

## IN THE NATIONAL CONSUMER TRIBUNAL HELD IN CENTURION

Case number: **NCT/266654/2023/73(2)(b)**

In the matter between:

**NATIONAL CONSUMER COMMISSION**

**APPLICANT**

And

**SPARES FOR AFRICA CC**

**RESPONDENT**

**Coram:**

|                             |   |                  |
|-----------------------------|---|------------------|
| Ms Z Ntuli:                 | - | Presiding Member |
| Dr MC Peenze:               | - | Panel Member     |
| Ms Phumla Manzi-Ntshingila: | - | Panel Member     |

|                   |   |                  |
|-------------------|---|------------------|
| Date of Hearing:  | - | 14 August 2024   |
| Date of Judgment: | - | 6 September 2024 |

### JUDGMENT AND REASONS

#### APPLICANT

1. The applicant is the National Consumer Commission (the NCC or the applicant), a state organ established in terms of section 85 (1) of the Consumer Protection Act, 2008 (the CPA), with its registered address at SABs Offices, 1 Dr Lategan Road, Groenkloof, Pretoria.
2. At the hearing, Ms Imrhan Magoro (Ms Magoro), a legal advisor within the NCC, represented the applicant.

## **RESPONDENT**

3. The respondent is Spares for Africa CC (the respondent), a close corporation with registration number B1986001085 and physical address at 217 Van Der Hoff Road, Pretoria, Gauteng Province. The respondent is a supplier, as defined in section 1 of the CPA.
4. The respondent was represented by Mr. Mark de Bruyn (Mr de Bruyn) of Couzyn, Hertzog, and Horak Attorney.

## **JURISDICTION**

5. Section 27(1)(a)(ii) of the National Credit Act, 2005 (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. Section 150 of the NCA empowers the Tribunal to make an appropriate order concerning prohibited or required conduct under the NCA or the CPA. The Tribunal, therefore, has jurisdiction to hear this application.

## **TERMINOLOGY**

6. A reference to a section in this judgment refers to a section in the CPA. A reference to a regulation refers to the CPA Regulations, 2011 (the regulations)<sup>1</sup>.

## **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.
8. According to Form TI.73(2)(b) CPA, the applicant requests the Tribunal to make an order as follows:

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<sup>1</sup> Published under Government Notice R293 in Government Gazette 34180 of 1 April 2011.

- 8.1 The respondent contravened sections 47(2)(a)-(b) and 54(1)(a)-(d);
- 8.2 The contraventions be declared prohibited conduct;
- 8.3 The respondent be interdicted;
- 8.4 The respondent be directed to return possession of the motor vehicle to the complainant in the same condition as it was when it was collected from the complainant;
- 8.5 The respondent be directed to refund the complainant an amount of R5,000.00 paid by the complainant as a deposit. This amount must be paid with interest in accordance with the Prescribed Rate of Interest Act, 1975, calculated from 19 September 2019, being the date on which it was paid by the complainant for the repairs, to the date of final payment;
- 8.6 The respondent be directed to pay an administrative fine of R1,000 000.00 (One Million Rand Only); and
- 8.7 Any other appropriate order contemplated in section 4(2)(b)(ii).

## **BACKGROUND**

9. The applicant received a complaint from Mr. Happy Nkuna (the complainant), who alleged the following:
  - 9.1 On 10 September 2019, he contacted the respondent and spoke to an individual referred to as Neish, an employee of the respondent. He informed Neish that he was looking to buy an engine for a 2017 Ford Focus, who told him the engine was available for R25,092.50, including installation. The complainant agreed to the price.
  - 9.2 On 19 September 2019, the complainant paid the respondent an upfront deposit of R5,000.00 to begin the supply and installation of the engine. It was agreed that

the remaining balance would be paid once the complainant had test-driven the vehicle and was satisfied with the engine's performance after installation.

- 9.3 On 20 September 2019, the respondent collected the complainant's vehicle from his residence and took it to Rautomec, a third-party workshop Neish claimed they owned. The complainant was informed that a mechanic from Rautomec would obtain the necessary parts from the respondent at no additional cost for installation. It was determined that the only additional part needed was a petrol pump, which the complainant agreed to purchase, with the cost to be deducted from the outstanding balance owed to the respondent.
- 9.4 After collecting the vehicle, the respondent took approximately nine months to install the engine, despite the complainant expressing concerns over the delay. To this effect, the complainant provided records of a WhatsApp conversation between himself and the respondent.
- 9.5 On 11 June 2020, the complainant went to Rautomec to test drive the vehicle after installation. During the test drive, he noticed that the performance did not match that of a Ford Focus. He inquired whether the installed engine was indeed for a Ford Focus and was verbally informed by a Rautomec employee that the engine installed was for a Ford Fiesta (an incorrect engine). To the complainant's surprise, Rautomec also presented him with a quote of over R19,000.00 for the work done on his vehicle.
- 9.6 Dissatisfied with the situation, the complainant raised the issue with the respondent. The respondent did not dispute that they had installed a Ford Fiesta engine instead of a Ford Focus engine, as initially agreed. He refused to settle the outstanding balance and demanded that the correct engine be installed. Although the vehicle remained with the respondent, the engine was never replaced. Instead, the respondent refused to return the vehicle to the complainant unless the outstanding balance and storage fees were paid. The vehicle remains in the respondent's possession.
- 9.7 As redress, the complainant sought that his vehicle be returned in the condition it was in when the respondent collected it and a refund of the R5,000.00 deposit

he paid.

- 9.8 Based on the above, the applicant formed a reasonable suspicion that the respondent contravened the CPA and instructed Mr. Shumani Eric Mudau to investigate the complaint. The investigation revealed contraventions that the applicant has now referred to the Tribunal. The matter was heard on 14 August 2024 via MS Teams.

## **ISSUES TO BE DECIDED**

10. 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.

## **THE HEARING**

### **THE REQUEST TO CALL A WITNESS**

11. During the hearing, Ms. Magoro said the applicant wished to call the complainant as a witness. The panel asked Ms. Magoro to explain whether the witness's testimony would be on aspects not in the founding papers. Ms. Magoro said they would like the complainant to explain the contractual arrangement in his own words, as contained in the founding papers.
12. In motion proceedings, cases are generally decided on the papers submitted by the parties. In specific circumstances, such as where significant factual disputes cannot be resolved purely based on affidavits, an expert witness could be called. Further, the calling of witnesses may be allowed where exceptional circumstances justify it.
13. The Tribunal conducts its hearings in an inquisitorial manner. Section 144 allows for discretion regarding the calling of witnesses. In this case, the existence of the verbal agreement between the parties was not in dispute, and nothing beyond what was covered in the papers would be presented. Therefore, the panel did not find it necessary for the applicant to call the complainant as a witness.

## THE APPLICANT'S ORAL SUBMISSIONS

14. Ms. Magoro's presentation mirrored the applicant's written submissions in the founding papers, with two exceptions. Firstly, she stated that the engine light illuminated when the complainant was test-driving the vehicle on 11 June 2022. When the panel queried this aspect, the applicant corrected it as the illumination of the engine light was not raised in the founding papers.
15. Secondly, Ms. Magoro stated that after realising that the engine was incorrect, the complainant demanded the cancellation of the agreement, the return of the vehicle, and a refund of the R5,000.00 deposit paid to the respondent. On further querying, it was clarified that the complainant requested the replacement of the engine with the correct one.
16. On jurisdiction, Ms. Magoro submitted that the Tribunal has jurisdiction, as the investigation revealed that the respondent contravened sections 47(2)(a)-(b) and 54(1)(a)-(d). Further, she argued that the referral was filed within the allowable three-year time frame. The cause of action was on 11 June 2024, when the complainant discovered the engine installed was incorrect.
17. Regarding the basis for the claim that the engine supplied was incorrect, Ms. Magoro emphasised that the engine did not perform as expected, and the Rautomec employee informed the complainant that a Ford Fiesta engine had been installed. The respondent did not dispute this claim at the time. Ms. Magoro conceded that they are not experts but asserted that it is generally understood that the performance of a Ford Focus engine is superior to that of a Ford Fiesta engine.
18. Ms. Magoro stated that the respondent took approximately nine months to install the incorrect engine and refused to replace it with the correct one. This has caused significant prejudice to the complainant, who is left without his vehicle while continuing to make installment payments to the financier. She said the complainant also suffered damage to his credit profile. Despite numerous attempts, the dispute remained unresolved. Ms. Magoro requested the Tribunal to impose an administrative fine of R1,000,000.00 in addition to the orders prayed for.

## THE RESPONDENT'S ORAL SUBMISSIONS

19. Mr. de Bruyn, representing the respondent, referred the panel to the respondent's answering affidavit. Mr. de Bruyn reiterated that the respondent did not breach the provisions of the CPA and that the applicant is not entitled to the relief it seeks. Hence, the respondent requests the dismissal of this application.
20. Mr. de Bruyn submitted that Mr. Donovan Soar (Mr. Soar), who handled the case, has twenty years of experience supplying engines for various vehicle models. He said the engine installed was a Ford EcoSport manual 1.0-liter, as stated in the invoice dated 19 September 2019. According to him, this generic one-liter engine suits the Ford Focus, Ford Fiesta, and Ford Kuga models. He argued that its installation could not have negatively impacted the vehicle's performance.
21. Mr. de Bruyn also disputed the applicant's claim that the respondent said it owned Rautomec. He said Rautomec is an independent third party that the respondent engaged to install the engine as per the agreement between the complainant and the respondent. He also said the respondent denies that additional parts required during the engine installation were to be free of charge. Mr. de Bruyn said it was common knowledge that parts unrelated to the purchased engine would be the complainant's responsibility.
22. Mr. de Bruyn referred to the invoices for the additional parts supplied and asserted that the complainant remains indebted to the respondent. The outstanding payment includes the amount settled by the respondent concerning the Rautomec quote for additional parts and services rendered, which the complainant failed to pay. Mr. de Bruyn also said the respondent was entitled to retain the vehicle due to a lien over it until the outstanding amount is settled. The respondent denies causing any damage to the complainant. Instead, the complainant's failure to pay for the engine, additional parts, and related labour costs has prejudiced the respondent.
23. Mr. de Bruyn further argued that the applicant's claim that the engine was incorrect was purely based on hearsay, with no confirmatory affidavit from the Rautomec person who told him that a Ford Fiesta engine was installed. He said neither the applicant nor the

complainant possessed the expertise to declare the engine incorrect, whereas the respondent has years of experience supplying engines for similar models.

24. The panel noted the invoices the respondent referred to and asked whether the respondent had provided quotes to the complainant before supplying the goods or services concerned and whether the complainant accepted such quotations, as required by the CPA. Save for admitting that no quotes were provided in the record, Mr. de Bruyn could not provide a response but argued that this issue was not central to the applicant's case before the Tribunal.
25. The panel also asked whether Rautomec, a third party engaged by the respondent to install the engine, concluded a separate agreement with the complainant to supply additional parts and services for which the respondent claimed to have paid Rautomec. Mr. de Bruyn could not confirm the existence of an agreement but stated that the respondent had received a telephone request for additional parts from Rautomec and that the complainant had been informed.
26. Regarding the claim that the respondent had a lien over the complainant's vehicle, Mr. de Bruyn cited<sup>2</sup> common law and referred to Amler's Precedents of Pleadings, stating that a debtor's lien arises from a debtor-creditor relationship and allows the creditor to enforce the lien if the debtor defaults on payment for improvements made by the creditor<sup>3</sup>. This extends to all improvements made under the agreement, even luxurious ones, and may be enforced to recover or secure amounts owed by the debtor<sup>4</sup>. The creditor can hold the object as security but not use it.

## **THE APPLICABLE PROVISIONS OF THE CPA**

27. Section 3(1)(d) states that the purpose of the CPA is to promote and advance the social and economic welfare of consumers in South Africa by protecting them from unconscionable, unfair, unreasonable, unjust, or otherwise improper trade practices and deceptive, misleading, unfair, or fraudulent conduct.

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<sup>2</sup> The respondent submitted authorities in a letter dated 15 August 2024, emailed to the Tribunal on 16 August 2024.

<sup>3</sup> Wynland Construction (Pty) Ltd v Ashley-Smith [1985] 2 All SA 368 (A), 1985.

<sup>4</sup> Van Niekerk v van den Berg [1965] 2 All SA 367 (A).

28. Section 4(2)(b) states that in any matter brought before the Tribunal under the CPA, the Tribunal must promote the spirit and purpose of the CPA and make appropriate orders to give practical effect to the consumer's right of access to redress, including any order provided for in the CPA and any innovative order that better advances, protects, promotes, and assures that the consumers realise their rights under the CPA.
29. Section 4(5) prohibits a supplier from engaging in conduct that goes against the purpose of the CPA, is unconscionable, misleading, or deceptive, or makes any misrepresentation about a supplier or any goods or services in ordinary dealings with a consumer.
30. Section 15 addresses the pre-authorisation of repair or maintenance work. It applies to suppliers who provide or install replacement parts or components in any property owned or controlled by the consumer and take possession of that property for the intended purpose. It also applies when a consumer requests an estimate before goods or services are supplied.
31. Section 15(2) stipulates that a supplier must not charge a consumer for goods or services provided under subsection (1) unless (a) the supplier has given the consumer an estimate that meets prescribed requirements and the consumer has authorised the work, or (b) the consumer, in writing or another recorded form, has (i) declined the estimate and authorised the work or (ii) pre-authorised charges up to a specified maximum, and the amount charged does not exceed that maximum.
32. Section 21(1)(e) states that goods or services delivered or performed for a consumer without their express or implicit request are unsolicited. Section 21(7) states that consumers are not obligated to pay for unsolicited goods or services or their delivery. Section 21(8) prohibits suppliers from demanding or collecting payment for unsolicited goods or services.
33. Section 29(a) states that a producer, importer, distributor, retailer, or service provider must not market any goods or service in a manner that is reasonably likely to imply a false or misleading representation concerning those goods or services, as contemplated in section 41.

34. Section 40(1) and (2) forbid suppliers from using undue influence, pressure, unfair tactics, or similar conduct in supplying, negotiating, concluding, executing, or enforcing agreements or demanding or collecting payments for goods or services. Further, suppliers must not exploit consumers' inability to protect their interests due to factors such as ignorance or language barriers.
35. Section 41 ensures consumers' right to accurate information disclosure. Section 41(1) states that in marketing any goods or services, a supplier must not (a) directly or indirectly make false, misleading, or deceptive representations about a material fact, (b) use exaggeration, innuendo, or ambiguity regarding a material fact, or fail to disclose a material fact if the omission is deceptive, or (c) fail to correct a consumer's apparent misunderstanding, leading to a false, misleading, or deceptive representation.
36. Section 47(2)(a)-(b) prohibits suppliers from accepting payment or other consideration for goods or services if (a) they have no reasonable intention of supplying those goods or services, or (b) they intend to supply goods or services materially different from those for which the payment or consideration was accepted.
37. Section 54(1)(a)-(d) outlines the rights of consumers when a supplier undertakes to perform services. Consumers are entitled to (a) timely performance and completion of the services, with notice of any unavoidable delays, (b) services performed to a standard and quality generally expected, (c) the use, delivery, or installation of quality goods and free of defects if such goods are necessary for the service, and (d) the return of their property in at least as good a condition as when it was provided for service, considering the circumstances and any specific agreements.
38. Section 54(2) provides that if a supplier fails to perform a service to the standards contemplated in subsection (1), the consumer may require the supplier to either (a) remedy any defect in the quality of the services performed or goods supplied or (b) refund to the consumer a reasonable portion of the price paid for the services performed and goods supplied, having regard to the extent of the failure.

## **ANALYSIS AND CONSIDERATION OF MERITS**

39. The panel noted undisputed facts based on the parties' written and oral submissions, which narrowed the dispute to the alleged incorrect engine and the additional parts and services supplied during the engine installation to determine whether the CPA was contravened. The following are undisputed facts:

39.1 A verbal agreement was concluded on 19 September 2019 for the supply and installation of a complete 1.0-liter engine for a 2017 Ford Focus at R25,092.50, which included the towing costs. The complainant paid the respondent a deposit of R5,000.00. The outstanding balance of R20,092.50 was to be settled after the engine installation. The respondent towed the vehicle to Rautomec for the installation on 20 September 2019.

39.2 After test-driving the vehicle on 11 June 2020, the complainant believed the engine installed was incorrect. He notified the respondent and requested that the correct engine be installed. The complainant did not settle the outstanding balance. The respondent refused to replace the engine and demanded payment of the outstanding amount. The respondent remains in possession of the complainant's vehicle.

## **THE ALLEGED INCORRECT ENGINE**

40 Section 142(1)(a) of the National Credit Act 34 of 2008 (NCA) mandates that the Tribunal conduct hearings in an inquisitorial manner. In this context, an inquisitorial system involves the judge actively investigating and developing the facts of the case.<sup>5</sup> In contrast to the adversarial system, which relies on competition between the prosecution and defence to determine facts, in the inquisitorial process, the judge plays a more active role in seeking out the truth<sup>6</sup>.

41 The key issue, in this case, is whether the respondent supplied and installed a 1.0-liter engine for a Ford Focus as verbally agreed. The applicant claims the installed engine was incorrect. The respondent disputes this. WhatsApp messages from 10, 11, and 18 September 2019 show the complainant specifically requested a 1.0-liter EcoBoost®

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<sup>5</sup> <https://www.merriam-webster.com/legal/inquisitorial> accessed on 6 September 2024.

<sup>6</sup> Organized Crime Module 9 Key Issues: Adversarial versus Inquisitorial Legal Systems (unodc.org) accessed on 6 September 2024.

engine for his 2017 Ford Focus. The respondent confirmed that this engine was available, yet the invoice dated 19 September 2019 mentions the Ford EcoSport, not the Ford Focus.

- 42 Given the above, the panel deemed it essential to establish the engine that is considered correct for a Ford Focus. According to the investigation report (paragraph 4.3, page 23), the respondent admitted to installing a Ford Fiesta engine. The respondent's affidavit (paragraph 23, page 143) stated that a 1.0-liter Ford EcoSport engine had been installed. Neither party provided the specific details of the engine installed in the complainant's Ford Focus. The common aspect is that both refer to a 1.0-liter engine but for different models.
- 43 Based on the information gathered, a 2017 Ford Focus typically came with a 1.6-liter TDCi, 2.0-liter Ti-VCT I-4, or 1.0-liter EcoBoost® engine<sup>7</sup>. On the other hand, a Ford Fiesta generally came with either a 1.0-liter or 1.5/1.6-liter TDCi or a 1.0-liter EcoBoost® engine<sup>8</sup>, whereas the Ford EcoSport typically came with either a 1.5-liter Ti-VCT, 1.5-liter TDCi, or a 1.0-liter EcoBoost® engine<sup>9</sup>. Of the three models, only the Ford Fiesta uses a 1.0-liter engine that is not EcoBoost®.
- 44 The Ford 1.0-liter EcoBoost® engine is commonly used in the Ford Focus, Fiesta, and EcoSport models. Although generally smaller than older engines, it produces a similar or more power output to an older, higher-capacity unit. It is more efficient due to turbocharging<sup>10</sup>. The respondent did not claim that a Ford Focus or Ford 1.0-liter EcoBoost® engine, which would be compatible with a Ford Focus, was installed. Further, the respondent could not confirm that the 1,0-liter Ford EcoSport engine installed was the EcoBoost®. Therefore, it is reasonable for the panel to conclude that the respondent installed an incorrect engine, as the applicant claimed.

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<sup>7</sup> <https://media.ford.com/content/fordmedia/fna/us/en/products/past-models/ford-focus/2017-focus.html#:~:text=2017%20FORD%20FOCUS%20TECH%20SPECS&text=Focus%20is%20available%20in%20either,with%20available%20SelectShift%20C2%AE%20functionality> & [https://media.ford.com/content/dam/fordmedia/Europe/documents/productReleases/Focus/FordFocus\\_TechSpecs\\_EU.pdf](https://media.ford.com/content/dam/fordmedia/Europe/documents/productReleases/Focus/FordFocus_TechSpecs_EU.pdf) accessed on 28 August 2024

<sup>8</sup> [https://media.ford.com/content/dam/fordmedia/Europe/documents/productReleases/Fiesta/FordFiesta2017FiestaDrive\\_TechSpecs\\_EU.pdf](https://media.ford.com/content/dam/fordmedia/Europe/documents/productReleases/Fiesta/FordFiesta2017FiestaDrive_TechSpecs_EU.pdf) accessed on 28 August 2024

<sup>9</sup> <https://www.cars.co.za/motoring-news/ford-ecosport-2013-2023-buyers-guide/153384/> accessed on 24 August 2024

<sup>10</sup> <https://www.parkers.co.uk/what-is/ford-ecoboost/#:~:text=For%20example%2C%20Ford%20says%20a,the%20equivalent%20naturally%2Daspirated%20engine> accessed on 28 August 2024

- 45 The panel noted the respondent's reliance on the invoice dated 19 September 2019, which reflects a Ford EcoSport engine. However, this invoice contradicts the complainant's explicit request for a Ford Focus engine. On multiple occasions (8 October 2019, 30 January 2020, and 19 February 2020), the complainant inquired about the engine's correctness. The complainant always believed that a Ford Focus engine was being installed. This misapprehension was not corrected by the respondent, which misled the complainant against the provisions of section 29(a) and section 41(1)(c), resulting in a false and deceptive representation.
- 46 The respondent emphasised that they had years of experience supplying engines. On the other hand, the complainant is an ordinary consumer with no technical knowledge of engines. Given the technical nature of the engine, the respondent's conduct of supplying the incorrect engine and demanding payment from the complainant indicates unconscionable conduct proscribed under section 40(2), read with section 4(5)(b).

#### **ADDITIONAL PARTS AND SERVICES SUPPLIED**

- 47 It is undisputed that the verbal agreement was on supplying and installing a complete engine, as confirmed in paragraph 24 of the respondent's affidavit. A complete engine ordinarily refers to a fully assembled, ready-to-install engine with all necessary components. The complainant was not informed that additional parts would be required, and the invoice dated 19 September 2019 does not refer to any additional parts or services. The issue of additional parts and services is also key because it forms part of the amount the respondent demands before releasing the vehicle.
- 48 Section 15 prohibits suppliers from charging consumers for goods or services without providing an estimate or obtaining pre-authorisation from the consumer. The respondent submitted invoices for additional parts and services to the Tribunal without evidence that the respondent gave the complainant estimates or obtained the complainant's authorisation for such goods and services. As a result, the respondent is prohibited from charging for these items under section 15(2)(a).
- 49 There is no evidence before this panel that the complainant requested any additional parts or services, either explicitly or implicitly. Without such a request, the goods and

services supplied by the respondent are considered unsolicited in terms of section 21(1)(e). The complainant is not obligated to pay for unsolicited goods or services in terms of section 21(7). Section 21(8) prohibits the respondent from demanding or collecting payment from the complainant.

- 50 The panel is concerned that the cost of these unsolicited additional parts and services (R25,466.83) was significantly high and exceeded the original invoice amount (R25,092.50). This is why the respondent should have provided a quote and obtained pre-authorisation from the complainant.

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

- 51 Suppliers are prohibited from accepting payment for goods or services if they do not intend to supply those goods or services or if they intend to provide goods or services materially different from what was promised. The respondent had no intention to supply a Ford Focus engine, as evidenced by the supply and installation of a 1.0-liter Ford EcoSport engine. The engine provided materially differed from what the complainant requested. The panel finds that the respondent contravened section 47(2)(a) and (b).
- 52 Furthermore, the CPA grants consumers the right to demand quality service. The applicant submitted that the respondent failed to install the correct engine timely and did not notify the complainant of any unavoidable delays. The vehicle has been with the respondent for over four years without resolution when all it required was an engine swap. The panel is convinced that the respondent's actions violated the complainant's right to timely service under section 54(1)(a).
- 53 Suppliers are required to provide service in a manner and quality that persons are generally entitled to expect. The complainant expected a Ford Focus engine to be installed, but an incorrect engine was supplied, negatively impacting the vehicle's performance. The complainant has given the respondent ample time to deliver on the expected product and service quality by replacing the wrong engine in vain. The panel finds that the respondent has contravened section 54(1)(b).
- 54 The panel accepts that the quality of the engine supplied by the respondent was inferior to a Ford Focus. A Ford 1.0-liter EcoBoost®, or 1.6-liter TDCi, 2.0-liter Ti-VCT I-4 engine,

is the quality the complainant was generally entitled to expect for a Ford Focus. The 1.0-liter engine is appropriate for a Ford Fiesta, not a Ford Focus. The complainant has a right to the use, delivery, or installation of goods free of defects and of a quality that persons are generally entitled to expect. The panel finds that the respondent failed to meet this standard and contravened section 54(1)(c).

- 55 The respondent refused to return the vehicle to the complainant in as good a condition as when it was delivered for service. At the same time, the respondent refused to install the correct engine. The respondent claimed a lien over the vehicle due to an outstanding payment, even though the complainant had rejected the incorrect engine. As of the hearing date, the respondent has still not installed the correct engine. The respondent's argument that it had a lien is not applicable in the circumstances of this case. The panel finds that the respondent contravened section 54(1)(d).

## **CONCLUSION**

56. The panel is satisfied that the applicant has, on the balance of probabilities, proved that the respondent has contravened sections 47(2)(a) and (b) and 54(1)(a), (b), (c) and (d), which should be declared prohibited conduct. The respondent's conduct blatantly disregards the objective under section 3(1)(d). Further, the panel noted that the respondent's conduct is also contrary to the spirit of the CPA espoused under sections 4(5)(b), 15(2)(a), 21(e), 29(a), 40(2), and 41(1)(c).
57. The panel is disappointed by the lack of transparency in this transaction. Vehicles and engines are technical goods that demand honest and accurate disclosure by suppliers so that the consumer can make informed decisions. Neither the complainant, the applicant, nor the Tribunal was provided with a shred of paper with detailed descriptions or specifications of the engine installed by the respondent. The respondent took advantage of the vulnerability of the complainant. The impunity with which the respondent acted was calculated to frustrate and defeat the purpose of the CPA. Such unjust and unfair conduct should be condemned.

## **RELIEF SOUGHT**

58. In the case of *Coertze and Burger v Young*,<sup>11</sup> the court confirmed that the Tribunal may, in terms of its statutory authority under section 75(4)(b), make any applicable order contemplated in the CPA or Section 150 or 151 of the NCA to provide an "*applicable order*." Section 4(2)(b)(ii)(bb) mandates the Tribunal to make appropriate orders to give effect to the consumer's rights of access to redress, including any innovative order that better advances, protects, promotes, and assures the realisation by consumers of their rights in terms of the CPA.
59. In addition to finding contraventions and declaring them prohibited conduct, the applicant requests that the respondent refund the complainant the R5,000.00 deposit, which must be paid with interest in accordance with the Prescribed Rate of Interest Act, 1975 calculated from 19 September 2019, the date on which the complainant paid for the repairs, to the date of final payment. Further, the applicant requests that the vehicle be returned in the condition it was when the respondent took possession of it.
60. The panel notes that the CPA does not prescribe a remedy for the violation of section 47(2)(a) or (b). The refund remedy requested by the applicant is prescribed for circumstances described under section 47(3). On the other hand, the remedy prescribed for section 54(1) is for the supplier to either remedy any defect in the quality of the services or goods or refund a reasonable portion of the price paid under section 54(2). Section 67(1) also requires a supplier to retain parts removed from the vehicle during any repair or maintenance work to return them to the consumer in a reasonably clean container.
61. The CPA does not empower the Tribunal to make an order of a refund with interest under section 47(2) or section 54(2). In section 47(3), the CPA provides for a refund with interest in case of stock shortage. In terms of section 150(i) of the NCA, read with section 4(2)(b)(ii), the Tribunal may make orders to give effect to a consumer right, including innovative orders. As far as the power to make innovative orders is concerned, it is clear from section 4(2)(b) that these orders go beyond the orders specified in the CPA. These orders must be "appropriate" and must be made if they "better advances, protects, promotes and assures the realisation by consumers of their rights in terms of

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<sup>11</sup> NCT/7142/2012/73(3) & 75(b) & (2) CPA.

this Act".<sup>12</sup> The respondent's conduct persists to date. Given the right under section 54(1)(d) and the passage of time since the deposit was paid, the panel agrees the return of the vehicle and the refund of the deposit with interest is warranted to ensure fairness, justice, and protection for consumers.

62. The applicant also requests an administrative fine be imposed on the respondent. Under section 151(1) of the NCA, an administrative fine may be imposed 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<sup>13</sup>.
63. Considering the nature of the contraventions, the panel agrees with the applicant that a fine is appropriate and justified. The CPA places specific obligations on suppliers to safeguard consumers, and a clear message must be sent that non-compliance with the CPA will not be condoned or tolerated. The applicant has, however, not demonstrated that the respondent benefited or profited significantly from this conduct to justify a maximum penalty. Also, no financial statements or the annual turnover of the respondent have been submitted.
64. Section 151(3) of the NCA outlines the factors the Tribunal must consider when determining an appropriate fine. The panel addresses each of these factors under the sub-headings below.

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

65. The respondent's conduct is serious and has severely prejudiced the complainant. The complainant has been deprived of goods and services of good quality expected. The respondent violated the complainant's rights. The complainant's vehicle has been in the respondent's possession since 20 September 2019.

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

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<sup>12</sup> Naude, T, & de Stadler, E. (2019). "Innovative Orders" under the South African Consumer Protection Act 68 of 2008. *Potchefstroom Electronic Law Journal (PELJ)*, 22(1), page 5. <https://dx.doi.org/10.17159/1727-3781/2019/v22i0a5108>.

<sup>13</sup> Section 151(2).

66. The applicant submitted that the complainant paid a deposit of R5,000.00 but has yet to receive his vehicle, as the respondent refused to return it. The complaint has been deprived of his vehicle in a manner that negatively impacted his daily life and his business.

#### The behaviour of the respondent

67. The applicant submitted that the respondent showed no regard for consumer rights, evidenced by a dismissive attitude throughout the process. The respondent refused to co-operate with the applicant during the investigation. The respondent also refused to co-operate with the Motor Industry Ombudsman of South Africa by failing to implement its recommendation. The impunity with which the respondent acted warrants a fine.

#### The market circumstances in which the contravention took place

68. No specific evidence was provided, but the nature of the conduct occurs in circumstances where consumers are not knowledgeable of their rights, with suppliers taking advantage of this vulnerability, especially with technical goods and services.

#### The level of profit derived from the contravention

69. The panel noted that the respondent has benefited from the R5,000.00 deposit paid by the complainant. The panel noted that the applicant did not demonstrate the level of profit derived, if any, by the respondent.

#### The degree to which the respondent has cooperated with the NCC and the Tribunal

70. The applicant persuaded the panel that the respondent refused to co-operate during the investigation. The respondent attended a meeting with the NCC but failed to provide the detailed response and supporting documents required by the applicant in this case. The panel views the respondent's disregard for the applicant's role as a regulatory authority as disdainful.

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

71. The applicant has not submitted evidence of any previous contravention(s).

## **ORDER**

72. Accordingly, the panel makes the following order:

- 72.1 The respondent has contravened section 47(2)(a) and (b) and section 54(1)(a), (b), (c), and (d) of the CPA;
- 72.2 The contraventions are declared prohibited conduct in terms of section 150(a) of the NCA;
- 72.3 The respondent must, within 30 days of the issuance of this judgment, return the vehicle to the complainant fully assembled and in as good condition as it was when the respondent collected it from the complainant;
- 72.4 The respondent must, within 30 days of the issuance of this judgment, refund the complainant the R5,000.00 deposit paid by the complainant, which amount must be paid with interest in accordance with the Prescribed Rate of Interest Act, 1975, calculated from 19 September 2019, being the date on which it was paid by the complainant for the supply and installation of the engine, to the date of final payment;
- 72.5 The complainant must, within 48 hours of the issuance of this judgment, provide the respondent with his nominated bank account, to which the respondent must pay the amount contemplated in 72.4 above;
- 72.6 The applicant must ensure the execution of the order for the return of the vehicle and the refund of the deposit contemplated in 72.3 and 72.4 above;
- 72.7 The respondent must, within 90 business days of the date of issue of this judgment, pay an administrative fine of R75,000.00 into the National Revenue Fund's following bank account:

Bank: The Standard Bank of South Africa

Account holder: Department of Trade and Industry

Branch name: Sunnyside

Branch code: 010645

Account number 370650026

Reference: NCT/266654/2023/73(2)(b) and the name of person or business making the payment; and

72.8 There is no order as to costs.

[signed]

**Ms Z Ntuli**

**Presiding Tribunal Member**

With Tribunal members Dr MC Peenze and Ms P Manzi-Ntshingila concurring.

**Authorised for issue by The National Consumer Tribunal**

**National Consumer Tribunal**

**Ground Floor, Building B**

**Lakefield Office Park**

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**national consumer tribunal**