

SOUTH AFRICA / JUDGMENT

Ndlovu obo Sbuyile Transport (Pty) Ltd v Edan Traders (Pty) Ltd (NCT/242384/2022/75(1)(b))

[2024] ZANCT 35 (30 August 2024)

[2024] ZANCT 35

COURT

National Consumer Tribunal

BEFORE

Zodwa Ntuli, Selwyn Hockey, Sithembiso Mbhele

CASE / FILE NUMBER

NCT/242384/2022/75(1)(b)

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IN THE NATIONAL CONSUMER

TRIBUNAL

HELD IN CENTURION

Case

number: NCT/242384/2022/75(1)(b)

In

the matter between:

SIHLE
PRISCA NOKUTHULA NDLOVU
APPLICANT
OBO
SBUYILE TRANSPORT (PTY) LTD
And
EDAN
TRADERS (PTY) LTD
RESPONDENT

Coram: Ms
Zodwa Ntuli
- Presiding Tribunal
Member
Mr
Selwyn Hockey
-
Tribunal Member
Adv
Sithembiso Mbhele -
Tribunal Member
Date
of Hearing
- 03 May 2024
Date
of Ruling
- 30 August 2024

JUDGMENT

AND REASONS

PARTIES

1. The applicant is Sihle Prisca Nokuthula Ndlovu (Ms. Ndlovu), an adult female, on behalf of Sbuyile Transport (Pty) Ltd, a private company incorporated under the company laws of South Africa with registration number 2020/161915/07. The applicant is a consumer, as defined in section 1 of the Consumer Protection Act 68 of 2008 (CPA). Ms. Ndlovu represented the applicant at the hearing. Ms. Ndlovu and the applicant are interchangeably referred to as “the applicant” in this judgment.
2. The respondent is Edan Traders (Pty) Ltd, a private company incorporated under the company laws of South Africa with registration number 1995/01960/07. The respondent is a supplier, as defined in section 1 of the CPA. Adv. Bradley Denton (Adv. Denton) represented the respondent at the hearing.

TERMINOLOGY

3. A reference to a section in this ruling refers to a section of the CPA. A reference to a rule refers to the Regulations for matters relating to the functions of the Tribunal and Rules for the conduct of matters before the National Consumer Tribunal[1] (the rules).

APPLICATION TYPE

4. The applicant referred this matter to the National Consumer Tribunal (the Tribunal) in terms of section 75(1)(b). The applicant initially referred a complaint to the National Consumer Commission (the NCC), which issued a non-referral notice stating that the applicant's redress could not be provided in terms of the CPA. If the NCC issues a notice of non-referral, section 75(1)(b) allows the complainant to refer the matter directly to the Tribunal, with leave of the Tribunal.

ISSUE TO BE DECIDED

5. The Tribunal must decide whether the respondent engaged in prohibited conduct and, if so, whether the relief sought should be granted.

RELIEF SOUGHT

6. On Form Tl/73(3) & 75(1)(b) & (2) CPA, the applicant requested the Tribunal to order that the respondent refund her R393,075.20 comprising of the R178,000 deposit and damages.

BACKGROUND

7. On 28 September 2020, the applicant concluded an agreement with the respondent to purchase a second-hand UD truck for R375,000.00, excluding Value Added Tax. She signed an Offer to Purchase (OTP) and paid a deposit of R20,000.00. Upon reviewing the document, she discovered a discrepancy between the payment structure and the OTP. She had signed the payment structure, which listed R375,000.00, whereas the OTP reflected R405,000.00. When she went to the respondent's premises on 1 October 2020 to finalise the agreement, she was informed that the truck was no longer available as they had sold it over the weekend.
8. The respondent's co-owner, Eddie Edan, offered her another truck, stating it was in good order and only needed servicing and new tyres. This was the 2002 International Harvester 900i (the truck) at the price of R316,250.00. She paid a deposit of R158,000.00 towards the truck, in addition to the R20,000.00 already paid on 29 September 2020. The remaining balance was financed by Truck and Finance Corporation (Pty) Ltd. Despite assurances that the truck would be ready for collection soon, she waited for about a month. At some point, when she called to check, she was told it had failed the roadworthy test but that the problems would be fixed. On 4 November 2020, the respondent informed her that the truck was ready for collection.
9. On 5 November 2020, while test-driving the truck with one of the respondent's employees, the truck broke down due to an air leak that caused the brakes to lock. The truck could not start, but the respondent claimed it was a minor issue. The truck could not be fixed on the same day, and the applicant's driver had to sleep at the respondent's premises for two days. The applicant, who had secured a contract, faced further trouble when the truck broke down again on the same day of collection while the driver

was en route to Brits. Other breakdowns occurred, with the respondent blaming the drivers and the diesel shortage. The applicant kept a record of the diesel gauge to ensure the truck had sufficient fuel, but the problems persisted.

10. Although the respondent addressed the initial problems after the purchase, they later refused to repair the truck when it broke down again on 31 March 2021. The respondent towed it on 1 April 2021 and demanded R147,000.00 to repair it. The respondent said the truck was sold voetstoots, and the one-month warranty had expired. The respondent refused to repair the truck to remedy the defects or provide a replacement. The applicant claimed she had spent significant money on a truck that did not fulfil its intended purpose.
11. On 4 June 2021, the applicant filed a complaint with the Motor Industry Ombudsman of South Africa, but the issue was not resolved. She then lodged a complaint with the NCC on 15 June 2022. However, on 30 June 2022, the NCC issued a notice of non-referral. Consequently, on 23 September 2022, the applicant referred the dispute to the Tribunal for adjudication. On 15 December 2022, the Tribunal Registrar issued a Notice of Filing to the parties. She alleged contraventions of the CPA, including sections 41((1)(a) and (c), 48(1)(i) and (ii), 56(2)(a) and (b), and 61.
12. On 17 January 2023, the Tribunal Registrar issued a Notice of Set Down, indicating that the leave to refer application would be adjudicated in chambers on 10 March 2023. Leave to refer was granted on 11 March 2023, and a ruling was issued on 20 June 2023. The respondent did not oppose the application, and the Registrar set the matter down for hearing on 18 August 2023. At the hearing, the respondent appeared and requested a postponement to file its answering affidavit, which was granted. A postponement ruling was issued on 21 August 2023.
13. The condonation hearing was heard on 11 December 2023, and the ruling was issued on 27 January 2024. The matter was set down for a hearing on the merits on 19 May 2024, which took place virtually via MS Teams. Mr. Mandla Maseko provided the interpretation services.

APPLICANT'S

SUBMISSIONS

14. Some of the applicant's factual submissions are detailed earlier in the background. She contends that the respondent violated the provisions of the CPA by selling her a defective truck and misrepresenting its condition. She explained that, as she was preparing for retirement, she was exploring ways to continue supporting her children. During this period, she enrolled in trucking training. The training company advised her to acquire a truck and start a trucking business, highlighting the promising opportunities in the industry.
15. She purchased the truck from the respondent, who assured her it was in good working condition. However, the truck broke down during the test drive. Afterwards, there were multiple breakdowns, and it never fulfilled its intended purpose, leading to a loss of

business. The respondent claimed the breakdowns were due to a fuel shortage and blamed the drivers for the breakdowns, but the truck never completed a single trip since she collected it. The applicant closely monitored the fuel gauge after that, but the problems persisted.

16. The applicant found it suspicious that the respondent blamed the applicant for the defects, especially since the truck had broken down in the respondent's hands on 5 November
2020. Even after the respondent repaired it, the truck broke down again the same day the driver collected it. The final breakdown occurred on 31 March 2021, and the respondent collected the truck on 1 April
2021. She asked the respondent to provide another truck to help her fulfil her contract, but they refused.
17. The applicant believes the respondent should have repaired the defective truck because it broke down within six months of purchase. The mechanics she consulted confirmed that the truck was defective. She has spent over R200,000.00 attempting to fix the truck without success. She feels that the respondent misled and deceived her. They exploited her inexperience and lied to induce her to buy the truck, resulting in significant prejudice.
18. Dissatisfied with the respondent's actions, the applicant filed a complaint with MIOSA. When the issue remained unresolved, she escalated it to the NCC, which issued a notice of non-referral. She then brought the matter to this Tribunal. The applicant stated that the truck's problems impacted her ability to repay the truck loan, causing severe financial and health strains. The truck has remained with the respondent since they towed it on 1 April 2021.

RESPONDENT'S

SUBMISSIONS

19. The respondent relied on its written submissions and requested that Mr. Visser, a director of Edan Trading (Pty) Ltd, be called as a witness. Mr. Visser highlighted his extensive experience in the trucking industry. He began as a workshop manager in 1977, and Edan Trading (Pty) Ltd was later formed. They have handled approximately 13,000 trucks and maintain a rental portfolio of over 300 trucks.
20. Mr. Visser explained that a second-hand 2002 International Harvester 900i truck, including hydraulics, was sold to the applicant on 1 October 2020 for about R316,000.00. He emphasised that the truck's low price reflected its age and condition, noting that a new model would cost about R2.5 million. The applicant could not reasonably expect a 20-year-old truck to perform like a new one. However, with proper care, it would still serve its intended purpose.

21. Mr. Visser acknowledged that the truck may have had an air leak issue, causing the brakes to lock when the applicant first collected it. However, he described this as a minor issue that the respondent promptly fixed. The truck was serviced and fitted with new tyres, and a roadworthy certificate was provided before collection. Since then, the applicant contacted the respondent about four times, reporting problems with the truck.
22. Each time, mechanics found that the truck had no fuel despite having two 600-litre fuel tanks and the batteries were flat. CM Auto Electrical inspected the truck and confirmed the same in a letter dated 11 August 2021. After refuelling and charging the batteries, the truck started. The problem recurred, but the truck failed to start after refuelling and charging the batteries.
23. Mr. Visser argued that the problems were due to the applicant's negligence in failing to ensure the truck had fuel, which affected various components, such as the starter and injectors. He noted that the applicant had twice left the truck on the side of the road with the key in the ignition. The respondent provides trucks but does not operate them for clients, and the applicant failed to take proper care of the truck. Additionally, the applicant's lack of experience in the trucking business contributed to the

issues.

24. Mr. Visser said the respondent sells all its trucks on a "voetstoots" basis, with a one-month engine, gearbox, and differential warranty. The applicant is bound by the agreement concluded with the respondent under these conditions. It is unreasonable to expect a six-month warranty on a second-hand truck. The respondent addressed the initial breakdowns while the warranty was still valid, but after that period, the respondent cannot be held liable for any further defects or damage. Mr. Visser concluded that after the truck was towed to the respondent's premises on 1 April 2021, the applicant failed to collect or repair it. Consequently, Truck and Finance Corporation (Pty) Ltd attached the truck through a court order and sold it at an auction.
25. Adv. Denton concluded by emphasising that the applicant's negligence and actions should be considered within the context of section 55(6), asserting that the respondent did not contravene section 55(2)(c). He further said the applicant did not provide adequate documentation to support any claim for damages.

APPLICABLE SECTIONS OF THE CPA

26. Section 75(1)(b) states that if the NCC issues a notice of non-referral in response to a complaint, other than on grounds contemplated in section 116, the complainant concerned may refer the matter directly to the Tribunal, with leave of the Tribunal.

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.
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 41(1)(a) states that in relation to the marketing of any goods or services, the supplier must not, by words or conduct, directly or indirectly express or imply a false, misleading, or deceptive representation concerning a material fact to a consumer.
30. Section 48(1)(c) states that a supplier must not require a consumer to waive any rights, assume any obligation, or waive any supplier liability on unfair, unreasonable, or unjust terms.
31. Section 51(1)(a)(i) and (ii) states that a supplier must not enter into an agreement with a consumer if that agreement is subject to any term or condition that aims to defeat the purpose and policy of the CPA or mislead or deceive a consumer.
32. Section 51(1)(b)(i), (ii), and (iii) states that a supplier must not make a transaction or agreement with a consumer if that agreement is subject to any term or condition that directly or indirectly aims to waive or deprive a consumer of a right stated in the CPA. It further prohibits a supplier from agreeing with a consumer subject to any term or condition that directly or indirectly aims to avoid a supplier's obligations or override the effect of any provision of the CPA.
33. Section 53(1)(a) states that when used concerning any goods, a component of any goods, or services, a "defect" means (i) any material imperfection in the manufacture of the goods or components, or the performance of the services, that renders the goods or results of the service less acceptable than persons generally would be reasonably entitled to expect in the circumstances, or (ii) any characteristic of the goods or components that renders the goods or components less useful, practicable or safe than persons generally would be reasonably entitled to expect in the circumstances.
34. Section 55(2)(a)-(c) states that consumers have the right to receive goods that are reasonably suitable for their intended purposes. They have a right to goods of good quality and in good working order. The goods must be free of defects and be useable and durable for a reasonable time.

35. Section 55(5) states that it is irrelevant whether a product failure or defect was latent or patent or whether a consumer could have detected it before taking delivery of the goods and that a product failure or defect may not be inferred in respect of goods solely because better goods have subsequently become available from the same or any other producer or supplier.
36. Section 55(6) states that section 55(2)(a) and (b) do not apply to a transaction if the consumer (a) has been expressly informed that goods were offered in a specific condition and (b) has expressly agreed to accept the goods in that condition, or knowingly acted in a manner consistent with accepting the goods in that condition.
37. Section 56(2) states that within six months after the delivery of goods to a consumer, the consumer may return the goods to the supplier without penalty and at the supplier's risk and expense if the goods fail to satisfy the requirements and standards contemplated in section 55. The supplier must, at the direction of the consumer, either repair or replace the failed, unsafe, or defective goods or refund the consumer the price paid for the goods.

CONSIDERATION OF THE MERITS

38. We are required to determine if the respondent contravened the CPA in a manner that amounts to prohibited conduct^[2] and whether the applicant is entitled to a remedy under the CPA. We are satisfied that this matter is properly before the Tribunal as it falls within its jurisdiction. The truck was supplied to a juristic person, which we confirmed meets the applicable threshold to qualify as a consumer. We also confirmed the respondent's status as a supplier,^[3] binds it to all the supplier obligations in the CPA.
39. We examined the nature of section 55(2) as it relates to the applicant's claim. In the case of *Motus Corporation (Pty) Ltd t/a Zambezi Multi Franchise (Renault) South Africa v Abigail Wentzel*^[4], the Supreme Court of Appeal confirmed that a consumer's right under section 55(2) exists by law, regardless of whether it is contractually guaranteed. This right is protected by section 56, and the consumer can choose to enforce it under the CPA or through an agreement. The applicant has decided to invoke the CPA.
40. We noted convergence between the parties regarding some of the essential terms of their sale agreement, including the description of the goods, the price paid, and the applicable conditions, including the contractual warranty. They also agreed on the purpose for which the applicant intended to use the truck and the sequence of events leading to this dispute. Therefore, the critical issue is whether the problems identified with the truck qualify as defects under section 53(1) to trigger remedies against the respondent under the CPA.
41. The applicant intended to use the vehicle for business purposes, relying on imminent opportunities to generate income. She trusted the respondent's expertise in selecting a suitable truck, and the respondent assured her that the truck was in good condition. It is undisputed that the truck malfunctioned from the onset during the test drive, attributed to an air leak that caused brake lockage and failures of critical components.

42. The court in the Motus case held that not every minor fault qualifies as a defect under the CPA. However, the numerous serious issues with the truck rendered it unusable and unsafe. The applicant's driver was repeatedly stranded in remote areas due to the truck's failures, occurring within days of purchase. Cargo required by clients could not be delivered as required. The estimated cost of repairing this truck is approximately R147,000.00, indicating the severity of the defects. It is reasonable to conclude that the truck was defective at the time of sale, meeting the definition of defects under section 53(1).
43. The respondent must meet the standard set in section 55(2), regardless of the truck's second-hand status and the contractual warranty. The applicant had a right to receive a truck of good quality, in good working order, and free of defects. With each breakdown, the truck became unusable, far below what could reasonably be expected of a vehicle, especially a business asset. It was unsuitable for its purpose. The truck was not durable for a reasonable period.
44. The truck posed a safety risk to the applicant, her driver, and other road users. Critical components, such as the fuel tank, cylinder head, injectors, and gearbox, were dysfunctional with prohibitive repair costs. The engine constantly overheated. Despite being second-hand, no information about the truck's condition was disclosed. With its extensive experience, the respondent ought to have acted better. The applicant was entitled to accurate information about the truck to make an informed decision when purchasing it.
45. The fact that the truck failed the initial roadworthy test before its release to the applicant should have prompted the respondent to be more transparent. The respondent had a duty to disclose all material facts and latent defects[5]. Despite subsequently passing the roadworthy test, the truck contained severe mechanical defects, which cannot be ignored. The test was done on 4 November 2021, and the truck broke down the following day. The defects drastically reduced the truck's quality and value.
46. The respondent introduced clauses to exclude liability for these defects, which were not clearly or sufficiently communicated to the applicant. The voetstoets clause and an arbitrary one-month warranty were imposed on the applicant, contrary to the objectives of the CPA. A supplier's use of a voetstoets clause in a contract of sale constitutes prohibited conduct under the CPA[6]. The applicant, a secretary without knowledge or experience with trucks, knew very little about the trucking business. We find that the respondent unconscionably took advantage of this fact, violating section 40.
47. The applicant was correct in demanding a remedy within the prescribed six-month warranty despite the one-month warranty. As mentioned earlier, the implied warranty applies by law, and section 56(4) provides additional statutory protection that overrides any contractual warranty. The applicant was entitled to return the defective truck and either receive a replacement or a refund. It is undisputed that the respondent failed to repair or replace the truck.

48. The respondent became aware of these defects as early as 5 November 2020 and knew their negative impact on the applicant and her business. The probability is that they knew about these before the sale, given the delayed delivery. As requested, the respondent had ample time and opportunity to address the defects by repairing or replacing the truck. Section 56(2) grants the consumer the right to choose a remedy, and the respondent had no choice but to comply with the chosen remedy within the meaning of that section.
49. We also considered the respondent's claim that the applicant was negligent and reliance on section 55(6). However, we are not as confident as the respondent, given that the truck failed during the respondent's test drive with the applicant, requiring more than two days to fix. The fact that it broke down again the same day contradicts the assertion that the initial breakdown was a minor, fixable issue. Apart from the truck being second-hand, no other information was provided regarding its defective condition.
50. Consequently, we are satisfied that the applicant demonstrated on the balance of probabilities that the respondent violated the applicant's rights under section 55(2)(a) to (c), which must be redressed. The respondent contravened sections 40(1) (a) to (c), 40(2), 41(1) (a) and (b), 48(1)(c), 51(1)(a)(i) and (ii), 51(1)(b)(i), (ii) and (iii), 55(2)(a) and (c) read with 56(1), and 56(2)(a) and (b). These contraventions should be declared prohibited conduct. The respondent's conduct significantly infringed upon the applicant's rights.
51. The respondent totally disregarded the CPA's purpose in section 3(1)(d) to protect consumers from such unfair and deceptive conduct. The respondent's refusal to address the applicant's concerns severely constrained the applicant and caused financial loss. The respondent also showed no sympathy throughout the process. The CPA is designed to protect consumers and provide remedies against non-compliant suppliers. The respondent's actions have severely prejudiced the applicant and left her without an all-important business asset. The respondent has acted with impunity and totally disregarded the statutory consumer protection provisions in the CPA.
52. The Tribunal has wide-ranging powers to make appropriate

orders

concerning prohibited conduct on the relief sought.[7] The Tribunal is empowered in terms of section 150 of the National Credit Act, 34 of 2005, read with section 4(2), to provide redress concerning the purchase price to give practical effect to the right violated. We noted the respondent's claim that while challenging the respondent's refusal to remedy the defects, Truck and Finance Corporation (Pty) Ltd attached and sold the truck at the auction.

53. Regarding the refund, section 4(2)(b)(ii)(bb) appears to empower the Tribunal to grant an order that goes beyond the right (to the price paid for) already afforded to the consumer in terms of the CPA. However, by applying the mandate in section 4(2)(b)(ii)(bb), the Tribunal can readily apply a broader inclusive rather than a distractive interpretation of the CPA as a whole.[8]
54. Section 1 defines 'price', when used in relation to the consideration of any transaction, to mean the total amount paid or payable by a consumer to a supplier in terms of the transaction or agreement, including any amount that the supplier is required to impose, charge or collect in terms of any public regulation. This means the total price paid by the applicant to the respondent for the supply of the truck, whether directly or through a financing arrangement, as demonstrated in the papers. This will give practical effect to the applicant's right to a refund under section 56.
55. We also noted that the applicant seeks damages as part of the remedy. It is important to point out that the Tribunal has no authority to order payment of other costs incurred by the applicant related to the truck, as these amount to damages. The applicant may institute a claim for damages before an appropriate forum if the applicant believes such a claim can be proven.[9] The applicant may request a certificate referred to in section 115(2)(b), which is sufficient proof of its contents.[10]
56. In terms of section 115(2)(b), a person who has instituted an action for damages suffered because of prohibited conduct in a civil court, must file with the registrar or clerk of the court a notice from the chairperson of the Tribunal in the prescribed form certifying whether the conduct constituting the basis for the action is prohibited or required conduct in terms of the CPA, stating the date of the Tribunal's finding and setting out the section of the CPA in terms of which the Tribunal made its finding. The certificate referred to in section 115(2)(b) is sufficient proof of its contents.
57. The applicant did not request an administrative penalty to be imposed on the respondent. However, we wish to express our disdain for the respondent's conduct. The CPA was enacted over fifteen years ago. Suppliers must do better and align their business practices and policies with those of the CPA. A repeat violation by the respondent should be met with severe penalties.

ORDER

58. In the result, we make the following order:
- 58.1 The respondent contravened sections 40(1)(a) to (c), 40(2), 41(1)(a) and (b), 48(1)(c), 51(1)(a) (i) and (ii), 51(1)(b)(i), (ii) and (iii), 55(2)(a), (b) and (c), read with 56(1), and 56(2)(a) and (b).
- 58.2 These contraventions are declared prohibited conduct.
- 58.3 The respondent is ordered to repay R316,250.00 to the applicant within 30 business days after this ruling is issued.

58.4 There is no cost order.

[SIGNED]

Ms Zodwa Ntuli Tribunal member

Tribunal members Mr Selwyn Hockey and Adv S Mbhele concur.

[1] Published in GN 789 in GG 34405 of 29 June 2007.

[2] Section 1 defines prohibited conduct to mean an act or omission in contravention of this CPA

[3] Section 1 defines a supplier as a person who markets any goods or services.

[4] [2021] ZASCA 40.

[5] Le Roux v Zietsman and Another (330/202) [2023] ZASCA 102 (15 June 2023) par 20.

[6] Vonk v Willow Crest Motors CC (NCT/115078/2018/75(1) (b)) [2019] ZANCT 63 (6 April 2019).

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

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

[9] See Steyn NO v Ronald Bobroff & Partners [2012] ZASCA 184; 2013 (2) SA 311 (SCA).

[10] Section 115(3).

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