

SOUTH AFRICA / JUDGMENT

National Consumer Commission v Jonaveo Investments (Pty) Ltd t/a Jona Auto (NCT/272421/2023/73(2)(b)) [2023] ZANCT 58 (10 December 2023) [2023] ZANCT 58

COURT

National Consumer Tribunal

BEFORE

A Potwana, S Hockey, M Peenze

CASE / FILE NUMBER

NCT/272421/2023/73(2)(b)

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IN THE NATIONAL CONSUMER TRIBUNAL HELD IN CENTURION

Case Number: NCT/272421/2023/73(2)(b)

In the matter between:

NATIONAL CONSUMER COMMISSION

APPLICANT

AND

JONAVEO INVESTMENTS (PTY) LTD T/A JONA AUTO

RESPONDENT

Coram:

Dr A Potwana - Presiding Member

Mr S Hockey - Tribunal Member

Dr M Peenze - Tribunal Member

Date of Hearing - 5 December 2023

Date of ruling – 10 December 2023

JUDGMENT AND REASONS

THE PARTIES AND UP APPLICATION TYPE

1. The applicant is the National Consumer Commission (the NCC), an organ of state established in terms of section 85(1) of the Consumer Protection Act, 2008 (the CPA). At the hearing, the applicant was represented by Ms Ntsako Ngobeni, an employee in the legal department of the NCC.
2. The respondent is Jonaveo Investments (Pty) Ltd, trading as Jona Auto (the respondent), a private company duly incorporated in terms of the company laws of the Republic of South Africa and a supplier as defined in section 1 of the CPA. There was no appearance by or on behalf of the respondent at the hearing.
3. This is an application in terms of section 73(2)(b) of the CPA. This section authorises the NCC to refer a matter to the National Consumer Tribunal (the Tribunal) after it investigates a complaint it received from a consumer.
4. The NCC received a complaint against the respondent from a consumer, Mr Patrick Joseph (the consumer), on 22 October 2020. The complaint was investigated, and it was alleged in the investigation report that the respondent contravened provisions of the CPA, as will be discussed below.

CONSIDERATION OF THE EVIDENCE ON AN UNOPPOSED BASIS

5. The NCC caused the application papers[1] to be served on the respondent on 22 May 2023 by the relevant sheriff. The sheriff's return indicates the papers were delivered to the respondent's business address.
6. In Form TI.73(2)(b), which is part of the application papers, the respondent was informed that it could oppose the application by serving an answer to the application within 15 business days of receipt of the application.
7. On 26 May 2023, the registrar of the Tribunal issued a notice of filing indicating that the application complies with the requirements of the Tribunal's rules. The respondent was again reminded that it may oppose the application by filing an answer within 15 business days from the date of receipt of the application.
8. The respondent failed to file an answering affidavit, and the matter was accordingly set down for hearing on 1 August 2023. On that date, the tribunal was not satisfied that the respondent received the notice of set out in the matter. Accordingly, the matter was postponed for the registrar to ensure that the respondent received a notice of set down.

9. A further notice of set down was served on the respondent on 31 August 2023 and the matter was accordingly heard on 5 December 2023.
10. As the respondent failed to file an answering affidavit, the matter was considered on an unopposed basis.
11. In terms of rule 13(5) of the Tribunal's rules[2], any fact or allegation in the application or referral not specifically denied or admitted in an answering affidavit will be deemed to have been admitted.

TERMINOLOGY

12. A reference to a section in this ruling refers to a section of the CPA.
13. A reference to a rule refers to the rules of the National Consumer Tribunal[3] (the rules).

BACKGROUND

14. On 23 May 2020, the consumer responded to an advertisement on a website[4] in respect of a 2015 Mercedes-Benz C180 Estate AMG (the vehicle) that was for sale by the respondent. The vehicle was advertised as being in an "excellent condition".
15. The consumer contacted the respondent, who advised him that the vehicle was due to be sold to a pre-approved client the following day. To secure the vehicle, the consumer paid an amount of R1 000.00 towards the purchase of the vehicle and soon thereafter paid the balance of the purchase price in the sum of R239 000.00.
16. On 27 May 2020, the consumer travelled from Cape Town to Johannesburg to take delivery of the vehicle.
17. The vehicle started losing power while travelling back to Cape Town. The consumer contacted the respondent, who advised him to drive slowly until he could reach a filling station for safety purposes. Later, the respondent told the consumer that all risks relating to the vehicle were no longer that of the respondent.
18. During the journey to Cape Town, the consumer noticed the following problems with the vehicle namely:
 - 18.1. the information system screen was blacked out and was not working;
 - 18.2. the sound system and radio were not working;
 - 18.3. the handbrake was inoperative, and warning signs came on whilst driving;
 - 18.4. the collision prevention control system was not working;
 - 18.5. the accident prevention assist was not working;
 - 18.6. the battery warning lights came on and stated, "Put vehicle and keep vehicle idling";

- 18.7. the sunroof could not open;
 - 18.8. the air conditioning system was not working;
 - 18.9. there was structural damage to the vehicle's front suspension;
 - 18.10. the gearbox erratically down-shifted whilst driving; and
 - 18.11. the vehicle lost power when going uphill, and the engine revs fell sharply.
19. When the consumer resumed his journey to Cape Town, the vehicle broke down again, and he had to arrange to have it towed to Cape Town.
20. On 29 May 2020, the consumer towed the vehicle to a Mercedes-Benz workshop in Kuilsriver, Cape Town, where a diagnosis of the vehicle was performed. The vehicle was found to have more defects, and the consumer was advised that it was impossible to repair the defects.

The consumer was also informed that the vehicle was in an accident, that the damages were irreparable, and that it should have been written off after the accident.

21. According to the founding affidavit, the consumer wants to return the vehicle to the respondent and get a refund. It is further stated that the consumer was ill-treated when he unsuccessfully endeavoured to engage the supplier "to make good as required in terms of the CPA".[5]
22. The consumer then approached the Motor Industry Ombudsman of South Africa (MIOSA) for a possible resolution of his dispute with the respondent. After numerous attempts to get a response from the respondent, the MIOSA concluded there was no reasonable probability of resolving the dispute through conciliation.

As a result, the MIOSA terminated its process and advised the consumer that it could approach the NCC in terms of provisions of the CPA.

23. The consumer lodged his complaint with the NCC on 22 October 2020. This was within six months from the date he purchased the vehicle. In his complaint form, the consumer made it clear that he wanted to return the vehicle to the respondent and wanted to be refunded the purchase price paid for it.
24. In the investigation report, which followed the investigation initiated by the NCC, it was reported that the respondent informed the investigator that the vehicle was sold on behalf of a foreign national from Mozambique who had since passed away. This, however,

was never mentioned to the consumer. A document titled "Notification of Change of Ownership/ Sale of Motor Vehicle" attached to the papers indicates that the seller has a South African identity document.

THE CONTRAVENTIONS

25. After the investigation, the investigators, duly appointed by the NCC, concluded that the respondent contravened various provisions of the CPA. The Tribunal will now deal with these contraventions in turn:

25.1. Contravention of section 26(2) and (3).

25.1.1. The investigation revealed that the respondent, as a supplier of goods, failed to provide the consumer with a written record of the transaction as required by section 26(2). Section 26(3) sets out what the written record required in subsection (2) must contain.

25.1.2. Since no written record of the transaction was provided by the respondent to the consumer, the investigation concluded that the respondent contravened sections 26(2) and (3).

25.2. Contravention of section 29(1)(a) and 41(1)(a) to (c).

25.2.1. In terms of section 29(1)(a), a retailer must not market any goods in a manner that is reasonably likely to imply false or misleading representation concerning those goods as contemplated in section 41. Section 41(1)(a) to (c) states that in relation to the marketing of any goods, the supplier must not by words or conduct (a) directly or indirectly express or imply a false, misleading or deceptive representation concerning a material fact to a consumer; (b) use exaggeration, innuendo or ambiguity as to a material fact, or fail to disclose a material fact if that failure amounts to a deception; or

(c) fail to correct an apparent misapprehension on the part of consumer, amounting to a false, misleading or deceptive representation.

25.2.2. The investigators concluded that the respondent advertised the vehicle knowing that it was accident-damaged and failed to disclose this to the consumer. In doing so, it was concluded that the consumer was misled into purchasing the vehicle, and as a result, the respondent contravened sections 29(1)(a), read with section 41(1)(a) to (c).^[6]

25.3. Contravention of section 55(2)(a) to (c).

25.3.1. Section 55(2) provides that every consumer has a right to receive goods that

(a) are reasonably suitable for the purpose for which they are generally intended; (c) will be usable and durable for a reasonable period of time, having regard to the use to which they would normally be put and all the surrounding circumstances of their supply; and (d) comply with any applicable standards set out under the Standards Act, 1993 (Act 29 of 1993) or any public regulation.

25.3.2. The investigation concluded that the respondent supplied the consumer with a defective vehicle that did not satisfy the standards and requirements set out in section 55(2)(a) to (c). It was also concluded that the defects are of a serious nature, which qualify as defects as contemplated in section 53^[7]. As a result, the investigators held that the respondent contravened sections 55(2)(a) to (c).

25.4. Contravention of section 56(2)(a)

24.4.1. Section 56(2)(a) provides that within six months after the delivery of any 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 then, at the direction of the consumer, either repair or replace the failed, unsafe or defective goods or refund the consumer the price paid by the consumer for the goods.

24.4.2. Since the vehicle broke down within the implied warranty period of six months, the investigation report concluded that the consumer is entitled to return the vehicle to the respondent and to either demand a repair thereof or to be refunded the purchase price.

24.4.3. It was noted in the report that the consumer elected a refund, but the respondent refused to refund the consumer the purchase price he paid for the vehicle.

24.4.4. As a result of the above, the NCC requests that the Tribunal order the respondent to refund the consumer the purchase price paid for the vehicle.

EVALUATION

26. As already alluded to, the respondent did not file an answering affidavit opposing this application. In terms of rule 13(5), the

facts and allegations put up by the NCC must be deemed to have been admitted as they have not been denied or admitted in an answering

affidavit. This being so, the Tribunal finds that the respondent contravened the provisions of section 55(2) and that such contraventions constitute prohibited conduct.

27. There is no written proof that the consumer demanded a refund of the vehicle's purchase price from the respondent. The evidence on record, however, shows that the respondent tried to engage with the respondent to resolve the problems encountered with the vehicle for the latter to make good in terms of the CPA. The consumer also referred a complaint to the NCC within six months of purchasing the vehicle. In this referral, he elected a refund in exchange for the return of the vehicle. The election, therefore, was made within the six-month period as contemplated in section 56(2).

28. Even if the consumer did not communicate its election to receive a refund to the respondent within six months after the delivery of the vehicle, in terms of section 56(2)(b), the Tribunal can order the refund the consumer seeks in terms of section 150 of the National Credit Act, 2005 (Act 34 of 2005) (the NCA).

29. Section 150 of the NCA empowers the Tribunal to make an appropriate order in relation to prohibited conduct and make any appropriate order required to give effect to a right as contemplated in the NCA or the CPA. Clearly, the respondent denied the consumer his rights under section 55. In the Tribunal's view, to give effect to this right, an appropriate order is an

order that the respondent refunds the consumer the purchase price paid for the vehicle. The vehicle is clearly not fit for purpose and does not meet the standards contemplated in section 55(2).

30. As for the other conclusions reached in the investigation report, it is the Tribunal's view that these cannot be faulted. The Tribunal, therefore, agrees that the respondent contravened sections 26(2) and (3), 29(1)(a), 41(1)(a) and (c), 55(2)(a) to
- (c) and 56(2), and that these contraventions should be declared prohibited conduct.

ADMINISTRATIVE FINE

31. The NCC asks that an administrative fine be imposed on the respondent. In terms of section 151(1) of the NCA, an administrative fine may be imposed in respect of prohibited or required conduct in terms of the CPA. 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[8].
32. Section 151(3) outlines the factors the Tribunal must consider when determining an appropriate fine. The Tribunal shall deal with each of these factors under the sub-headings below.

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

The respondent sold a defective vehicle to the consumer and disregarded the consumer's rights under the CPA. The vehicle was sold in May 2020, and various attempts were made to resolve the matter, with the respondent failing or refusing to cooperate with the MIOSA.

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

As a result of the respondent's action, the consumer has been out of pocket in the sum of R240 000.00 since May 2020, which is the purchase price he paid for the vehicle. The consumer has not been able to derive any benefit from the use of the vehicle.

32.3. The behaviour of the respondent

The respondent has been uncooperative with the MIOSA and ignored the present application to the Tribunal.

32.4. The market circumstances in which the contravention took place

Consumers in the South African market are generally vulnerable in relation to suppliers, which is why protection has been afforded to consumers under the CPA.

32.5. The level of profit derived from the contravention

The Tribunal is not in a position to make a finding in relation to the level of profit derived from the contravention by the respondent.

32.6. The degree to which the respondent cooperated with the NCC

The respondent cooperated with the NCC's investigation to an extent but insisted it was not liable under the CPA.

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

There is no evidence that the respondent previously contravened provisions of the CPA.

33. Considering the above factors, the Tribunal finds that an administrative fine of R50 000.00 (fifty thousand Rand) is appropriate.

THE ORDER

34. In the result, the Tribunal makes the following order:

34.1. The respondent has contravened sections 26(2) and (3), 29(1)(a), 41(1)(a) and (c), 55(2)(a) to (c) and 56(2).

34.2. The above contraventions are declared to be prohibited conduct.

34.3. The respondent is directed to refund the consumer the purchase price paid by the consumer for the vehicle in the sum of R240 000.00 (two hundred and forty thousand Rand). This payment shall be made within 15 business days from the date of the issuance of this order into the bank account selected by the consumer.

34.4. The consumer shall make the vehicle available for the collection thereof by the respondent immediately after the payment referred to in paragraph 34.3 has been effected.

34.5. The respondent shall pay an administrative fine in the sum of R50 000.00 (fifty thousand Rand) within 30 business days from the date of the issuance of this order into the bank account of the National Revenue Fund, the details of which are as follows:

Bank: The Standard Bank of South Africa

Account holder: Department of Trade and Industry Branch name: S[...]

Branch code: 0[...]

Account number 3[...]

Reference NCT/272421/2023/73(2)(b), with the respondent's name used as a reference.

34.6. There is no order as to costs.

S Hockey (Tribunal member)

Tribunal members Dr A Potwana and Dr M Peenze concur.

[1] The From TI.73(2)(b), founding affidavit and annexures thereto.

[2] See footnote 3 below.

[3] GN 789 of 28 August 2007: Regulations for matters relating to the functions of the Tribunal and Rules for the conduct of matters

before the National Consumer Tribunal, 2007 (Government Gazette No. 30225).

[4] Cars.co.za.

[5] See para 6.2.10 and 6.2.11 of the founding affidavit, page 13 of the record.

[6] It must be added that the vehicle was also advertised as being in excellent condition.

[7] This section defines “defect” as meaning any material imperfection in the manufacture of the goods or components, or in the performance of the services, that renders the goods or results of the services less acceptable than persons generally would be reasonably entitled to expect in the circumstances, and 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.

[8] Section 151(2).

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