, MIOSA recommended that the agreement be cancelled, as requested by the consumer. The first respondent did not adhere to the MIOSA recommendation. The consumer escalated the complaint to the applicant. After investigating, the applicant concluded that the first respondent contravened sections 55(2)(b), 55(2)(c), and 56(2)(b) and referred the complaint to the Tribunal for adjudication.
12. Following the filing of the application with the Tribunal on 31 October 2022 and leading up to the hearing on 24 October 2024, the matter has been subject to multiple interlocutory applications for condonation of late document filing.
13. On 23 March 2023, the Tribunal Registrar set the main matter down for a hearing on 19 April 2023. At this hearing, the first respondent informed the Tribunal of its intention to introduce new evidence in the form of WhatsApp messages and voice notes (collectively referred to as "the messages"). Consequently, the Tribunal postponed the hearing sine die, ruling that the new evidence was provisionally admitted.
14. On 2 June 2023, the applicant filed an application under rule 15 to amend its prayers, including adding an alternative prayer. The proposed alternative prayer sought a declaration that the first respondent had contravened section 56(3) in that further defects, failures, or unsafe features were discovered within three months after the vehicle had been returned to the consumer after repairs.
15. The rule 15 application was set down unopposed for a hearing on 2 August 2023. However, the first respondent objected to proceeding with the rule 15 hearing on an unopposed basis. The Tribunal then postponed the matter to allow the parties to prepare arguments on the validity of the first respondent's notice opposing the amendment and to determine whether

the amendments should be granted. The postponement order was issued on 31 August 2023.

16. The rule 15 application was set down for hearing on 21 February 2024. The ruling, issued on 29 February 2024, granted an order allowing the founding affidavit to be amended to the extent that relief was sought solely against the first respondent. However, the Tribunal did not permit the addition of the alternative prayer concerning section 56(3). The main matter was thereafter scheduled for a hearing on 20 May 2024.
17. At the hearing, the first respondent sought to raise a point in limine that had not previously been disclosed to either the applicant or the Tribunal. Advocate Fehr explained that this issue had not been raised in the first respondent's papers but requested the Tribunal's indulgence to raise it during the hearing. He further stated that he had been newly briefed following the unavailability of the first respondent's previous counsel. As a result, he had only identified the point in limine while preparing for the hearing.
18. The Tribunal postponed the matter sine die to allow the first respondent to file and serve the point in limine on the applicant and to allow the applicant to file its reply by way of heads of argument. A postponement ruling was issued on 23 May 2024. The main matter was set down for a hearing on 24 October 2024, which occurred virtually via Microsoft Teams.

## **ISSUES TO BE DECIDED**

19. The Tribunal must decide whether the applicant has proved a contravention under the CPA and whether the applicant is entitled in law to the relief sought.

## **AGREED AREAS OF DISPUTE BETWEEN THE PARTIES**

20. This matter was partly heard on 20 May 2024, when the parties narrowed the issues in dispute before presenting arguments. The applicant said the disputed issues are (a) whether the consumer had repudiated his election to cancel the agreement for a refund, (b) the date on which the vehicle was returned to the consumer after repairs, and (c) whether the consumer used the vehicle for approximately 10,000 kilometres after its return. The applicant also alluded that the first respondent was yet to give evidence on the WhatsApp messages that were admitted by the panel for what they are.

21. The first respondent agreed with the issues identified by the applicant but contended that it was disputed that an election to cancel the agreement had occurred in the first place. Furthermore, the first respondent stated that the date of the vehicle's return after repairs was no longer in dispute, as the consumer had already confirmed this fact in a confirmatory affidavit filed with the applicant's replying affidavit.
22. Consequently, the Tribunal's focus is on the agreed areas of dispute. It is noted that the consumer subsequently confirmed that all the WhatsApp messages played during his evidence on 24 October 2024 were between him and Trevor De Bruin (Mr De Bruin) of the first respondent, except for one recording for which the consumer could neither confirm its content nor that it was ever sent to him. No further dispute arose regarding the WhatsApp messages.

## **THE HEARING**

### **THE APPLICANT'S REQUEST TO CALL WITNESSES**

23. During the hearing, the applicant requested permission to call the consumer and Johannes Nicholas Brunt (Mr Brunt) of MIOSA as witnesses. The first respondent objected to calling Mr Brunt as a witness, asserting that the applicant's founding papers made no reference to Mr Brunt. It was argued that Mr Brunt's testimony was irrelevant as the applicant's only reference to MIOSA was on page 3.3.7 of the inspector's report. No objection was raised regarding the consumer.
24. The applicant said Mr Brunt's testimony was essential in proving that the consumer elected to cancel the agreement and get a refund in its complaint to MIOSA. It also asserted that MIOSA's outcome forms part of the applicant's founding affidavit as an annexure. Despite this, the applicant stated that it would no longer call Mr Brunt to testify unless the first respondent persisted in its denial that the consumer elected cancellation for a refund.
25. In motion proceedings, cases are generally decided on the papers submitted by the parties. An expert witness could be called in specific circumstances where significant factual disputes cannot be resolved purely based on affidavits. Further, the calling of witnesses may be allowed where exceptional circumstances justify it. The Tribunal conducts its hearings inquisitorially with discretion regarding the calling of witnesses. As the applicant

abandoned calling Mr Brunt as a witness, the Tribunal proceeded with the applicant, who was permitted to call the consumer to testify.

## THE FIRST RESPONDENT'S POINT IN LIMINE

26. At the hearing, the first respondent argued for the dismissal of the applicant's referral because the inspectors involved in the investigation lacked proper authority because their mandate had expired. The first respondent referenced an investigation directive issued under section 88(1) by its Acting Commissioner, Ms T Mabuza, on 10 January 2022, appointing Mr M Magagula and three others to investigate the matter for three months. However, the inspector's report was signed by Mr Magagula on 25 October 2022, more than six months after the authority had expired.
27. The first respondent further asserted that the applicant attempted to address this issue in paragraph 27 of its replying affidavit, which referred to Annexure A. However, Annexure A was an inspector's report authored by Mr S E Mudau, who was not among the appointed inspectors in this case. Further affidavits were deposed in March 2023, with the consumer confirming that he was contacted for a confirmatory affidavit but could not recall who contacted him from the applicant. Some facts were gathered from the consumer and his father eleven months after the authority had expired. There was no record of an extension of the investigation mandate.
28. Relying on the judgment in *National Consumer Commission v Vodacom (Pty) Ltd*,<sup>2</sup> the first respondent submitted that the inspector had no authority and conducted the investigation beyond the permitted period. The first respondent further asserted that the investigation with the repairer in the inspector's report is undated. Rule 19 does not extend investigation authority. The applicant's attempt to introduce a document referencing an unrelated investigation suggests an awareness of the lapse in authority. Additionally, the applicant acted contrary to its enforcement guidelines.<sup>3</sup>
29. In response, the applicant maintained that the investigation directive issued on 10 January 2022 granted inspectors the authority to investigate the first respondent's activities. The applicant referenced key dates in the inspector's report, demonstrating that fact-gathering

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<sup>2</sup> NCT205517/2022/73(2)(b).

<sup>3</sup> GN 492 of 25 July 2011 Government Gazette No. 34484.

occurred within the authority period. Specifically, the first respondent was notified of the complaint on 12 January 2022, and a questionnaire was issued on 20 January 2022, with the first respondent responding on 2 February 2022.

30. The applicant argued that the directive did not require the inspectors to produce a report within three months but only to conduct the investigation within that time frame. Reference was made to section 99, which distinguishes between an investigation, evaluation, and referral. The investigation authority applied to the investigation role, not the evaluation and referrals processes. The first respondent's reliance on the applicant's investigation guidelines was misplaced, as guidelines do not override legislation.
31. The applicant asserted that the Vodacom case confirms that the investigation occurred within the prescribed period. No further investigation was conducted beyond the initial information or document gathering. The confirmatory affidavit from the consumer was not a new investigation but a response to new issues raised by the first respondent, which is permissible under rule 19. The applicant averred that the investigation remained within the authorised scope and authority. Accordingly, the first respondent's point in limine should be dismissed.

### **THE APPLICANT'S SUBMISSIONS ON THE MERITS**

32. The applicant's version was based on the applicant's written submissions and the consumer's oral testimony, most of which is captured in the background above. After electing to cancel the agreement,<sup>4</sup> the consumer was informed that Mr De Bruin would contact him following an investigation into the issue. On 24 January 2020, Mr Du Bruin called the consumer and advised him that the investigation had concluded that the vehicle's breakdown resulted from driver negligence. He further stated that the agreement would not be cancelled, and the vehicle would be repaired at the first respondent's expense. Despite the consumer's objection, the first respondent proceeded with the repairs.
33. The vehicle was returned to the consumer on 3 June 2020. However, upon inspection, the consumer discovered a water leak and immediately notified the first respondent, who collected the vehicle again on 8 June 2020. Thereafter, the consumer had no further communication with the first respondent. The consumer denied that he repudiated his

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<sup>4</sup> The cancellation was emailed to the respondent on 20 and 21 January 2020, with copies submitted by the consumer during the oral testimony.

election to cancel the agreement by accepting the repaired vehicle, asserting that he was compelled to do so under the threat of accumulating storage fees. Furthermore, he stated that he needed to safeguard the financier's interest and prevent the unauthorised use of the vehicle while it remained in the first respondent's custody. This decision followed a phone call from Mr De Bruin, who pressured him to accept the vehicle to avoid financial repercussions.

34. The applicant contended that the first respondent failed to provide written or oral evidence proving that the consumer had withdrawn his cancellation. On the contrary, the first respondent's own affidavit supporting its condonation application<sup>5</sup> explicitly stated that the consumer elected to cancel the agreement and demanded restitution. Additionally, the consumer's subsequent complaints to MIOSA and the applicant further demonstrated his ongoing intention to cancel the agreement and seek a refund.
35. The applicant also disputed the first respondent's claim that the consumer drove the vehicle for approximately 10,000 kilometres, citing the absence of evidentiary support and emphasising that the timeline did not align with the alleged mileage. According to WhatsApp messages, the vehicle remained in the first respondent's custody for eight to ten weeks before being returned to the consumer on 3 June 2020 and collected again on 8 June 2020. The vehicle was with the consumer between 17 and 20 January 2020 and again between 3 and 8 June 2020. The applicant argued that it is improbable that the consumer could have accumulated such mileage within this period. The consumer suspected the first respondent used the vehicle while it was in its custody, as supported by a traffic fine issued to the consumer in February 2022.<sup>6</sup> This indicated that the vehicle was used while in the first respondent's control.
36. The applicant further contended that reports from Supermac Master Mechanics (Supermac) and Cape Crew Vehicle Centre (Cape Crew) lack confirmatory affidavits and fail to meet the Tribunal's requirements for expert evidence. Due to their failure to comply with procedural rules, these reports should be deemed inadmissible. In addition to relying on hearsay evidence, the applicant asserts that the first respondent's case is fraught with inconsistencies and unsubstantiated claims, warranting dismissal.

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<sup>5</sup> See paragraph 20 of the condonation affidavit, page 124 of the bundle.

<sup>6</sup> See page 190 of the bundle.

37. The applicant also submitted that even if the Tribunal were to find that the consumer repudiated his cancellation, which it denied, the fact remained that the vehicle continued to exhibit faults post-repair, which invoked section 56(3). The applicant asserted that the Tribunal had the authority under section 4(2)(b)(i) to mero motu raise section 56(3). Furthermore, should the Tribunal accept the first respondent's assertion that the consumer drove the vehicle for approximately 10,000 kilometres, which the applicant denied, the consumer was willing to have the corresponding cost deducted from the refund.

### **THE FIRST RESPONDENT'S SUBMISSIONS ON THE MERITS**

38. The first respondent made oral submissions based on its written submissions. It denied all the allegations against it as unsubstantiated. The first respondent challenged the reliability of the applicant's version, asserting that the consumer omitted material information from the complaint form and during the interview with the inspector conducting the investigation, particularly that the vehicle was returned to the consumer on 3 June 2020. It referred to the consumer's response during oral testimony, in which he stated that space constraints prevented him from including this information in the complaint form and that he omitted the said information during the interview with the inspector because he did not want to interrupt the investigation or to jeopardise the case filed with the applicant. The first respondent contended that the consumer misled both the applicant and the Tribunal.
39. The first respondent argued that the applicant failed to prove breaches of sections 55(2)(b), 55(2)(c), and 56(2)(b). It contended that no technical reports were submitted to substantiate that the vehicle was defective at the time of sale, as required to establish a contravention under section 55. Furthermore, the consumer could speculate on the cause of the breakdown as he was not present. The first respondent submitted reports from Supermac and Cape Crew that driver negligence was the cause of the breakdown, thereby excluding the supplier's liability under section 56. It maintained that reliance on sections 55 and 56 was misplaced and that the first respondent had no duty to prove driver negligence.
40. The first respondent asserted that even if the Tribunal were to find that the consumer elected cancellation and restitution, the consumer subsequently accepted the vehicle after repairs and expressed appreciation to the first respondent. It argued that this constitutes a repudiation of his initial election to cancel the agreement. It further argued that the consumer never claimed he was coerced or pressured into accepting the vehicle in any of

the papers the applicant filed. Additionally, the first respondent contended that at no point in the papers did the consumer claim that he was coerced or pressured into accepting the repaired vehicle. Further, the consumer's subsequent request for permission from the first respondent to take the vehicle to a local Ford dealer for an inspection of the leak after repairs had been completed, in the first respondent's view, indicated that he accepted the repaired vehicle. This conduct, the respondent asserted, is inconsistent with that of someone unwilling to accept the vehicle.

41. On the admissibility of evidence, the first respondent conceded that there were no confirmatory affidavits from Supermac and Cape Crew. However, it argued that the panel should prefer its version over the applicant's, given what it described as the consumer's lies and deliberate omissions of material information. Additionally, it maintained that no evidence demonstrated that the consumer explicitly requested a refund. The first respondent further rejected the applicant's reliance on a contravention of section 56(3) as an alternative prayer, asserting that this was not the case the first respondent was required to answer in the applicant's founding papers.

#### **APPLICABLE PROVISIONS OF THE NCA**

42. In the context of goods, section 53 (1) (a) defines a defect as (i) any material imperfection in the manufactured goods that renders the goods less acceptable than persons generally would be reasonably entitled to expect. Alternatively, as (ii) any characteristic of the goods or components that renders them less useful, practicable, or safe than persons generally would be reasonably entitled to expect.
43. Section 55 (2) (a), (b), and (c) respectively give a consumer the right to receive goods that are reasonably suitable for their intended purpose; are of good quality, in good working order, and free of defects; and usable and durable for their normal use for a reasonable time.
44. Section 56 (1) provides that it is implied in an agreement concerning the supply of goods that the retailer warrants that the goods comply with the requirements and standards contemplated in section 55.
45. 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 POINT IN LIMINE

46. The Tribunal considered the parties' submissions with reference to the statutory provisions and case law to determine whether the inspectors operated within their mandated authority and timeframes. In this case, the empowering provision for inspectors to investigate is section 72(1)(d), which empowers the applicant to direct an inspector to investigate the complaint as quickly as practicable. Inspectors must adhere to the statutory boundaries of their investigative powers, ensuring alignment with constitutional principles and legislative intent.
47. According to sections 99(d) and (h), the applicant is responsible for enforcing the CPA by "*(d) investigating and evaluating alleged prohibited conduct and offences*" and "*(h) referring matters to the Tribunal, and appearing before the Tribunal, as permitted or required by this Act*". These provisions distinguish the investigation from evaluation and referral, underscoring the need for investigators to operate strictly within their designated roles. Therefore, the panel is satisfied that what constitutes an investigation is unequivocal.
48. In *Prudential Authority of the South African Reserve Bank v Msiza and Another*,<sup>7</sup> the court dealt with a similar empowering provision in the Financial Sector Regulation Act 9 of 2017 and examined whether the investigator acted within the scope of the authority granted by the Prudential Authority. The court determined that the purpose of such an investigation was to gather information to enable the Prudential Authority to fulfil its regulatory functions, not to make determinations about individuals' conduct. This case highlights the importance of investigators adhering to their informational role without overstepping into adjudicative functions.
49. The Tribunal finds that the applicant's investigation was executed within the authority and timeframe, and there is no evidence of a further investigation after 2 February 2022. The claim that the inspectors overstepped their mandate during this investigation is unsubstantiated. The fact-gathering was conducted within the timeframe set by the

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<sup>7</sup> [2023] ZAGPPHC 313 (2 May 2023).

investigation directive. The fact that the same inspector or investigator may carry out evaluative and referral stages of the process should not detract from what constitutes an investigation. Accordingly, the panel finds that the point in limine must fail.

## **CONSIDERATION OF CONTRAVENTIONS AND PROHIBITED CONDUCT**

50. In the case of Motus Corporation (Pty) Ltd t/a Zambezi Multi Franchise (Renault) South Africa v Abigail Wentzel,<sup>8</sup> the Supreme Court of Appeal confirmed that a consumer's right under section 55(2) exists by law and is protected by section 56. The court further held that not every minor fault qualifies as a defect under the CPA. The panel is satisfied that the applicant demonstrated that the defect was mechanical and serious in nature, within the meaning of section 53(1). The Tribunal accepts that the vehicle had a defect.
51. The first respondent was required to meet the standard set in section 55(2). The consumer had the right to receive a vehicle of good quality, in good working order, and free of defects, regardless of its second or used status. The engine failure rendered the vehicle unusable, requiring the first respondent to collect it. The vehicle cannot be considered durable for a reasonable period, given engine failure within three days. The consumer was deprived of using and enjoying the vehicle he purchased. The Tribunal finds that this contravenes section 55(2)(b) and (c).
52. The consumer was within his rights to demand the cancellation and restitution as the defect occurred within the statutory six-month warranty period. The applicant's evidence supports that the consumer made this election and tendered the return of the vehicle. A claim for restitution means a legal demand to be restored to a previous position where the consumer has the purchase price refunded upon vehicle return. The consumer provided evidence through the emails of 20 January 2020 at 07h38 and 21 January 2020 at 17h00 in which he explicitly requested cancellation. Despite the consumer's direction, the first respondent refused to refund the purchase price to the consumer. The Tribunal finds that this contravenes section 56(2)(b).
53. The first respondent had ample time and opportunity to refund the purchase price. The first respondent's alleged repair costs are immaterial to determining whether it acted according to the consumer's direction as mandated by the CPA. Section 56(2) grants the consumer the right to choose a remedy, not the supplier. The first respondent had no choice but to

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<sup>8</sup> [2021] ZASCA 40.

oblige and failed to do so. The first respondent did not dispute that the engine failed within three days but disputes the cause.

54. The high repair costs of approximately R113,767.61 indicate the extent of the vehicle's defect, although the calculations may have included the unauthorised subsequent repair costs for the water leak. The Tribunal is persuaded that the defect was serious. The evidence shows that it is reasonable to conclude that the consumer's version that the defect existed when the vehicle was sold is more probable. More so, because the defect manifested within three days of delivery to the consumer. An engine is a critical vehicle component for its functioning and overall performance.
55. The Tribunal considered the first respondent's defence that driver negligence caused the damage. The first respondent relies on reports by Supermac and Cape Crew alleging driver negligence. However, as the applicant correctly argued, the reports' authors did not submit a confirmatory affidavit, and the first respondent did not call them to testify. Section 3(1) of the Law of Evidence Amendment Act 45 of 1988 states that hearsay evidence is inadmissible unless all parties agree to its admission, the person upon whose credibility the probative value of such evidence depends on testifies at such proceedings, or the court finds it in the interests of justice to admit it.
56. Any evidence, whether oral or in writing, the probative value of which depends on the credibility of a person other than the person giving the evidence, constitutes hearsay evidence.<sup>9</sup> Accordingly, the Tribunal rejects the first respondent's reports by Supermac and Cape Crew as inadmissible hearsay. The Tribunal notes that the defect manifested within three days of delivery of the vehicle, and further faults transpired even after the vehicle was repaired against the consumer's will. In the absence of admissible evidence to prove negligence, the Tribunal finds it reasonable to conclude that the vehicle had a defect at the time of sale.
57. The Tribunal considered the first respondent's argument that the consumer repudiated his election to cancel the agreement. Section 48(c)(i) and (iii) prohibits suppliers from requiring consumers to waive rights that are granted or the suppliers' obligations entrenched under the CPA. It follows that if a consumer elects to abandon or repudiate his statutory right to a refund, such an election must be communicated in clear and unequivocal terms. In this

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<sup>9</sup> Body Corporate of Argyle Green v Appeal Authority City of Johannesburg and Others (2021/9113) [2024] ZAGPJHC 943 (16 September 2024) Par 13.

case, the consumer denies repudiating his election to cancel and said he accepted the vehicle under economic duress due to the first respondent's threat of storage fees. The evidence shows his continued pursuit of a refund through MIOSA and later the applicant, proving that he did not voluntarily waive or repudiate his right.

58. Therefore, the Tribunal concludes that the consumer's acceptance of the vehicle does not amount to repudiation of his refund claim. On the contrary, the first respondent unfairly placed the consumer in an untenable position by compelling him to accept the vehicle against his will when it insisted on repairing the vehicle. This conduct unconscionably undermines the rights afforded by section 56(2). The acceptance of the vehicle under these circumstances post-repair cannot be used to imply that the consumer repudiated his election to cancel the agreement and receive a refund.
59. The first respondent's refusal to address the dispute further caused the consumer severe inconvenience. The CPA protects consumers and provides remedies against non-compliant suppliers. To deprive the consumer of a refund for over four years has undoubtedly prejudiced him. The first respondent claimed that the vehicle was returned on 6 March 2020, claiming the consumer used it until about November or December 2020. The Tribunal found no evidence to support these allegations. The Tribunal concludes that the first respondent contravened the CPA, contrary to section 3(1)(d), which aims to protect consumers from unfair and deceptive conduct.
60. Consequently, the Tribunal is satisfied that the applicant demonstrated, on the balance of probabilities, that the first respondent violated the applicant's rights under sections 55(2)(b) to (c) and 56(2)(b), which must be redressed. The Tribunal agrees with the applicant that these contraventions should be declared prohibited conduct. The Tribunal finds no basis to accept the alternative prayer concerning section 56(3) because the Tribunal did not grant the applicant's request to add it to the relief sought. The prejudice to the first respondent outweighs any benefit that can be achieved by accepting this alternative prayer. Similarly, the Tribunal finds no basis to consider issues that occurred after the vehicle was repaired because this was not the case the applicant brought before the Tribunal.

## **RELIEF SOUGHT**

61. The Tribunal has wide-ranging powers to make appropriate orders concerning prohibited conduct.<sup>10</sup> Section 150 of the NCA, read with section 4(2) of the CPA, empowers the Tribunal to provide redress concerning the purchase price to give practical effect to the right violated.
62. Regarding the refund, section 4(2)(b)(ii)(bb) appears to empower the Tribunal to grant an order that goes beyond the right (to the price paid for) already afforded to the consumer in terms of the CPA. However, by applying the mandate in section 4(2)(b)(ii)(bb), the Tribunal can readily use a broader inclusive rather than a distractive interpretation of the CPA as a whole.<sup>11</sup>
63. Section 1 defines 'price', when used in relation to the consideration of any transaction, to mean the total amount paid or payable by a consumer to a supplier in terms of the transaction or agreement, including any amount that the supplier is required to impose, charge or collect in terms of any public regulation. This means R276,607.49, which is the total price paid by the consumer to the first respondent for the vehicle, regardless of whether it was directly or through a financing arrangement. This will have a practical effect on the applicant's right to a refund under section 56.

### **Interest**

64. The panel noted the applicant's unsubstantiated request for the first respondent to be ordered to pay interest as part of the refund remedy. In any event, the remedy that can be granted is embedded in section 56(2). As a statutory body, the Tribunal cannot go beyond the scope of its enabling legislation, as reaffirmed in *National Credit Regulator v National Consumer Tribunal & Others*.<sup>12</sup>

### **Interdict**

65. The Tribunal does not believe that the applicant laid the basis for this Tribunal to grant

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<sup>10</sup> See *National Credit Regulator v Dacqup Finances CC trading as ABC Financial Services – Pinetown and Another* (382/2021) [2022] ZACSA 104 (24 June 2022).

<sup>11</sup> Also see *Platinum Wheels (Pty) Ltd v National Consumer Commission and Another* (A261/2021) [2022] ZAGPPHC 831 (2 November 2022) para 83-105.

<sup>12</sup> (707/2022) [2023] ZASCA 133; [2024] 1 All SA 67 (SCA) (17 October 2023).

an interdict. In *Shoprite Investment Limited v The National Credit Regulator*,<sup>13</sup> the High Court of South Africa (Gauteng Division, Pretoria) supported a concession by the National Credit Regulator's legal counsel that a restraining order would serve no purpose as the legislation, the NCA, proscribed the granting of reckless credit. In this case, the CPA prohibits the conduct that the applicant seeks to interdict.

### **Administrative penalty**

66. Regarding the administrative penalty, section 112(1) empowers the Tribunal to impose an administrative fine regarding prohibited or required conduct. Such a fine 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 the first respondent's annual turnover during the preceding financial year but prays for an administrative fine of R200 000.00 against the first respondent.
67. Considering the nature of the contraventions, the Tribunal is persuaded that a fine is justified. Section 112(3) enjoins the Tribunal to consider certain factors when determining an appropriate administrative fine. The applicant's submissions regarding the factors listed in section 112(3) are discussed under the respective sub-headings below.

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

68. The Tribunal agrees with the applicant that the first respondent's conduct disregards more than one provision of the CPA and severely prejudiced the consumer, who has not used the vehicle since 20 January 2020. The contraventions are serious in nature. A motor vehicle is one of the most critical assets a consumer may invest in.
69. The contraventions have unequivocally deleterious impacts on consumers generally and in this case, on the consumer. The persistence in shifting the blame to the consumer rather than accepting liability and complying with the CPA indicates a total disregard for the consumer's rights at the expense of making a profit.

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

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<sup>13</sup> [2019] ZAGPPHC 956 (18 December 2019) at para 48.

70. The applicant submitted that this was not a victimless crime. It was not a mere statutory

transgression that, while offending the statute, does no harm to flesh-and-blood citizens. Those consumers who are denied the right the CPA conferred on them are immediately damaged. The first respondent's actions damaged the consumer, compelling him to keep an inferior product. The consumer has not suffered further pecuniary loss other than the purchase price paid for the vehicle.

*The behaviour of the respondent*

71. The applicant submitted that the first respondent showed no respect for the consumer's rights throughout this matter. It failed to take responsibility for the breakdown of the vehicle as early as January 2020 and blamed the consumer. Despite the alleged defence, the first respondent failed to take the applicant into its confidence by providing a diagnosis during the investigation to demonstrate negligence.
72. The applicant submitted that the first respondent's failure to file a condonation application for the late filing of the answering affidavit delayed the finalisation in violation of the Tribunal's order. Section 160(1) of the NCA makes failure to comply with an order of the Tribunal an offence.

*The level of profit derived from the contravention*

73. The applicant submitted that similar considerations apply to calculating the profit derived from the contraventions concerning the quantum of harm or damage generated. The first respondent benefitted from the purchase price of R276 607,49, whereas the consumer used the vehicle for less than three days.

*The degree to which the respondent cooperated with the applicant*

74. The applicant submitted that the first respondent co-operated with the applicant and MIOSA but failed to take responsibility for the defect. It cited the driver's negligence without any attempt to gain the said parties' confidence by providing a diagnostic report to support its defence during the investigation.

*Whether the respondent has previously been found in contravention of the Act*

75. The applicant submitted that there is no evidence of the first respondent's previous contraventions of the CPA or enforcement action against it.

## ORDER

76. Accordingly, the panel makes the following order:

- 76.1 The first respondent has contravened sections 55(2)(b) and (c), and 56(2)(b) of the CPA;
- 76.2 The contraventions are declared prohibited conduct in terms of section 150(a) of the NCA;
- 76.3 The first respondent must, within 15 business days of the issuance of this judgment, refund the consumer the purchase price of R276,607.49 to the consumer's nominated bank account;
- 76.4 The applicant must ensure the execution of the order contemplated in 76.3 above and the subsequent payment of the second respondent by the consumer in terms of the financing agreement upon receipt of the refund;
- 76.5 The first respondent must, within 90 business days of the date of issue of this judgment, pay an administrative fine of R200,000.00 into the National Revenue Fund's following bank account:

Bank: Nedbank

Account Holder: Department of Trade, Industry and Competition

Account type: Current Account

Branch Name: Telecoms and Fiscal

Branch code: 198765

Account number: 126 884 7941

Reference: NCT/246983/2022/73(2)(b) and the name of person or business making the payment; and

76.6 There is no order as to costs.

### **Ms Z Ntuli - 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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