

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

Case number: **NCT/417334/2025/73(2)(b)**

In the matter between:

NATIONAL CONSUMER COMMISSION

APPLICANT

And

**HERRING & VAN DER BURGH CC
T/A AUTO KING, MILNERTON**

FIRST RESPONDENT

MFC, A DIVISION OF NEDBANK LIMITED

SECOND RESPONDENT

Coram:

Ms P Manzi-Ntshingila - Presiding Tribunal member

Dr MC Peenze - Tribunal member

Adv C Sassman - Tribunal member

Date of hearing - 21 September 2026

Date of Judgment - 2 October 2026

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 Mr Takalani Kutumela, its Legal Advisor.
3. The first respondent is Herring & Van der Burgh CC trading as Auto King, Milnerton (the first respondent). The first respondent is a close corporation with registration number

CK1994/041286/23 and a supplier as defined in section 1 of the CPA. The first respondent has been incorrectly cited in the pleadings leading up to this judgment as Auto One Motors (Pty) Ltd, trading as Auto King. This point will be discussed further below.

4. At the hearing, the first respondent was represented by Adv Guan Potgieter, instructed by Smit Kruger Incorporated.
5. The second respondent is MFC, a division of Nedbank Limited, which is a registered credit provider in terms of section 40(1) of the National Credit Act¹ (NCA) with registration number NCRCP16 (the second respondent).
6. At the hearing, the second respondent was represented by Adv Albe Jacobsz, instructed by Hack, Stupel & Ross Incorporated.

TERMINOLOGY

7. A reference to a section in this judgment refers to a section of the CPA unless stated otherwise, and a reference to a rule refers to the Rules of the Tribunal² (the rules).

APPLICATION TYPE

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

BRIEF BACKGROUND

9. On 8 October 2022, Mrs Ncumisa Magoda (the consumer) purchased a used 2015 model Hyundai H1 motor vehicle from the first respondent for R328 345.00.³ At the time, the vehicle was recorded as having travelled 161 230km. The consumer paid a deposit of R90 000.00 to the first respondent, with the balance, plus additional fees, to be financed by the second respondent.
10. Over the next six months, the vehicle presented certain defects, and the applicant alleges that the first respondent's conduct in this regard indicates that it sold a defective vehicle to the consumer and failed to cancel the sale agreement when it was required

¹ Act 34 of 2005.

² Published under GN 789 in GG 30225 on 28 August 2007 as amended by GN 428 in GG 34405 on 29 June 2011, GN R203 in GG 38557 on 13 March 2015 and GN 157 in GG 39663 on 4 February 2016.

³ Registration number CAA135768.

to. This conduct, it submits, amounts to a contravention of sections 55(2) and 56(3), and it seeks several orders against the first respondent as well as an order for the second respondent to cancel the credit agreement it holds with the consumer.

11. The first respondent denies that it contravened any provision of the CPA. It submits that the applicant purchased a high-mileage used vehicle and used it extensively as a taxi. It maintains that it effected repairs to the vehicle when it was returned to it on more than one occasion, either at its own expense or under the vehicle's mechanical warranty. It requests that the application be dismissed with costs.
12. The second respondent does not oppose the merits as far as they relate to the allegations against the first respondent, but instead submits that the applicant is ignorant of the fact that the second respondent is the legal owner of the vehicle and that the orders it seeks are not competent. It further submits that the consumer has not been paying the required instalments and has accumulated substantial arrears under the credit agreement, all while using the vehicle to generate an income. The second respondent also requests that the application be dismissed with costs.

THE APPLICANT'S SUBMISSIONS

13. In its founding affidavit, the applicant alleges that the following sequence of events occurred subsequent to the consumer purchasing and taking delivery of the vehicle on 8 October 2022:

- 13.1 On 9 October 2022, the consumer returned the vehicle to the first respondent, complaining of heavy dark smoke emitting from the vehicle whilst driving;

- 13.2 On or about the week of 15 October 2022, the first respondent contacted the consumer to collect the vehicle after having repaired it, which she did;

- 13.3 Around 25 October 2022, the consumer returned the vehicle to the first respondent, complaining of the same issue and left the vehicle in its possession;

- 13.4 During November 2022, the first respondent contacted the consumer to collect the vehicle after repairs had been effected;

- 13.5 During December 2022, the consumer returned the vehicle to the first respondent, complaining of the vehicle smoking while driving, but was told that the vehicle could

not be repaired at that time due to the mechanical workshops closing for the festive season;

13.6 Around the third week of February 2023, the consumer returned the vehicle to the first respondent for repairs, and the vehicle was taken to Phone A Part (Pty) Ltd (Phone A Part) for repairs. The vehicle's turbocharger was reconditioned, and it was returned to the consumer a few days later;

13.7 After the repairs, the vehicle continued smoking and on 15 March 2023, the consumer took the vehicle to Hyundai in Bellville for a diagnostic test. The test confirmed an internal oil leak in the turbocharger, causing the engine to consume oil. A list of parts requiring replacement was provided. The list included:

- 13.7.1 Turbocharger;
- 13.7.2 Exhaust gasket;
- 13.7.3 Turbocharger gasket outlet;
- 13.7.4 AD04 gasket;
- 13.7.5 Turbocharger gasket;
- 13.7.6 EA06 EGR pipe;
- 13.7.7 DB09 EGR pipe gasket;
- 13.7.8 EGR valve assy;
- 13.7.9 EFR cooler gasket;
- 13.7.10 Complete INT; and
- 13.7.11 Intercooler hose x 2.

13.8 On 16 March 2023, the consumer returned the vehicle to the first respondent, advised them of the diagnosis from Hyundai, left it in their possession and requested the cancellation of the sale agreement;

13.9 The consumer complained to MIOSA⁴ and, on 13 June 2023, received an outcome in which MIOSA found that it could not meet her expectations and recommended that she collect the vehicle from the first respondent, which she did in October 2023; and

13.10 On 29 February 2024, the consumer took the vehicle to Phone A Part for repairs, and the vehicle's cylinder head and valves were repaired at her own expense, costing R21 800.00.

⁴ The Motor Industry Ombudsman of South Africa.

14. The applicant submits that the consumer is still paying instalments to the second respondent for a defective vehicle, as well as repaying a loan she took to pay a deposit to the first respondent.
15. The first respondent has contravened the provisions of sections 55(2) and 56(3), and the applicant seeks an order to that effect, together with an order declaring the contravention prohibited conduct. At the hearing, the applicant indicated that it was abandoning its request for an interdict against the first respondent, as initially set out in its papers.
16. Furthermore, the applicant is seeking that the first respondent be ordered to cancel the sale agreement, take back the vehicle, and refund the consumer the deposit of R90 000.00, together with all instalments paid to the second respondent as well as the cost of repairs which she paid herself, amounting to R21 800.00. In addition, it seeks the imposition of an administrative fine of R1 000 000.00 against the first respondent.
17. Against the second respondent, the applicant seeks an order cancelling the credit agreement it has with the consumer.

THE FIRST RESPONDENT'S SUBMISSIONS

18. At the hearing, Adv Potgieter submitted that he was acting on behalf of Herring & Van der Burgh CC, trading as Auto King, Milnerton and that the applicant had cited and brought an incorrect and separate entity, namely Auto One Motors (Pty) Ltd, trading as Auto King, before the Tribunal. The latter was not the supplier in this instance, and the relief sought by the applicant cannot be granted against it.
19. Furthermore, the complaint began in 2022, and the matter is only before the Tribunal in 2026. Under section 116(1)(a), it is too late for the applicant to join or cite the correct supplier. On this basis alone, the application must be dismissed with costs, as the incorrect entity is before the Tribunal, and the supplier cannot be joined to the proceedings at this stage.
20. There are discrepancies between the applicant's founding affidavit and the investigation report, in that the deponent of the affidavit is drawing conclusions which the investigation did not find.
21. The damages claim of R21 800.00, for repairs to the vehicle, which the applicant requests from the first respondent, is not supported by its own evidence since the invoice

included does not provide any details of the vehicle in question and is made out to Eric Magoda. No explanation has been provided as to his identity or relation to this matter.

22. The statutory warranty envisaged by sections 55 and 56 is not absolute. It must be applied with due regard to the nature, age, mileage, price, condition, and intended purpose of the goods at the time of sale. The application of section 55(2) excludes goods as contemplated in section 55(6) where a consumer has been informed that the goods being offered are in a specific condition and has expressly agreed to accept the goods in that condition.
23. The consumer in this case was informed and was fully aware that the vehicle was used, approximately seven years old, and had high mileage. The first respondent expressly disclosed to the consumer that the vehicle was sold without a spare key, without a service book and subject to risks ordinarily associated with a used vehicle in its condition. The consumer inspected the vehicle herself and agreed to the risks associated with purchasing such a vehicle, as set out in the signed terms and conditions of the sale agreement.
24. The consumer travelled extensively with the vehicle in a five-month period accumulating more than 15 000km. She purchased the vehicle to use as a taxi. There is no indication that the vehicle was returned the following day, on 9 October 2022, with mechanical issues, as the applicant alleges.
25. To the extent that minor mechanical issues arose with the vehicle subsequent to delivery, those were duly attended to by the first respondent within a reasonable time and at no cost to the consumer. In particular, an oil leak was repaired in October 2022, and the turbocharger was reconditioned and then later repaired under the vehicle's workmanship guarantee.
26. In November 2022, the consumer complained of smoke emanating from the engine due to a lack of oil. The vehicle was returned for repairs in December 2022, after travelling approximately 7 000 km. The job card for the repairs is dated 20 December 2022 and specifies stripping and replacing the stabiliser bush rubbers. These repairs had no bearing on the alleged smoke emanating from the engine.
27. On 23 February 2023, the first respondent replaced the turbocharger. By this stage the consumer had complained to the second respondent and had increased the vehicle's mileage to 177 194km.

28. Evidence exists, in the form of a report from Phone A Part, that the consumer introduced petrol into the diesel engine of the vehicle, causing severe damage to the cylinder head and fuel system. Such damage is attributable to owner negligence and cannot be ascribed to any latent defect or failure of the first respondent to comply with the CPA. The CPA does not impose liability on suppliers for damage arising from misuse, negligence or abnormal use of goods by a consumer.
29. By 16 March 2023, the consumer sought to cancel the sale agreement. She left the vehicle at the first respondent's premises and complained to MIOSA. MIOSA did not meet the consumer's expectations and recommended that she collect the vehicle from the respondent within seven days, which she failed to do. The first respondent then returned the vehicle to Phone A Part, and it performed further remedial work on the turbocharger.
30. On 13 April 2023, the first respondent submitted the vehicle to DEKRA for an inspection. During the inspection, it became evident that the vehicle had been involved in an accident after delivery, as evidenced by missing parts, misaligned panels, and respray marks. A subsequent test drive corroborated this conclusion. Notwithstanding MIOSA's determination, the consumer collected the vehicle from the first respondent and referred her complaint to the applicant in October 2023.
31. Accordingly, the first respondent denies that it has contravened the provisions of the CPA and avers that all obligations imposed upon it have been met fully and reasonably. It cooperated at all times with the consumer and the applicant.
32. The application should be dismissed with costs.

THE SECOND RESPONDENT'S SUBMISSIONS

33. At the hearing, the second respondent agreed with Adv Potgieter that the incorrect party had been cited and is before the Tribunal. The applicant had an opportunity to rectify this, but decided not to. On this basis alone, the application should be dismissed.
34. The second respondent cannot address the alleged problems pertaining to the vehicle but opposes the relief sought in prayers 4 to 8 of Part D of the notice of referral. In prayer 4, the second respondent's property is to be handed over to the first respondent, and in prayer 8, a cancellation of the credit agreement impacts directly on the second respondent's rights in terms of the agreement.

35. The second respondent is of the view that the relief sought by the applicant is not competent. The second respondent paid the first respondent R246 117.70 and is the legal owner of the vehicle. The applicant cannot seek an order requiring the vehicle's return to the first respondent. There is no basis to deprive the second respondent of its property. If the vehicle is returned to the first respondent, the second respondent would still be financially prejudiced, as it would not receive its money back. The second respondent requests that if the vehicle is to be returned to the first respondent, the Tribunal amends the applicant's prayer in this regard to include an order that the first respondent refund the second respondent the amount of R246 117.70, together with the cost of the Velocity Warranty amounting to R11 995.00.
36. The Tribunal is not empowered to order the first respondent to refund the consumer the instalments she paid to the second respondent.
37. The second respondent disputes the applicant's submission that the consumer is currently paying towards the credit agreement for the vehicle. Although she has possession of the vehicle and has travelled more than 50 000km with it, she has not been paying her monthly instalment, despite generating an income from it. The consumer's account held with the second respondent is currently in arrears with R168 986.34, amounting to approximately 25 months of arrears, and the last payment was made on 6 August 2025 in the amount of R4 000.00.

APPLICABLE SECTIONS OF THE ACT

38. 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.
39. 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 usable 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.
40. Section 55(6) states that section 55(2)(a) and (b) do not apply to a transaction if the consumer has been expressly informed that the particular goods were offered in a specific condition and has expressly agreed to accept them in that condition or knowingly acted in a manner consistent with accepting the goods in that condition.

41. 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 consumer's direction, either repair or replace the failed, unsafe, or defective goods or refund the consumer the price paid by the consumer for the goods.
42. Section 56(3) states that if a supplier repairs any goods or any component of any goods, and within three months after that repair, the failure, defect or unsafe feature has not been remedied, or a further failure, defect or unsafe feature is discovered, the supplier must either replace the goods or refund the consumer the price paid by the consumer for the goods.

CONSIDERATION OF THE EVIDENCE

43. Upon receiving the complaint from the consumer in this matter, the applicant directed its inspector to investigate the complaint in accordance with section 72(1)(d). The Tribunal is satisfied that the applicant has provided sufficient argument and basis for establishing that there was reasonable suspicion. The investigation was not launched arbitrarily but in response to the consumer's complaint. The investigation concluded that the first respondent had contravened sections 55(2) and 56(3), and the applicant referred the complaint to the Tribunal for adjudication in line with section 73(2)(b).

The incorrect party was cited as the first respondent

44. Both respondents are in agreement that the first respondent cited in the pleadings leading up to the hearing was not the supplier in this matter. The party cited is a company called Auto One Motors (Pty) Ltd trading as Auto King (the company), whereas the supplier in this matter was a close corporation called Herring & Van der Burgh CC, trading as Auto King, Milnerton (the CC). The parties submit that on this basis alone, the application should be dismissed. The Tribunal, however, rejects this stance.
45. The incorrect identification of a party is not a bar to its amendment.⁵ The law reports are filled with instances in which the incorrect description of a party was allowed to be changed, in the absence of prejudice to the other parties involved, to reflect the true

⁵ *Consolidated Transport Rigging and Logistics (Pty) Ltd v Concord Cranes (Pty) Ltd* (34646/20) [2023] ZAGPPHC 1984 at paragraph 13.

state of affairs.⁶ Although the applicant did not file a replying affidavit to address this aspect, from the reading of the trading names of the two entities, namely Auto King and Auto King, Milnerton, it is easy to see how the discrepancy could have come about.

46. The Tribunal is not convinced that the applicant intended to misrepresent the facts or act in a *mala fide* manner to try to deceive it. It is clear that the two entities are closely associated and operate jointly. This can be seen in the vehicle's delivery inspection sheet⁷ and several invoices for the vehicle's repairs, which are made out to the company, not the CC.
47. From the outset, Mr Craig Lawrence (Mr Lawrence), the Financial Manager of the CC and deponent to the first respondent's answering affidavit, has been involved in the applicant's investigation. He communicated with the applicant's investigator and consented to service of the application by email.⁸ In his reply to the applicant's investigator, he states that the vehicle "*was repaired immediately by ourselves as per the CPA...*" In deposing the first respondent's answering affidavit, he refers to the CC as the "(First Respondent)" and made submissions in respect of both the company and the CC. Similarly, Adv Potgieter, at the hearing, made submissions in respect of both entities. Therefore, the first respondent was always aware of who the supplier in this matter is and who the complaint is against.
48. The tax invoice presented to the second respondent for the sale of the vehicle clearly indicates the CC as the supplier selling the vehicle,⁹ and the second respondent's remittance advice showing proof of payment indicates the CC's VAT number¹⁰ as the dealer VAT number. The second respondent was also always aware of who the supplier in this matter is and who the complaint is against.
49. The Tribunal is of the view that correcting the citation of the first respondent in this matter will not result in any undue prejudice to the parties or result in a new cause of action with new allegations or new relief sought by the applicant.
50. The informal and inquisitorial nature of proceedings before the Tribunal indicates that, where possible, the Tribunal should adopt a less formal and adversarial approach than

⁶ See, for instance, *Four Tower Investments (Pty) Ltd v André's Motors* 2005 (3) SA 39 (NPD).

⁷ CL2 on page on page 327 of the case record.

⁸ See pages 63 – 65 and 70 of the case record.

⁹ NM1-3 on 42 of the case record.

¹⁰ NB8 on page 506 of the case record.

a court would in a civil matter.¹¹ To that extent, the rules and procedures in motion court proceedings and legal technicalities should not be allowed to stifle proceedings before the Tribunal.¹² Section 145 provides that, subject to the rules of procedure before the Tribunal, the member of the Tribunal presiding at a hearing may determine any procedure for that hearing, with due regard to the circumstances of the case and requirements of applicable sections of the legislation.

51. The Tribunal is satisfied that the consumer's complaint and the applicant's referral are against the CC as cited above. The parties to the proceedings were at all times aware of such, and correcting the citation of the first respondent will not unduly prejudice the parties.

Discrepancies between the applicant's affidavit and the investigation report

52. The first respondent submitted that there exist discrepancies in the applicant's affidavit and its investigation report, and that the version presented by the applicant before the Tribunal contradicts the findings in its investigation.
53. The Tribunal notes from the case record and during the hearing that certain discrepancies became apparent. For example, paragraph 7.1 of the applicant's affidavit states that the applicant received the complaint from the consumer on 7 May 2023, whereas paragraph 1.1 of its investigation report states that the complaint was received on 7 July 2023, two months later. Another example can be found in paragraph 7.2.4 of the applicant's affidavit, which states that on 9 October 2022, the consumer returned the vehicle to the first respondent, complaining of *"heavy dark smoke emitting from the vehicle whilst driving."* However, in its investigation report, it states that on 9 October 2022, the vehicle broke down and *"the consumer informed the supplier about the dysfunctional suspension and the supplier repaired the vehicle."*
54. The Tribunal finds the applicant's version of the sequence of events unreliable and inconsistent in some areas with the documentary evidence before it. To this extent, the Tribunal is inclined to adjudicate the sequence of events based on the first respondent's version and the supporting documentary evidence placed before it by both parties.

¹¹ Section 142(1) of the NCA.

¹² *National Credit Regulator v First Group Investment Holdings (Pty) Ltd and Another* (475/2024) [2026] ZASCA 67 (11 May 2026) (*NCR v First Group*) at paragraphs 22 – 24.

55. The Tribunal, however, is not of the view that the discrepancies between the applicant's affidavit and its investigation report warrant the dismissal of this application as implied by the first respondent. The filing of the affidavit does not transform the informal nature of the proceedings before the Tribunal into motion-court proceedings. The proceedings remain subject to the NCA, especially section 142(1), which, as mentioned earlier, provides for an informal, inquisitorial approach. Even without the affidavit, the referral would have been complete, valid, and compliant with the Tribunal's rules. Whatever the Tribunal needs to adjudicate the complaint is contained in the consumer's complaint, the applicant's Form T1.73(2)(b) and the investigation report, together with supporting documentary evidence. The filing of the affidavit was thus surplusage.¹³

The first respondent's allegation that the vehicle is excluded under section 55(6)

56. At the hearing, the first respondent stated that section 55(2) must be read in its entirety, including section 55(6), which excludes transactions in which the consumer was expressly informed that the goods were offered in a specific condition and then accepted the goods in that condition. It submits that in this case, the consumer was informed that she was purchasing an older model, used vehicle which had travelled 161 230km. She was further informed that the vehicle was being sold without a spare key or service book, and she accepted it in that condition, with the usual risks associated with such a vehicle.
57. The exclusions envisaged under section 55(6) only apply to the provisions contained in section 55(2)(a) and (b). In other words, even if goods are excluded from 55(2)(a) and (b), they are still required to comply with section 55(2)(c) and (d), meaning that they must still be usable and durable for a reasonable period of time, having regard to the use to which they would normally be put and to all surrounding circumstances of the supply. Furthermore, the goods must still comply with any applicable standards set under the Standards Act 29 of 1993 or any other public regulation.
58. The Tribunal is of the view that for a vehicle to be excluded from the provisions of section 55(2)(a) and (b), it should need some sort of repair before it can be used as it normally would be. Examples may include, but are not limited to, accident-damaged, written-off, or unroadworthy vehicles. These vehicles typically need to be repaired first before they can be used. If age, high mileage and the absence of a spare key and service book are sufficient to exclude a vehicle from the provisions of section 55(2)(a) and (b), it would

¹³ *NCR v First Group* at paragraph 27.

leave many consumers without the protection of the CPA when purchasing a used vehicle. This could not have been the legislature's intention.

59. On this basis, the Tribunal rejects the first respondent's view that the consumer's vehicle formed one of the exclusions envisaged under section 55(6). In any event, this point seems to have been a last thought by the first respondent, as it contradicts several submissions in its earlier-filed answering affidavit, in which it repeatedly submits that the vehicle was roadworthy, of good quality, with no defects, and reasonably durable.¹⁴

The allegation that the vehicle was involved in an accident after taking delivery

60. The first respondent alleges that the vehicle was involved in a collision after the consumer took delivery. An allegation which she denies. In an email from Mr Lawrence to the applicant, he states that, in March 2023, the consumer returned the vehicle to its premises, and upon viewing the vehicle, he noticed that the vehicle showed signs of recent repair and spray work in that some parts were missing, and the vehicle's panels were not correctly aligned. Upon taking the vehicle for a test drive, he concluded that it had been involved in a collision and was no longer in the same condition.¹⁵
61. No evidence was placed before the Tribunal to confirm the first respondent's allegations. Its own DEKRA Condition Report,¹⁶ indicates that the vehicle was inspected on 13 April 2023 and under the heading "Comments" states:

"General Comments: ACCORDING TO AGE AND MILAGE OF THE VEHICLE: NORMAL WEAR AND TEAR MARKS ON BODY, INTERIOR AND MECHANICAL PARTS. Body Exterior Vehicle has minor dent. Scratches and Chip Marks on some body panels."

62. Although the report confirmed that the vehicle still had an oil leak at the time of inspection and by that time had travelled 177 305km, it attributed other minor scratches, chip marks, and a dent to normal wear and tear for a vehicle of its age and mileage. The report did not confirm any accident damage to the vehicle.

Allegation of misuse by introducing petrol into the diesel engine

63. It is common cause that the vehicle in question uses diesel and not petrol. The first respondent attributes some of the vehicle's problems to the consumer introducing petrol

¹⁴ See paragraphs 16, 23, 63 and 91 of the first respondent's answering affidavit.

¹⁵ NM1-17 on page 63 of the case record.

¹⁶ CL5 on pages 334 – 346 of the case record.

into the diesel vehicle. The first respondent provided a Test Report from Phone A Part confirming fuel contamination, which led to the cylinder head repair on 29 February 2024 at a cost of R21 800.00, which the consumer paid herself.¹⁷

64. No evidence of fuel contamination before this date was presented. In an internal email from Mr Lawrence to a colleague, C Coetzee, dated 21 February 2023, he states: *"It is our workshop opinion that the vehicle issues is due to normal wear and tear on vehicle as it is been used for business transportation daily."*¹⁸
65. Following this email on 21 February 2023, the first respondent repaired the vehicle by replacing its turbocharger on 23 February 2023.
66. The Tribunal agrees with the first respondent that it cannot be held responsible where the consumer has subjected the vehicle to misuse by introducing petrol into the diesel vehicle, causing extensive damage and resulting in the vehicle's cylinder head needing replacement. However, its own evidence confirms that this event occurred in February 2024, approximately sixteen months after the consumer purchased and took delivery of the vehicle on 8 October 2022. It falls outside the implied warranty contained in section 56 and does not account for the mechanical issues experienced with the vehicle in the first six months after delivery. For this reason, the event, its effect on the vehicle, and the amount the consumer paid for the repairs cannot form part of the Tribunal's consideration of the application of section 56.

The sequence of events as laid out by the first respondent and confirmed by the documentary evidence placed before the Tribunal

67. The first respondent confirms that the consumer purchased and took delivery of the vehicle on 8 October 2022. It confirms that later that same month, it repaired an oil leak on the vehicle's engine. The attached invoice for repairs indicates that the vehicle's gearbox had to be removed and that a rear main seal was replaced.¹⁹
68. Given this admission and the evidence provided by the first respondent, it is reasonable to conclude that between the time of taking delivery of the vehicle and the repairs being carried out, the consumer must have complained to the first respondent about the

¹⁷ CL8, CL9 and CL10 on pages 351 – 353 of the case record.

¹⁸ CL4 on page 330 of the case record.

¹⁹ CL0 at page 321 of the case record.

vehicle. Although it is disputed that the consumer complained and returned the vehicle the very next day, as the applicant alleges.

69. The Tribunal is persuaded that this was the first repair to the vehicle after the consumer took delivery of it and that it was at her direction that the first respondent repaired it. However, the documentary evidence indicates that the oil leak persisted after the repair.
70. The first respondent submits that in November 2022, after the first repairs, the consumer alleged that the vehicle broke down and that smoke emanated from the vehicle's engine due to an absence of oil.²⁰ The vehicle was then returned to it in December 2022, but only to replace a Bush-Stabiliser bar. This is confirmed by the job card and invoice dated 20 December 2022.²¹
71. The following year, in February 2023, repairs were carried out to the vehicle's turbocharger. This is confirmed by the first respondent's invoice from Phone A Part marked as CL11 and dated 23 February 2023.²² In addition, preceding this repair, Mr Lawrence, in the same email to his colleague referred to above, indicated on 21 February 2023, that the oil leak was repaired but that the consumer complained of another mechanical issue with the vehicle, which appeared to be a faulty turbocharger:

"Thereafter client reported a another mechanical issue with the vehicle, client brought vehicle in for assessment and it was found to be a turbo issue. After inspection we found that the turbo seals had giving in ... the turbo was stripped and sent to turbo master for reconditioning. I have spoken to Turbo master yesterday and advised they are busy with recon and it will be ready for collection by Tuesday."

72. After the first respondent had carried out repairs to the oil leak in October 2022 and the turbocharger in February 2023, the consumer was still dissatisfied and continued complaining of smoke and noise coming from the engine. She took the vehicle to Hyundai Bellville (Hyundai) for a diagnosis. This is corroborated by an invoice she received, dated 15 March 2023.²³ On the invoice, it states:

"Investigate SMOKE COMING FROM ENG[I]NE NOISE FROM ENGINE."

"during inspection found internal oil leak in turbo causing engine to use oil... turbo needs to be replaced."

²⁰ See paragraph 32 of the first respondent's answering affidavit on page 299 of the case record.

²¹ CL3 on pages 328 and 329 of the case record.

²² See page 354 of the case record.

²³ NM1-11 on pages 51 – 52 of the case record.

73. Hyundai diagnosed the vehicle and found numerous faults, including an engine oil leak and a faulty turbocharger. Both items were purportedly repaired by the first respondent in October 2022 and February 2023, the month before. Hyundai's quotation for repairs to the vehicle was for R96 658.00.
74. The Supreme Court of Appeal in *Motus v Wentzel*²⁴(*Motus*) has confirmed that for a consumer to find relief under both 56(2) and 56(3), the issues with a vehicle must fall within the definition of a defect.
75. Section 53(1)(a) defines a defect as follows:
- “defect” means—*
- (i) *any material imperfection in the manufacture of the goods or components, or in performance of the services, that renders the goods or results of the service less acceptable than persons generally would be reasonably entitled to expect in the circumstances; or*
 - (ii) *any characteristic of the goods or components that renders the goods or components less useful, practicable or safe than persons generally would be reasonably entitled to expect in the circumstances;*
76. In *Motus*, it was held that not every small fault is a defect as defined. It must either render the goods less acceptable than people generally would be reasonably entitled to expect from goods of that type, or it must render the goods less useful, practicable or safe for the purpose for which they were purchased.²⁵
77. The Tribunal accepts that the consumer was using the vehicle for business purposes, however, no evidence was led on how much the vehicle had travelled between taking delivery on 8 October 2022 and returning it to the first respondent later that same month for the first repair. The first respondent's invoice marked CL0 does not indicate the vehicle's mileage at that stage. In this regard, the Tribunal is persuaded, on a balance of probabilities, given the vehicle's age and overall mileage, that the oil leak the consumer experienced with the vehicle was likely present at the time of the sale.²⁶
78. Based on the evidence and the first respondent's version, the consumer complained about the vehicle smoking in November 2022, after repairs had been effected. This complaint and the oil leak persisted over the next few months. The diagnosis from

²⁴ In *Motus Corporation (Pty) Ltd and Another v Wentzel* (Case no 1272/2019) [2021] ZASCA 40 (13 April 2021), at paragraphs 42 – 44.

²⁵ *Motus* at paragraph 41.

²⁶ See section 117 - In any proceedings before the Tribunal, or before a consumer court in terms of this Act, the standard of proof is on a balance of probabilities.

Hyundai, dated 15 March 2023, and the respondent's DEKRA report, dated 13 April 2023, both confirm the presence of an oil leak following the first respondent's repairs in October 2022. The diagnosis from Hyundai further confirmed that the vehicle still had a faulty turbocharger, even after it had been repaired by the first respondent.

79. The Tribunal is persuaded that the vehicle's engine had a persistent oil leak and that this rendered the vehicle defective at the time it was sold to the consumer. It is uncertain whether the problems with the turbocharger were present at the time of the vehicle's sale, but the evidence shows they persisted even after the first respondent repaired it. Therefore, the vehicle was of a quality less acceptable than persons would generally be reasonably entitled to expect when paying a sale price of R328 345.00, plus interest and fees. The characteristics of the vehicle further rendered it less useful, practicable or safe than persons generally would be reasonably entitled to expect. It was also not usable and durable for a reasonable period of time. In selling the defective vehicle to the applicant, the first respondent contravened section 55(2)(a), (b) and (c). No evidence was led to prove a contravention of section 55(2)(d).
80. Within three months of repairing the vehicle, the same oil leak persisted, and as Mr Lawrence indicated in his email, the consumer reported another mechanical issue, which led to a repair of the suspension and then repairs to the turbocharger. The persistent oil leak and further failure or defect reported within three months after the initial repairs entitled the consumer to relief under section 56(3).
81. After the consumer complained about smoke coming from the engine in November 2022, it was incumbent on the first respondent to replace the vehicle or refund the consumer the price paid by her. The legislation does not afford a consumer the discretion to request further repairs within three months of the initial repair, nor does it permit the supplier to continue repairing the vehicle indefinitely.
82. The first respondent's own version and evidence show that it failed in its statutory obligations when the vehicle's oil leak persisted, and a further mechanical fault was reported within three months of its repairs. It insisted on repairing the vehicle more than once thereafter. By failing to replace the vehicle or refund the consumer, the first respondent contravened section 56(3)(a) and (b).

The second respondent's objection to the relief sought by the applicant

83. The second respondent submits that it paid the first respondent R246 117.70 for the vehicle and that it is the title holder and legal owner of the vehicle. The applicant does not dispute this but maintains that it is entitled to the relief it seeks.
84. The second respondent submits that the Tribunal cannot make an order for the vehicle to be returned to the first respondent because it would have the effect of depriving the second respondent of its property. Furthermore, an order cancelling the credit agreement it holds with the consumer will prejudice the second respondent immensely, since there is still an outstanding balance on the vehicle. In this regard, it submits that the orders the applicant seeks are not competent as it would leave the second respondent without its asset and without the money it paid to the first respondent.
85. As confirmed above, the consumer was entitled to relief under section 56(3) as early as November 2022. The section requires the first respondent to either replace the vehicle or refund the consumer the price she paid for it. Section 56(3) must be read in the same context as 56(2), in that to receive the relief, the consumer must make the goods available for return to the supplier. This much is clear and logical from the plain reading of the legislation.
86. Section 56(3) does not require a consumer to formally cancel the sale agreement. It is the supplier who is responsible for facilitating a replacement of the goods or a refund to fulfil its statutory obligations. Naturally, if the supplier retrieves the goods and the consumer is refunded the price paid, this would result in the cancellation of the sale agreement between the parties. The credit agreement that the second respondent holds with the consumer meets the requirements of an instalment agreement.²⁷ By definition, an instalment agreement requires the sale of movable property and a transfer of possession to the consumer. Therefore, in the absence of a sale agreement and with no vehicle in the consumer's possession, there can be no instalment agreement with the second respondent. In this regard, it appears that the second respondent's real

²⁷ **"instalment agreement"** means a sale of movable property in terms of which-

- (a) all or part of the price is deferred and is to be paid by periodic payments;
- (b) possession and use of the property is transferred to the consumer;
- (c) ownership of the property either-
 - (i) passes to the consumer only when the agreement is fully complied with; or
 - (ii) passes to the consumer immediately subject to a right of the credit provider to re-possess the property if the consumer fails to satisfy all of the consumer's financial obligations under the agreement; and
- (d) interest, fees or other charges are payable to the credit provider in respect of the agreement, or the amount that has been deferred.

gripe is not so much with the relief sought by the applicant but with the enabling provisions of the legislation itself.

87. Both sections 56(2) and (3) are silent with regard to goods purchased on credit where consumers have chosen a bank or other credit provider as its agent to pay the supplier on its behalf for the goods. In terms of section 5(2)(d), the credit agreement between the consumer and the second respondent is excluded from the operation of the CPA, but the vehicle, which was the subject matter of the agreement, is not excluded.²⁸
88. In *Van Niekerk v FirstRand Bank*²⁹ the SCA considered the clauses in the credit agreement for the purchase of a vehicle and concluded that the bank wore two hats in that transaction. It was both the credit provider and the vehicle supplier. However, no party has argued that such is the case in this matter.
89. The second respondent's concern is valid in that the legislation requires the vehicle to be returned to the first respondent, and a refund given to the consumer, leaving it out of pocket and without its asset. This could not have been an oversight by the legislature, particularly regarding vehicles, as it is not uncommon for consumers to purchase vehicles on credit. The Tribunal is of the view that the legislature did not consider the omission of a clear description of the credit provider's rights in the application of section 56(2) and (3) as a lacuna. Instead, it took comfort in knowing that section 4(2)(b)(ii)(bb) gives the Tribunal broad jurisdiction and a wide discretion to make appropriate and innovative orders in cases like these.
90. Section 4(2)(b)(ii)(bb) empowers 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.

²⁸ *Van Niekerk v FirstRand Bank Limited* (065/2024) [2025] ZASCA 187 (10 Dec. 2025) (*Van Niekerk*) at paragraph 19.

²⁹ *Van Niekerk* at paragraph 24.

91. Furthermore, once the Tribunal makes a finding of prohibited conduct, it is not limited to the provisions of the CPA. Then section 150(i) of the 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. In this case, it includes the consumer's rights in respect of her vehicle and her rights in respect of her credit agreement. The Tribunal's wide-ranging powers in making any appropriate order in relation to prohibited conduct were confirmed by the SCA in *NCR v Dacquip Finances*.³⁰
92. In applying the Tribunal's mandate in terms of its governing legislation, the Tribunal finds that it would be appropriate in this instance to cancel the sale agreement concluded between the consumer and the first respondent and for the consumer to surrender the vehicle to the first respondent. In the absence of a sale agreement or possession and use of the vehicle, the second respondent's instalment agreement then falls short of the statutory definition of an instalment agreement as contained in section 1 of the NCA and cannot continue in its current form. Therefore, it too must be set aside.
93. In clause 13.6 of the second respondent's instalment agreement, the consumer agreed to nominate it as her "*agent for arranging the services*" under the agreement and to pay over the loan amount on her behalf.³¹ It is common cause that the consumer paid the first respondent R90 000.00 and that the second respondent, on her instruction, paid the first respondent R246 117.70 to purchase the vehicle. Therefore, the first respondent must refund the consumer the deposit she paid and, further, refund her nominated agent, the second respondent, the same amount it received from it to release the consumer from the credit agreement.
94. Any claim that the consumer may have for instalments paid in respect of her credit agreement, insurance premiums or repairs will amount to a claim for damages. Section 56(3) makes no provision for the Tribunal to order a refund of these amounts. She may approach the Chairperson of the Tribunal for a certificate under section 115(2) to claim her damages in a civil court.

CONSIDERATION OF AN ADMINISTRATIVE FINE

95. The applicant requested the Tribunal to impose an administrative fine on the first respondent. The Tribunal is satisfied that the nature of the first respondent's

³⁰*National Credit Regulator v Dacquip Finances CC trading as ABC Financial Services – Pinetown and Another* (382/21) [2022] ZASCA 104 (24 June 2022) at paragraph 30.

³¹ See page 501 of the case record.

contraventions and the consequent implications for the consumer justify the Tribunal imposing an administrative fine on the first respondent. The kind of contraventions perpetrated by the first respondent is undoubtedly the type of conduct the CPA seeks to prohibit. Once it finds a 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.

96. 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, demonstrating a disregard for the CPA and consumers' rights. There is no evidence before the Tribunal that the contraventions are continuous, repeated or extend to more than one consumer. However, the nature of the contraventions warrants serious action against the first respondent.

Any loss or damage suffered as a result of the contravention

The consumer fell victim to the sale of a poor-quality vehicle with a persistent oil leak and a faulty turbocharger. After purchasing the vehicle, she repeatedly had to return it for repairs. Although the evidence shows she was able to travel approximately 16 000km between 8 October 2022 and 13 April 2023, her use of the vehicle was an impaired use due to its poor quality. The purchase caused inconvenience and financial prejudice to the consumer.

The behaviour of the first respondent

There is no evidence that the first respondent acted with malice or intentionally attempted to exploit the consumer. It repeatedly attempted to repair the vehicle. It appears to have operated under the mistaken belief that it was required to do so, whereas the law required it to cancel the sale, provide a replacement vehicle or refund the consumer. Despite evidence to the contrary, the first respondent remains steadfast in its belief that it has not contravened the CPA.

The market circumstances in which the contravention took place

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

The level of profit derived from the contravention

No evidence was led regarding the exact amount of profit derived from the sale of the vehicle, but the first respondent benefited from the price paid by the consumer and the second respondent.

The degree to which the first respondent has cooperated with the applicant and the Tribunal

The first respondent cooperated with the applicant's inspector during the investigation and provided a comprehensive answer to the applicant's allegations made before the Tribunal.

Whether the first 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 first respondent.

97. Regarding the abovementioned factors, the factual evidence, and the conduct displayed, it is in the interests of justice for an administrative fine to be imposed on the first 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 first 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 first respondent's annual turnover, however the Tribunal can still impose a fine of up to R1 000 000.00 (one million rand).
98. The first respondent's conduct cannot be condoned, and therefore, the Tribunal finds that a fine of R100 000.00 (one hundred thousand rand) will be appropriate.

COSTS

99. Both respondents requested a cost order against the applicant. Section 147(1) of the NCA states that each party participating in a Tribunal hearing must bear its own costs. However, under section 147(2), if the Tribunal has not made a finding against a respondent, then the presiding member may award costs to the respondent and against a complainant who referred the complaint in terms of sections 141(1) of the NCA or 75(1)(b) of the CPA. Furthermore, if the Tribunal has made a finding against a respondent, the presiding member may award costs against the respondent and to a

complainant who referred the complaint in terms of sections 141(1) of the NCA or 75(1)(b) of the CPA.

100. From the reading of section 147(2) of the NCA, it is clear that the Tribunal is not empowered to award costs in instances where a matter has been referred to it by the applicant in terms of section 73(2)(b). This interpretation was confirmed in *The National Consumer Commission v Univision Services Association NPC (Univision)*,³² where it was held that the applicant acts to protect consumer rights and is not merely seeking redress for a personal infringement of a civil right, as a complainant would.
101. The applicant acts in the public interest in the pursuit of its statutory obligation to enforce consumer rights, not only on behalf of those who have complained to it, but also on behalf of the public at large.³³ The Court held that, in this sense, there is no reason for the general rule regarding costs in civil litigation to apply to referrals made by the applicant in terms of section 73(2)(b).

CONCLUSION

102. The first respondent contravened sections 55(2)(a), (b) and (c) and 56(3). On this basis, the first respondent is found to have engaged in prohibited conduct. The Tribunal finds that imposing an administrative fine on the first respondent is appropriate as a punitive measure in this instance.

ORDER

103. Accordingly, the Tribunal makes the following order:

- 103.1 The citation of this application is hereby amended to indicate that the first respondent in these proceedings is Herring & Van der Burgh CC trading as Auto King, Milnerton, with registration number CK1994/041286/23;
- 103.2 The first respondent has contravened sections 55(2)(a), (b) and (c) and 56(3) of the CPA;
- 103.3 The first respondent's contravention of sections 55(2)(a), (b) and (c) and 56(3) of the CPA is declared prohibited conduct;

³² (618/2017) [2018] ZASCA 44 (28 March 2018).

³³ *Univision* at paragraph 17.

- 103.4 The sale agreement concluded between the consumer and the first respondent is cancelled and set aside;
- 103.5 The first respondent must collect the vehicle in question with registration number CAA135768 from the consumer at its own risk and expense within ten business days of this judgment being issued;
- 103.6 The first respondent must refund the consumer R90 000.00 (ninety thousand Rand), within ten business days of this judgment being issued;
- 103.7 The instalment agreement concluded between the consumer and the second respondent is cancelled and set aside;
- 103.8 The first respondent is ordered to repay the second respondent R246 117.70 (two hundred and forty-six thousand, one hundred and seventeen Rand and seventy cents), within ten business days of this judgment being issued;
- 103.9 The first respondent must, within thirty 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 Constitution³⁴ 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/417334/2025/73(2)(b) and the name of the person or business making the payment; and

- 103.10 There is no cost order.

³⁴ Constitution of the Republic of South Africa, Act 108 of 1996.

[signed]

Adv C Sassman

Tribunal member

Presiding Tribunal member Ms P Manzi-Ntshingila and Tribunal member Dr MC Peenze concur.

Authorised for issue by The National Consumer Tribunal

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national consumer tribunal