

SOUTH AFRICA / JUDGMENT

Maluleke v Farhad Omar Ismail Trading Trust t/a Squad Cars Motor Group (I.T) (NCT/146540/2019/75(1)(b)) [2022] ZANCT 9 (2 February 2022) [2022] ZANCT 9

COURT

National Consumer Tribunal

BEFORE

P Beck, L Best, F Manamela

CASE / FILE NUMBER

NCT/146540/2019/75(1)(b)

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case number: NCT/146540/2019/75(1)(b)

In the matter between:

TSAKANE ALFORD MALULEKE

APPLICANT

and

FARHAD OMAR ISMAIL TRADING TRUST

RESPONDENT

T/A SQUAD CARS MOTOR GROUP (I.T)

REGISTRATION NUMBER ([....])

Coram:

Ms P Beck – Presiding Tribunal Member

Dr L Best – Deputy Chairperson of the Tribunal

Adv F Manamela – Tribunal Member

Date of hearing – 20 January 2022 via the Microsoft Teams digital platform

Date of judgment – 2 February 2022

JUDGMENT AND REASONS

APPLICANT

1. The Applicant is Tsakane Alford Maluleke, a major male (“Mr Maluleke” or “the Applicant”) and a consumer as defined in terms of the Consumer Protection Act 68 of 2008 (“the Act or the CPA”) who resides in Centurion, Gauteng.
2. The Applicant represented himself at the hearing of this application (“the hearing.”)

RESPONDENT

3. The Respondent is the Farhad Omar Ismail Trading Trust T/A Squad Cars Motor Group (I.T) with registration number [...] (“the Respondent” or “Squad Cars”) with its principal place of business is at 466 Gerit Maritz Road, Pretoria North, Pretoria.
4. The Respondent is a dealer and supplier of pre-owned motor vehicles to members of the public.
5. The Respondent was represented by an attorney, Ms Naidoo, from the law firm NM Aboo attorneys.

APPLICATION TYPE AND RELIEF SOUGHT

6. The Applicant makes this application in terms of section 75(1)(b) of the CPA. This section provides that if the National Consumer Commission issues a notice of non-referral in response to a complaint, the complainant

may refer the matter directly to the Tribunal, with leave of the Tribunal. On 19 January 2021, the Tribunal granted the applicant

leave to refer his complaint directly to the Tribunal.

7. The Applicant initially sought an order for the following relief:

7.1. That the Respondent uplifts the vehicle from the financier, the Motor Finance Corporation (“the MFC”); (“take the vehicle back[1]”) and refunds the Applicant the purchase price of the vehicle;

7.2. In the alternative, the Respondent sought a refund of the difference between the purchase price of the vehicle and the current market value of the vehicle;

7.3. Compensation for the unfair and deceitful conduct of the Respondent; and

7.4. A refund of the storage costs of the vehicle of R30 000.00 which were added to his account by the credit provider.

8. At the hearing, the applicant narrowed the relief to:

8.1. That the Chairperson of the National Consumer Tribunal (“the Tribunal”) issues him with a notice in terms of section 115(2)(b) of the CPA to institute a claim in a civil court to recover the damages he alleges he suffered arising out of the purchase of the vehicle from the Respondent.

TERMINOLOGY

9. A section in this judgment refers to a section in the CPA.

BACKGROUND: THE MATERIAL

FACTS

10. The material facts determining this application are set out below.

11. In December 2017, the Applicant purchased a pre-owned 2015 model Toyota Avanza vehicle from the Respondent. The vehicle had 175 000 kilometres on the odometer. The purchase was financed by Nedbank Limited, a division of the Motor Finance Corporation (“the MFC.”). The purchase agreement was signed on 30 November 2017, but he only took delivery of the vehicle on 5 December 2017. He then had to return the vehicle to the Respondent because he did not provide the Respondent with a copy of his driver’s licence. He took final delivery of the vehicle on 20 December 2017. From January 2018 to February 2018 the vehicle broke down on number of occasions since the Applicant took delivery of the vehicle. The Respondent effected repairs to the vehicle within the first three months of the Applicant taking delivery of the vehicle. On 28 February 2018, the vehicle broke down and had to be towed in for repairs. On 1 March 2018 the Applicant told the Respondent that he no longer wanted the vehicle due to its continuous mechanical problems. The Respondent refused to accept the return of the vehicle and to refund the purchase price to the Applicant. The Respondent insisted on repairing the vehicle.

12. In April 2018, when the vehicle broke down again, the Respondent informed the Applicant that the quotation for the repair of vehicle

was the amount of R25 852.00 to re-condition the engine. The Respondent informed the Applicant that it would claim an amount of

about R20 000.00 from the warranty policy on the vehicle; and the Applicant would be liable for the balance of the cost of repair of R6000.00. Under duress the Applicant agreed to pay this balance. The Applicant took some time to raise the R6000.00. On 11 May 2018, when the Applicant went to collect the vehicle, he was told that he had to pay storage costs of R58 000.00. He could not afford to pay this amount. At the time he was also in arrears with his instalments on the credit agreement for the purchase of the said vehicle. The Applicant had intended using the vehicle as a lift club for his colleagues. His colleagues would pay him for travelling in the vehicle; and he

would use this income to pay the instalments on the vehicle. This arrangement was unsuccessful [2] and he was unable to pay the instalments on the vehicle. The vehicle was later attached by the credit provider (“Nedbank Limited”) by order of the High Court.

13. In December 2018, the Applicant filed a complaint with the Motor Industry Ombudsman of South Africa (“the MIOSA.”) On 17 January 2018, MIOSA issued a letter finding in favour of the Applicant. MIOSA found that section 56 of the CPA has application;

that the vehicle supplied by the Respondent had a six month implied warranty entitling the Applicant to “repair or replace the failed, unsafe or defective goods; or refund the consumer the price paid by the consumer for the goods.” On 12 February 2019, the Applicant filed a complaint with the National Consumer Commission (“the NCC.”) On 13 September 2019, the NCC issued a Notice of non-referral, informing the Applicant to apply for leave to refer the complaint directly to the Tribunal. The Applicant alleges that the Respondent sold him a defective vehicle

14. Various interlocutory applications followed before the matter was finally set down for a hearing into the merits of the matter.

The Applicant

15. The essential basis of the applicant’s claim is that the Respondent sold him a vehicle that was defective from the start.
16. According to the Applicant, the defects manifested themselves within the first month of the Applicant taking delivery of the vehicle. The Respondent refused to accept return of the vehicle from the Applicant. Instead, the Respondent unilaterally elected to repair the vehicle instead of refunding the Applicant the purchase price of the vehicle. According to the Applicant the vehicle was referred for repairs to the Central Automotive Service (Pty) Ltd (“Central Auto”) a workshop which is located on the premises of the Respondent.
17. The Applicant referred the Tribunal to the following sections of the CPA in support of his case.

Section 55 – Consumers right to safe, good quality goods

18. In terms of section 55 of the CPA the consumer has a right to receive goods that are reasonably suitable for the purposes for which they are generally intended; are of good quality and in good working order and free of any defects; and will 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 the surrounding circumstances of their supply. The Applicant submitted that the Respondent contravened section 55 of the CPA.

19. The Applicant explained that he arrived at the Respondents premises on 30 November 2017 to sign the sale agreement and the checklist of the vehicle on the false commitment of the Respondent's sales consultant that he would receive the vehicle on the same day. He was surprised to learn on the day that this was not the case. Instead the sales consultant requested that he signs all the documents, including the check list, to avoid the deal being rejected. When he received the vehicle on 5 December 2021, many

items on the vehicle were not what he had signed for. He requested a copy of the sale agreement from the Respondent. He was denied a copy of the sale agreement for two years. He only received a copy of the sale agreement in 2020 because the sale agreement was per the Respondent, archived by the Respondent. His request for the service book of the vehicle was similarly denied to him by the Respondent. To date he has not received it. The Applicant submitted that the Respondent deprived him of the information pertaining to the defects in the vehicle and as a result,

his consumer rights were violated.

20. The Applicant placed on record that contrary to what the Respondent submitted on affidavit, he took delivery of the vehicle on 5 December 2017 because the vehicle was still being serviced. This fact is confirmed in an e-mail from MFC, the financier dated 1 March 2019, wherein the financier queries with the Respondent the reason why the Applicant collected the vehicle after the date when he signed the sale agreement. The Respondent, in a handwritten note to the MFC confirmed the delivery date of the vehicle to the Applicant to be 5 December 2017. In as much as the Applicant took delivery of the vehicle on 5 December 2017, he was requested on the same day to return the vehicle to the Respondent because he did not provide the Respondent with a copy of his driver's licence. At the time his driver's licence was lost and he had traffic enforcements on the vehicle that he had to pay. He waited for about two weeks to receive his salary to pay the traffic enforcements and to obtain a temporary drivers licence. As a result, he effectively took delivery of the vehicle two weeks later, on 20 December 2017.

21. In support of the contravention of section 55 of the CPA, the Applicant referred the Tribunal to the invoices that pertain to the repairs to the vehicle since taking delivery of the vehicle on 20 December 2017. The invoices and repairs are as detailed below-

21.1 Invoice number 1373 from Central Auto dated 5 December 2017 in the amount of R550.00 for the removal and replacement of the cam control valve;

21.2 Invoice from Squad Cars dated 12 January 2018 in the amount of R758.00 for the oil pack;

21.3 Invoice from Squad Cars dated 6 February 2018 in the amount of R950.00 for the sensor valve of the engine light;

21.4 Invoice from Squad Cars dated 20 February 2018 in the amount of R795.00 for a high volt battery;

21.5 Invoice from Central Auto dated 21 February 2018 in the amount of R1 312.00 for the labour to remove and fit the stub axle and for a press fit bearing;

21.6 Invoice from Central Auto dated 7 March 2018 in the amount of R25 852.00 for amongst others the removal and stripping of the engine and to recondition the engine; and

21.7 The letter dated 14 March 2018 from Central Auto confirming that the vehicle was brought to their workshop on 5 December 2017 for the fitment of a new variator solenoid; that the vehicle was brought in for the second time on 21 February 2018 for the replacement of the right front wheel bearing that had seized; that oil sweating was found on the vehicle's engine; and that the vehicle was towed to the same workshop in March 2018 with an engine knock which the workshop suspected was oil pump failure.

22. The Applicant submitted that the vehicle was not fit for purpose from the time that he took delivery of the vehicle. The Applicant submitted that this is demonstrated by the vehicle stopping or choking shortly after he took delivery, when it reached the speed limit of 80km/ph. When this happened, drivers behind the Applicant could not anticipate that the Applicant would come to a sudden stop which would happen frequently. Furthermore, shortly after December 2017, the Applicant at his own cost had to replace the vehicles re-treaded tyres and brake pads. He claims that the Respondent downplayed the issue of the defect on the vehicle's bumper, and the complaint that the engine light kept coming on frequently.
23. According to the Applicant, the dates in paragraph 21 above are evidence of the defects in the vehicle; and that he returned the vehicle to the Respondent for repairs within 2 months of taking delivery of the vehicle. He testified that he requested that the sales person swap the vehicle for another vehicle. The Respondent unilaterally refused to accept return of the vehicle and insisted that he would repair the faults in the vehicle. In so doing, the Respondent deprived the Applicant of his right in terms of the CPA, to return the vehicle to the Respondent and to obtain a refund of the purchase price of the vehicle.
24. The Applicant submitted that the Respondent misled him as to the mileage of the vehicle. The Applicant referred the Tribunal to the following records as evidence of the Respondent's deception of the mileage of the vehicle:

24.1 The sale agreement reflects the mileage as 175 000km as at 30 November 2017;

24.2 The Central Auto invoice dated 5 December 2017 records the vehicle's mileage as 172534;

24.3 The Respondent's invoice dated 12 January 2018 records the mileage of the vehicle by hand as 185 425km;

24.4 The Respondent's invoice dated 20 February 2018 records the mileage of the vehicle as 172475; and

24.5 The Central Auto invoice dated 21 February 2018 records the mileage when the wheel bearing was replaced as 192 863 implying that the Applicant between 20 February 2018 (21.5 above) and 21 February 2018 travelled 20 000 km in 24 hours which is disputed by the Applicant.

25. The Applicant submitted that these discrepancies were intended to mislead him as to the condition of the vehicle. To date the Respondent has not explained why the vehicle could not be delivered to the Applicant on 30 November 2017, when the Applicant signed the sale agreement.
26. The Applicant also questioned the relationship between the Respondent and Central Auto, the repairer of the vehicle. The Applicant stated that both the Respondent and Central Auto are located on the same business premises. This gave him the impression that this was the Respondent's preferred repairer of the Applicant's vehicle possibly to cover up the "shoddy work previously done on the vehicle or to conceal the real problems the vehicle had." [3]

Section 56(3) of the CPA – Implied warranty of quality

27. The Applicant submitted that on or about 28 February 2018; and a few days after the Respondent repaired the vehicle, the vehicle broke down in Naboomspruit while travelling to Mokopane on a family visit. The initial response of the Respondent's representative, Mr Junaid ("Junaid"), was that arrangements would be made for the vehicle to be towed to the nearest dealer in Naboomspruit. Later Junaid changed his statement and stated that the vehicle had to be towed to the Respondent's workshop. By this time the Applicant arranged for the towing of the vehicle and had to pay R1300.00 for the towing company to hand the vehicle over to the Respondent.
28. Once the Applicant arrived at the dealership, the Applicant was shocked when the Respondent requested that the Respondent uses the

Applicant's warranty to repair the vehicle at a cost of R25 852,00. The repairs were to be undertaken by a third party repairer

of the Respondent's election. The Respondent informed the Applicant that the Applicant would be responsible for the shortfall

on the warranty of R6000.00. If the Applicant did not accept the Respondent's instruction, the Respondent gave the Applicant an ultimatum that the vehicle would be left out on the street. The Applicant felt completely "misled, crooked, and that this was a deceitful act by the dealer to avert their responsibility in terms of section 56 of the CPA." [4] Under duress, the Applicant agreed to pay the shortfall on the warranty of R6000.00 by 25 April 2018.

29. According to the Applicant section 56 of the CPA gives him as a consumer an implied warranty of six (6) months in which period he could request the Respondent to repair, exchange (replace) or obtain a refund. In terms of section 56(3) if the Respondent repairs the defects in the vehicle and within three (3) months after the repair the defects have not been remedied, the Respondent must replace the goods or refund the Applicant the purchase price of the goods.
30. Upon being questioned by the Tribunal on his election to repair the vehicle after the vehicle broke down so many times, the Applicant testified that he told the Respondent that he wished to return the vehicle to the Respondent for a refund of the purchase price which was declined by the Respondent.
31. The Applicant placed on record that in as much as the vehicle was towed to the dealership on 1 March 2018[5], the invoices were only submitted to the warranty company in May 2018.
32. On 11 May 2018 the Respondent informed the Applicant that his vehicle was ready for collection. He was not informed that if he did not collect the vehicle it would accumulate storage costs. The invoice for the repairs to the vehicle in the amount of R25 852.00 bears no reference to storage costs. When he went to the dealership a few months later the Respondent informed him that he was liable for storage costs of R58 000.00 which amount he could not pay. By this time he was already in arrears with his vehicle instalments.
33. The Applicant testified that the aforementioned demonstrates that the Respondent contravened section 55 and 56 of the CPA. As a result of the Respondent's conduct the Applicant's vehicle was repossessed by Nedbank Limited and sold at an auction sale. The Applicant is thus not able to obtain the relief he originally sought for the return of the defective vehicle to the Respondent and to claim a refund of the purchase price.
34. Accordingly, the Respondent committed prohibited conduct.

Witness for the Applicant C Toweel

35. The Applicant called one witness, Ms C Toweel, the team leader specialist of the credit provider, Nedbank Limited. It is to be noted that Nedbank Limited is not a party in the matter.
36. Ms Toweel testified under oath that Nedbank Limited negotiated the storage costs due on the vehicle and paid an amount of R40 000.00 for the release of the vehicle.
37. Ms Toweel testified under oath that the vehicle was repossessed by Nedbank Limited and sold at an auction sale on 23 July 2021 for the amount of R94 300.00.

The Respondent

38. The Respondent did not place the facts in dispute, the sequence of events, the faults with the vehicle and the repairs completed on the vehicle.

39. The Respondent placed on record that the Applicant, when taking delivery of the vehicle, signed a check list form in respect of the interior and exterior condition of the vehicle. In so doing the Respondent submitted that the Applicant confirmed by ticking the check list items and by appending his signature thereon, that the vehicle was in good order and working condition. He did not record the defective bumper or that the tyres and brakes were defective within three months of purchasing the vehicle, as alleged in his founding affidavit. The Respondent disputes that the Applicant was not made aware of the mileage of the vehicle as 172475km at the time of purchase.
40. The Respondent contends that the complaints of the Applicant suggest that the vehicle was involved in a motor vehicle accident pursuant to the Applicant taking delivery of the vehicle; and that the Applicant was fabricating the complaints simply to cancel the sale and to claim a refund.
41. With reference to the MIOSA findings, the Respondent pursuant to these findings requested that the Applicant pays the amount of R6000.00 towards the cost of the vehicle repairs and to return the vehicle to the Respondent's workshop. All the repairs and storage costs were conducted at the special instance of the Applicant, by a third party workshop. The Respondent was therefore not liable for the storage costs of the third party workshop.
42. The Respondent submitted that on the facts before the Tribunal that the "Applicant purchased the vehicle pursuant to his satisfaction thereof"[6] and the case against the Respondent should be dismissed.

ANALYSIS

Relevant statutory provisions of the CPA

43. Chapter 2 of the CPA concerns fundamental consumer rights. It is convenient to set out the relevant sections in chapter 2 that determine this application.

Section 53: Meaning of "defect"

44. In the context of goods, section 53 (1) (a) defines a defect as (i) any material imperfection in the manufactured goods that renders the goods less acceptable than persons generally would be reasonably entitled to expect. Alternatively, as (ii) any characteristic of the goods or components that renders them less useful, practicable or safe than persons generally would be reasonably entitled to expect.

Section 55: Consumer's right to safe, good quality goods

45. Section 55 (2) (a), (b) and (c) respectively give a consumer the right to receive goods that are reasonably suitable for their intended purpose; are of good quality, in good working order and free of defects; and usable and durable for their normal use for a reasonable time.

Section 56: Implied warranty quality

46. Section 56 (1) provides that it is implied in an agreement concerning the supply of goods that the retailer warrants that the goods comply with the requirements and standards contemplated in section 55.
47. Section 56 (2) gives the consumer the right to return the goods to the supplier within six months after delivery if the supplier does not meet the requirements and standards contemplated in section 55. In that event, the supplier must, at the consumer's discretion, without imposing a penalty and at the supplier's risk and expense, either (a) repair or replace the failed, unsafe or defective goods; or (b) refund the price the consumer paid for the goods.
48. Section 56(3) gives the consumer an implied warranty of quality that if a supplier repairs the goods and within three months of the repair the failure, defect or unsafe feature has not been remedied or there is a further failure, defect or unsafe feature is discovered the supplier must replace the goods or refund the purchase price of the goods.
49. The CPA established the legal framework to achieve and maintain, amongst other things, a fair and efficient consumer market responsible for the benefit of consumers.[7] In realising consumer rights, the Tribunal or a court must develop the common law and promote the spirit and purpose of the CPA. It must also make appropriate orders to give effect to a consumer's right of access to redress.[8] Common cause
50. It is common cause that all the defects, failures or faults manifested within three (3) months of the Applicant taking delivery of the vehicle. It is common cause that the Respondent declined the Applicant's request to return the vehicle; that the Respondent attended to repairs to the vehicle on several occasions; that the Respondent requested that the Applicant's vehicle warranty be used to attend to repairs to the vehicle; and requested that the Applicant settles the difference between the warranty of R25 852.00 and the cost of repairs in the amount of R6000.00.
51. The Tribunal must decide this application on a balance of probabilities.

Consideration of the merits

52. The Supreme Court of Appeal has found that not every small fault is a defect as defined. The defect 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 the consumer purchased them.[9]
53. On the aforementioned set of facts, the Tribunal must consider whether the vehicle was less useful, practicable or safe for the purpose the Applicant purchased it; and on the Applicant's amended relief sought, whether the Respondent's conduct amounts to prohibited conduct in terms of the CPA.

54. It is not necessary for the Tribunal to firmly conclude whether the failure of the vehicle falls either under section 53 (a)(i) or (ii). It was common cause that the vehicle broke down in the same month that the Applicant took delivery of the vehicle; that the Respondent repaired the vehicle despite the Applicant's request to return the vehicle and obtain a refund; and that the Applicant's vehicle broke down within three (3) months of the Respondent repairing the vehicle.
55. The circumstances surrounding the Applicant's claim against the Respondent, therefore, falls within the ambit of the CPA. Section 55(2)(b) of the CPA requires a supplier to provide goods that are of good quality, in good working order, and free of defects. Applying sections 55 and 56 of the CPA to the Applicant's matter, the Applicant had the right to receive a vehicle that was reasonably suitable for the purpose for which it was generally intended. The vehicle must be of good quality, in good working order and free of any defects, and must be usable and durable for a reasonable period in time, having regard to the use to which vehicles of this nature would normally be put.
56. The Applicant, therefore, was entitled on these facts in terms of section 56(2) of the CPA to return the vehicle to the Respondent within three (3) months of taking delivery of the vehicle without incurring a penalty. In that event, the Respondent was obliged as per the Applicant's election (my emphasis) to refund, repair, or replace as required by section 56(2) (a) and (b) of the CPA and if within three (3) months of the repairs to the vehicle, the defects have not been remedied, the Applicant was again entitled to invoke his right in terms of section 56(3) of the CPA for a refund of the purchase price or a replacement of the vehicle.
57. If the Tribunal has regard to the repair history of the vehicle, it is undisputed that the Respondent repaired and fitted a new variator solenoid; removed and replaced the cam shaft control valve; the vehicle wheel bearing that had seized up; and replaced the battery all within the first three (3) months of the Applicant taking delivery of the vehicle.
58. It is undisputed that after these repairs were effected by the Respondent, the vehicle broke down again in February 2018 and that this repair required a reconditioning of the engine at a cost of R25 852.00. The vehicle turned out to be unusable, untrustworthy and unsafe. The Applicant's vehicle warranty did not cover the full amount of these repairs. The Respondent held the Applicant liable for the shortfall of the repair costs in the amount of R6000.00. The Applicant, under duress of the threat by the Respondent that his vehicle would be left in the street, agreed to pay the shortfall of R6000.00.
59. Consequently, there is sufficient evidence based on the numerous invoices introduced into evidence as proof of the inherent defects in the vehicle. Even after the repairs to the vehicle were effected by the Respondent, it was less suitable than when the Applicant initially took delivery of the vehicle because it required a complete re-conditioning of the engine. The vehicle clearly did not comply with the Applicant's right to receive goods compliant with section 55(2).

60. The Tribunal therefore rejects the Respondent's contention that the Applicant's signature of the vehicle check list implied that the vehicle was in good order and free of defects. The Tribunal also rejects the Respondent's assertion as being without any substance that the defects arose in the vehicle as a result of an accident after the Applicant took delivery of the vehicle; alternatively; as fabricated by the Applicant to obtain a refund.
61. In the light of the evidence presented by the Applicant, the Tribunal made a negative deduction of the Respondent's failure to implement and respond to the finding made by MIOSA, the ombud established for the motor industry in terms of section 82 of the CPA.
62. In the Tribunal's view, the vehicle did not satisfy the requirements of section 55 (2) because the vehicle was not suitable for its intended purpose; was neither of good quality, nor in good working order and free of defects; and 'plainly' not usable and durable for a reasonable time.
63. Therefore, the Applicant was entitled in terms of section 56 (2) to return the vehicle to the Respondent within six months of taking delivery of the vehicle without incurring a penalty. In that event, the Respondent was obliged to refund the Applicant the amount paid for the vehicle. The Respondent refused to refund the Applicant and to accept return of the vehicle. Instead, the Respondent took the vehicle to a repairer of the Respondent's choice and used the Applicant's vehicle warranty to cover the cost to recondition the engine. The Applicant was left without his vehicle and faced with the Respondent's claim of R6000.00 for the shortfall on the warranty. The Applicant could not afford to pay the shortfall. Ultimately, when the Applicant returned to the Respondent to pay the R6000.00 the third party repairer demanded R58 000.00 as storage costs. The Applicant similarly, could not afford this additional cost. Ultimately, the credit provider paid the storage costs at a re-negotiated lesser amount, attached the vehicle; and sold it at an auction.
64. The conduct of the Respondent left the Applicant without the vehicle and liable to the credit provider for any difference between the purchase price and the sale price of the vehicle at the auction; and legal costs. Ultimately, the Applicant was deprived by the Respondent of his right in terms of the CPA to obtain a refund, replacement or repair of the vehicle.
65. This is a clear case of prohibited conduct where the Applicant hardly had the use of the vehicle he purchased from the Respondent. The Tribunal is satisfied on the evidence before the Tribunal, that the Respondent has contravened the CPA.
66. Accordingly, the Tribunal is in terms of the CPA bound to make any appropriate order to give effect to a consumer's rights as contemplated in the CPA.

CONSIDERATION OF AN ADMINISTRATIVE FINE

67. The egregious conduct of the Respondent persuades the Tribunal to consider the imposition of a fine on the Respondent. The nature of the contraventions and the importance of this issue for consumers further persuade the Tribunal that a fine is appropriate and justified.

The buying and selling of pre-owned vehicles is a large industry in South Africa. This industry impacts thousands of consumers who are unable to purchase a new vehicle. A clear message must be sent to the Respondent and to the industry, that non-compliance with the CPA will not be condoned or tolerated.

68. The nature, duration, gravity and extent of the contravention

The Respondent's conduct of ignoring the CPA as set out above had dire consequences for the Applicant.

69. Any loss or damage suffered as a result of the contravention

The Applicant would reasonably not have suffered the loss of his vehicle and the claim of the credit provider if the vehicle was in good order and free of defects from inception.

70. The behaviour of the Respondent

On the evidence before the Tribunal the Respondent refused to comply with the CPA. Its paltry defence of the application before the Tribunal was simply that the Applicant signed a vehicle check list before taking possession of the vehicle and in so doing the Applicant confirmed that he was satisfied with the vehicle. When the Applicant requested to return the vehicle to the Respondent, the Respondent made an election not only to repair the vehicle but to choose a repairer of the Respondent's choice located at the premises of the Respondent.

This behaviour is indicative of a dismissive attitude of the rights of consumers and the dispute resolution process in general. The fact that the Respondent elected to use the Applicant's warranty to repair the vehicle and to hold the Applicant liable for the shortfall and storage costs of its elected repairer is an aggravating factor.

71. The market circumstances in which the contravention took place

No specific evidence is before the Tribunal but based on the types of matters referred to the Tribunal it would appear that vehicle related complaints against dealerships are very common. For the average consumer the purchase of a pre-owned vehicle would constitute an extremely costly and important transaction, second only to the purchase of a house.

72. The level of profit derived from the contravention

No specific evidence was provided in this regard. Again, the Respondent would have derived the significant benefit of not having to refund consumers or repair their vehicles.

73. The degree to which the respondent has co-operated with the Tribunal

The Respondent co-operated with the Tribunal. However, the Respondent's ignorance or dismissive attitude towards the recommendations of the "industry-specific regulator", MIOSA, is not a good gesture towards the motor industry's pursuit to resolve

complaints amicably.

74. Whether the Respondent has previously been found in contravention of this Act
- There is no record of a previous investigation or findings against the Respondent.
75. There is no financial record of the annual turnover of the Respondent's business before the Tribunal. The Tribunal can still however impose a fine but is then limited to a maximum fine of R1 000 000.00 (One Million Rand.)
76. The Tribunal emphasised that a strong message must be sent out that dealers in the pre-owned motor vehicle industry cannot escape the peremptory provisions of the CPA.
77. The Tribunal must however also consider that the fine must not be so punitive as to discourage dealers from engaging in the pre-owned vehicle sale business. It must further be kept in mind that the fine imposed would be for a first offender as such. Further transgressions by the Respondent would be met with significantly higher penalties.

CONCLUSION

78. The Respondent is found to have contravened sections 51(1)(a) and (b) of the CPA and this constitutes prohibited conduct.
79. The Respondent must be interdicted from contravening the provisions of the CPA any further.
80. An administrative penalty of R100 000.00 (One Hundred Thousand Rand) is appropriate under the circumstances.

ORDER

81. Accordingly, the Tribunal makes the following order:

81.1 The Respondent must pay an administrative fine of R100 000.00 (One Hundred Thousand Rand) into the National Revenue Fund referred to in section 213 of the Constitution within 30 business days of the date of this judgment.

The National Revenue fund account details are as follows:

Bank:

Standard Bank of South Africa

Account name: Department of Trade and Industry

Account number: [...]

Account type: Business current account

Branch code: 010645 (Sunnyside)

Reference Number: NCT/146540/2019/75(1)(b)(Name of Depositor)

81.2 The Applicant is entitled to approach the executive chairperson of the Tribunal to obtain a certificate in terms of section 115(2)(b) of the CPA to claim his damages in the High Court.

81.3. No order is made as to costs.

P A BECK PRESIDING MEMBER

Tribunal members – Deputy Chairperson of the Tribunal

Dr L Best and Adv F Manamela concur with this judgment.

- [1] Applicant's Founding Affidavit Pg 16 of the bundle
- [2] MIOSA letter dated 17 January 2019 Pg 34 of the bundle.
- [3] Applicant's founding affidavit Pg 12 of the bundle.
- [4] Applicant's founding affidavit page 12 of the bundle.
- [5] Applicant cites the year as 2019 erroneously in his founding affidavit on Pg 13 of the bundle.
- [6] Respondent's answering affidavit Pg 92 of the bundle.
- [7] Section 3 (1) (a) of the CPA.
- [8] Section 4 (2) of the CPA.
- [9] Motus Corporation (Pty) Ltd t/a Zambezi Multi Franchise and Another v Wentzel [2021]All SA 98 (SCA) at para [41].

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Prepared on 14 October 2026 · Esheria