

SOUTH AFRICA / JUDGMENT

Ndlovu v Toyota Randburg (NCT/139033/2019/75(1)) [2022] ZANCT 22 (31 March 2022) [2022] ZANCT 22

COURT

National Consumer Tribunal

BEFORE

MC Peenze, FK Manamela, F Sibanda

CASE / FILE NUMBER

NCT/139033/2019/75(1)

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IN THE NATIONAL CONSUMER TRIBUNAL HELD IN CENTURION

Case Number: NCT/139033/2019/75(1)

In the matter between:

PAPANI CASSIUS NDLOVU APPLICANT

and

TOYOTA RANDBURG

(a Division of Motus Group Limited) RESPONDENT

Coram:

Dr. MC Peenze : Presiding Tribunal member

Adv. FK Manamela : Tribunal member

Mr. F Sibanda : Tribunal member

Date of hearing : 22 March 2022

Date of judgment : 31 March 2022

JUDGMENT AND REASONS

INTRODUCTION

1. The Applicant is Papani Cassius Ndlovu (Mr. Ndlovu or the Applicant) an adult male person and a consumer as defined in terms of the Consumer Protection Act 68 of 2008 (the Act or the CPA) who resides at C[....], Z[....] P[....], Gauteng.
2. The Respondent is Randburg Toyota, a division of Motus Group Limited, a public company registered in terms of the company laws of the Republic of South Africa and a credit provider with the National

Credit Regulator (NCR), with registration number NCRCP 4340.

3. At the hearing of this matter, the Applicant represented himself. The Applicant also utilized the services of a translator. The Respondent was represented by Mr. Chris Marlow, the in-house counsel of the Respondent.
4. The hearing was conducted over two days. The first day was via MS Teams and the second day at the National Consumer Tribunal (the Tribunal) Courtroom in Centurion.
5. The Respondent indicated in advance that it would be calling three witnesses.

TYPE OF APPLICATION AND JURISDICTION

6. This application is brought in terms of section 75 (1) (b) of the CPA, which states that –
"If the Commission issues a notice of non-referral in response to a complaint, other than on the grounds contemplated in section 116, the complainant concerned may refer the matter directly to –
(a) ...
(b) the Tribunal, with the leave of the Tribunal."
7. On 28 July 2021, the Tribunal heard Mr. Ndlovu's leave application and granted him leave to refer the complaint directly to the Tribunal. Therefore, this hearing is about the merits of the matter.
8. The Tribunal has jurisdiction to hear this matter, in accordance with section 75 (1) (b) of the Act.

ISSUES TO BE DECIDED

9. The Tribunal must decide whether the Respondent engaged in prohibited conduct, by selling a defective vehicle to the Applicant, in contravention of section 56 read with section 55 of the Act. The Tribunal must also decide whether it can grant the relief sought, should it find in favour of the Applicant.

BRIEF BACKGROUND

10. On 6 September 2017, Mr. Ndlovu purchased a pre-owned 2012 model BMW 320i (the vehicle) from Randburg Toyota. He returned the vehicle the next day for repairs to the brakes.
11. On 9 September 2017, the vehicle broke down on the N17 road, while the Applicant was driving to Trichardt in Mpumalanga. The Applicant contacted his insurance company, and the vehicle was towed by STR Towing Services and stored at their yard. On 10 September 2017, he called the Respondent and gave the manager, Mr Kadir, the details of the towing company. On 12 September 2017, the Respondent arranged for the vehicle to be towed to the nearest BMW dealership, Pinnacle Auto (Pinnacle), for diagnostics. Pinnacle Auto discovered that the vehicle's engine had ceased to operate and that a new engine had to be fitted. The vehicle had an extended motor plan from BMW. However, the Respondent did not know that the vehicle had an extended motorplan and had failed to transfer the motor plan into the Applicant's name. Consequently, Pinnacle refused to replace the engine.
12. The Respondent subsequently towed the vehicle to Sovereign Auto Vereeniging, a sister company in the Motus Group. The Respondent later advised the Applicant that, according to Sovereign Auto Vereeniging, he had driven the vehicle into the water, which had caused the engine to seize. According to the Respondent, the water had entered the engine through the air intake. Both BMW and Toyota refused to accept liability for repairing the vehicle.
13. The Applicant denies driving the vehicle into the water. He alleges that Toyota sold him a defective vehicle and failed to inform him that the vehicle was still under the BMW warranty. He wants Toyota to refund him.
14. On 25 October 2017, Mr. Ndlovu complained to the Motor Industry Ombudsman of South Africa (MIOSA). On 16 May 2018, MIOSA issued a letter stating that it could not make a finding in his favour. On 11 June 2018, Mr. Ndlovu complained to the National Consumer Commission (NCC). On 26 February 2019, the NCC issued a notice of non-referral, informing him to apply for leave to refer the complaint directly to the Tribunal.
15. On 2 September 2019, Mr. Ndlovu filed his application with the Tribunal. On 28 July 2021, the Tribunal granted him leave to refer the complaint directly to the Tribunal.
16. There is a dispute of facts. Toyota denies that the vehicle was defective when it was sold. It alleges that the Applicant caused the damage to the engine by driving it into the water. Mr. Ndlovu denies that he drove the vehicle into the water. He claims, Toyota sold him a defective vehicle.
17. This matter was initially set down for hearing on 4 October 2021. After hearing the parties, the Tribunal postponed the matter to allow for proper preparation and the calling of witnesses.

18. The matter was subsequently set down for hearing on 23 February 2022, on which day the matter did not conclude. Thereafter, the Registrar set the matter down for continuation on 22 March 2022.

THE HEARING

19. On 22 March 2022, the matter continued opposed with the use of a translator. The Respondent called two more witnesses, who were also cross-questioned by the Applicant.

THE LAW APPLICABLE TO THE APPLICATION

20. The Applicant's complaint relates the right to safe, good quality products and the implied warranty on products, as outlined in section 56 read with section 55 of the Act. Below, we consider the sections of the Act that are applicable to this case.
21. In section 53 (1) (a) of the Act, a "defect" is defined as follows:
- (i) "any material imperfection in the manufacture of the goods or components, or 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; or
 - (ii) any characteristic of the goods or components renders the goods or components less useful, practicable or safe than persons generally would be reasonably entitled to expect in the circumstances."
22. Section 55 (2) of the Act states as follows –
- "Except to the extent contemplated in subsection (6), every consumer has a right to receive goods that –*
- (a) are reasonably suitable for the purposes for which they are generally intended;
 - (b) are of good quality, in good working order and free of any defects;
 - (c) will be useable 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; and
 - (d) comply with any applicable standards set under the Standards Act, 1993 (Act 5 No. 29 of 1993), or any other public regulation."
23. Section 55 (6) of the Act states as follows –
- "Subsection*
- (2) (a) and (b) do not apply to a transaction if the consumer –
 - (a) has been expressly informed that particular 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."

24. Section 56 of the CPA states as follows –

“(1) In any transaction or agreement pertaining to the supply of goods to a consumer there is an implied provision that the producer or importer, the distributor and the retailer each warrant that the goods comply with the requirements and standards contemplated in section 55, except to the extent that those goods have been altered contrary to the instructions, or after leaving the control, of the producer or importer, a distributor or the retailer, as the case may be.

- (2) 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, and the supplier must, at the direction of the consumer, either –
- (a) repair or replace the failed, unsafe or defective goods; or
 - (b) refund to the consumer the price paid by the consumer, for the goods.
- (3) If a supplier repairs any particular goods or any component of any such goods, and within three months after that repair, the failure, defect or unsafe feature has not been remedied, or a further failure, defect or unsafe feature is discovered, the supplier must –
- (a) replace the goods; or
 - (b) refund to the consumer the price paid by the consumer for the goods.
- (4) The implied warranty imposed by subsection (1), and the right to return goods set out in subsection (2), are each in addition to –
- (a) any other implied warranty or condition imposed by the common law, this Act or any other public regulation; and
 - (b) any express warranty or condition stipulated by the producer or importer, distributor or retailer, as the case may be.”

ANALYSIS OF THE EVIDENCE

25. Given the fact that these are motion proceedings, the Tribunal was guided by the Plascon Evans rule[1], in considering the evidence presented. The Plascon Evans rule as articulated by the honourable judge in Dwele v Phalatse and Others[2] states that –

“In motion proceedings a final order may be granted if those facts averred in the applicant’s affidavits, which have been admitted

by the respondent, together with the facts alleged by the respondent, justify such an order. In certain instances the denial by a respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact. It is bona fide disputes in motion proceedings which fall to be determined on the

facts

contained in the opposing papers which must be preferred in accordance with the rule in *Plascon-Evans Paints Ltd v. Van Riebeeck Paints (Pty) Ltd*”.

26. In this matter, most facts were common cause, either by admittance or absence of counter-argument. As confirmed by the parties’ affidavits, the following undisputed facts are relevant:

26.1. The date and nature of the sale: Applicant bought a pre-owned 2012 model BMW 320i on 6 September 2017 from the Respondent. The mileage at delivery was approximately 112 000 km;

26.2. Pre-purchase inspection:

26.2.1. The vehicle passed a roadworthy test prior to date of sale; and

26.2.2. Midcity conducted a 120-point check of the vehicle, as requested by the Respondent;

26.3. After-sale defects and problems detected:

26.3.1. The Applicant returned the vehicle the day after purchase for repairs to the brakes; and

26.3.2. On 9 September 2017, three days after purchase, the vehicle became defective;

26.4. Circumstances on the day the vehicle became defective:

26.4.1. The vehicle became defective whilst the Respondent was traveling on a national road;

26.4.2. The vehicle was towed from the national road and then handed over to a BMW dealership in Secunda, Pinnacle Motors (“Pinnacle”), with the consent of the Respondent;

26.4.3. On 9 September 2017, when the vehicle became defective, no rain or evidence of water was evident on the road where the vehicle was collected; and

26.4.4. Pinnacle provided a quotation for the cost of the replacement of the vehicle’s engine in the amount of around R200,000, but did not indicate the cause of the engine failure;

26.5. Actions by Respondent:

26.5.1. The Respondent took ownership of the vehicle on 12 September 2017 by having it towed to Pinnacle. It also arranged for the vehicle to later be towed to Sovereign BMW in Vereeniging (“Sovereign”), which company is owned by the Motus Group;

26.5.2. The Respondent requested Sovereign to diagnose the cause of the failure of the engine;

26.5.3. In October 2017, Sovereign diagnosed the cause of the engine failure as water damage;

26.5.4. Subsequently, the Respondent indicated that it would not accept liability for the cost of repair; and

26.5.5. Sovereign kept the vehicle in storage until January 2019, whereafter it was delivered to the Respondent and inspected by its Manager and Sales Agent; and

26.6. The vehicle is no more in the possession of either the Applicant or the Respondent, as the credit provider, Toyota Financial Services, had repossessed the vehicle since and sold it on auction.

27. The Respondent raised a factual dispute on the cause of the engine failure. The Respondent called three witnesses to provide oral evidence supporting its allegation that the Applicant drove the vehicle into water, thereby causing the fatal failure of the engine.

Shameen Muhammed Kadir (“Kadir”)

28. Kadir, the manager of the Respondent, testified that he inspected the vehicle after Pinnacle brought it to the Respondent’s premises in January 2019. He found mud and debris in the engine compartment and the interior of the vehicle and submitted in his testimony that it was therefore clear to him that the vehicle had been driven through water. He also submitted that, according to his experience, a vehicle’s engine can seize if driven through water of 50 cm or more deep.

29. Although Kadir testified that the Applicant never brought any defects to the Respondent’s attention, such testimony is in contradiction with the whatsapp messages between the sales agent and the Applicant.

Ricardo Moreira (“Moreira”)

30. Moreira, an aftersales manager of Sovereign, testified that he did not work on the vehicle himself, but inspected the vehicle at a later stage.

31. According to Moreira, the relevant technician, who found the alleged water ingress, was not available for testimony. Also, the report by this technician did not form part of the evidence before the tribunal and witnesses presented hearsay evidence in this regard.

32. Moreira, who has 12 years’ experience in the servicing and repairs to motor vehicles, testified that engines usually fail for the following reasons:

32.1. Normal wear and tear;

32.2. Due to lack of maintenance;

32.3. Overheating – when the engine is used with insufficient levels of lubricants such as water or oil;

32.4. Abuse; over-revving of the vehicle;

32.5. Continued driving the vehicle after warning lights came on indicating that there is a problem with the vehicle; and

32.6. Poor detonation and foreign objects in the engine. This may vary from foreign objects (contaminated fuel) or water in the engine. These incidents prevent the pistons from moving up and down the cylinder sleeve, causing it to bend, break and damage the engine. According to Moreira, this is referred to as “engine lock”.

33. According to Moreira, it is impossible for the Applicant to have driven almost 400 km with the vehicle, had there been water in the engine, as the engine would not turn and the vehicle would not be able to move. More explicitly, Moreira confirmed that the point at which the vehicle would have broken down, had to be the place where the water infiltrated the engine, as the engine would

have immediately seized.

34. Moreira could not explain how the vehicle could have seized on a national road where no evidence of water puddles or water entry into the vehicle existed. Moreira could also not testify to the nature of the towing and storage by Sovereign and the Respondent after 9 September 2017.

Ronald Jones (“Jones”)

35. The testimony of Jones was unreliable. Jones provided testimony in contradiction with his affidavit by stating under oath that he received a phone call from the Applicant on the day of the engine failure, 9 September 2017, in which call the Applicant allegedly outlined that he was stuck in a rural area while it was raining. Apart from this information being introduced as “new facts” during the hearing, it also contradicted the undisputed whatsapp messages between Jones and the Applicant. In the whatsapp messages, as put before the Tribunal, the flow of communication between the Respondent and the Applicant evidenced that Jones’s phone was “on charge” the night of the engine failure and that Jones only responded back to the Applicant the next day. The

whatsapp messages recorded as follows:

“09/09/2017, 23:23 – Papani Cassius Ndlovu: boss sorry to disturb u. I got stuck with de car. I think I will take it bk.

10/09/2017, 13:20 – Ronald Jones Toyota: Boss sorry phone was on charge

10/09/2017, 13:20 – Papani Casius Ndlovu: Good day Ronald, sory to isturb u on yo rest day. So as I had only 3 days with it I blv u guys u must take full responsibility n im thinking of cancelling de deal as I don’t trust dis car anymo.”

36. Jones further testified that the Applicant did not bring defects under his attention. However, according to the evidence before the Tribunal, various problems had been communicated to Jones since the day of its purchase. These problems include defects relating to the bonnet lock, rattling noise, break pads, day-night lights and the remote battery:

"06/09/2017, 17:26 – Papani Cassius Ndlovu: Hi boss, de car has got a problem 06/09/2017, 17:30 – Ronald Toyota: Eish like ... sorry

06/09/2017, 17:46 – Papani Cassius Ndlovu: I will come tomoro moning 06/09/2017, 17:48 – Ronald Toyota: OK boss. Which side or what's doing

06/09/2017, 17:48 – Papani Cassius Ndlovu: mbonet lock broken, irritating sound trm wheels, rear foglight and de seat 06/09/2017, 17:52 – Ronald Toyota: OK let me check for you tomorrow, what time you coming 06/09/2017, 17:52 – Papani Cassius Ndlovu: around 9

....

07/09/2017, 09:36 – Papani Cassius Ndlovu: the front bake pads n disc finished 07/09/2017, 09:37 – Ronald Toyota: OK, cone this side let's help you brother

...

07/09/2017, 10:36 – Ronald Toyota: Sir I have to get new pads and new stuff they say agents only and your car will be only ready tomorrow morning they say at 10 the latest...all good they busy now brother with your car will get it later

07/09/2017, 18:22 – Ronald Toyota: the noise gone.. 07/09/2017, 18:56 – Papani Cassius Ndlovu: no boss is still der

08//09/2017, 15:41 – Papani Cassius Ndlovu: boss the remote battery total dead, it is no longer working

08/09/2017, 15: 42 – Ronald Toyota: nd spare just get battery and send me receipt will refund you

09/09/2017, 15:41 – Papani Cassiu Ndlovu: de automatic day night lights not working on de car."[3]

37. The Tribunal is concerned that the vehicle seemingly passed its roadworthy test whilst the brake disks and pads were completely worn and had to be replaced by the Respondent. Irrespective, the Respondent consented to replace it and did so on 10 September

2017. Other defects persisted, though.

38. It is further common cause that the Applicant drove a total of about 400 km with the vehicle after purchase. The number of problems that presented itself during that time, had been emphasized by the Applicant as unacceptable and not in line with his expectation of the normal use of the vehicle, which was presented as a luxury previously owned vehicle in a good working condition. Jones could not explain this anomaly.

39. The Applicant submitted that the cumulative effect of such defects, either known or not known, rendered the vehicle unsafe.

ANALYSIS

40. From the evidence before the Tribunal, it appears that the Respondent attempted to show sympathy for the Applicant when the defects in the vehicle were brought to its attention. It also assisted the Applicant in some respects, such as replacing the brake pads. However, it is similarly clear that the vehicle showed signs of being unsafe and in a poor working order straight away.
41. The Tribunal found the Applicant a reliable and convincing witness. The Applicant had put a convincing case that the vehicle's engine had "cut-out" during his driving on a national, tarred, road. The Applicant's testimony that he did not drive through any water or allowed any water ingress into the engine is accepted by the Tribunal as truthful. Although the Respondent's witnesses testified to having witnessed debris in the vehicle at a later stage, the nexus between such debris and the cause of action was not established. In fact, the debris in the vehicle, as well as the subsequent report by Sovereign, only surfaced after the Respondent towed the vehicle from Pinnacle to Sovereign.
42. The Respondent failed to call either Pinnacle or the Sovereign technician who drafted the "cause of faulty engine" report. Also, no photos of the alleged debris or water damage were presented to the Tribunal. In the absence of any proof that the debris and water damage existed already at the time of the engine failure, the best evidence before the Tribunal regarding the day of the engine's seizure, is that of the Applicant.
43. Further, on the Respondent's own version, the vehicle would not have been able to drive after the alleged water ingress occurred. As the place where and the circumstances within which the vehicle was found, undisputedly confirm that the vehicle was found stuck on a national road, the engine had to seize there,. As no evidence of water ingress at the scene was presented, the only deduction the Tribunal can make, is that the engine had seized due to other reasons than that of water ingress.
44. Even though the vehicle is formerly owned, the consumer has the right to a useable and durable vehicle for a reasonable period of time. In this case, the durability of 400 km and three days are inadequate. Accordingly, a request for refund, repair or replacement would have been justified in terms of the CPA.
45. Section 56 (2) of the Act says the consumer may return the goods, and then direct the supplier to repair or replace the unsafe or defective goods or refund the consumer the purchase price. From the evidence before the Tribunal, it is evident that the Applicant attempted to return the vehicle for refund, repair or replacement. However, due to the long delay by the MIOSA and National Consumer Commission in finalising their respective investigations, the Applicant was not able to utilize the vehicle and failed to make prompt payments to its credit provider. The impact of this delay on the consumer is huge.

46. It is further important to point out, as emphasised by Barnard (2020)[4], that section 55 (6) of the Act is not an endorsement of the voetstoets (selling goods “as is”) clauses that were prevalent to these types of agreements prior to the promulgation of the Act and that any attempt to exclude liability when transacting, goes against the letter and spirit of the Act.
47. Thus, as stated above, the Applicant would have been entitled to return the vehicle to the Respondent, without penalty, and at the Respondent’s risk and expense, if the vehicle was defective and satisfied the requirements of section 56 of the Act. This is the essence of this case, and consequently, what the Tribunal must determine.
48. The issue of a defective vehicle was dealt with recently in *Motus Corporation (Pty) Ltd and Another v Wentzel*[5]. Ms Wentzel brought a case in the Gauteng Division of the High Court, against Motus Corporation (Pty) Ltd, trading as Zambezi Multi

Franchise (Renault). Ms Wentzel sought to return a Renault Kwid motor vehicle, against the refund of the purchase price, claiming that Renault had sold her a brand new car that was ‘woefully defective’, in breach of sections 49 (1) (b), 55 (2) (b) and (c), 56 (2) (a) and (b) and 56 (3) of the Act. The court found in Ms Wentzel’s favour. Renault took the matter on appeal at the Supreme Court of Appeal (SCA).

49. The SCA had to decide, among other things, whether Ms Wentzel made out a case in terms of section 56 (2) and (3) of the Act for the refund of the purchase consideration paid to Renault in respect of the vehicle. The court opined that –

“Not every small fault is a defect as defined. It must either render the goods less acceptable than people generally would be reasonably entitled to expect from goods of that type, or it must render the goods less useful, practicable or safe for the purpose for which they were purchased...Is very rattle or unfamiliar noise a defect in terms of the statute? A defective module may be readily replaced, as occurred with the immobiliser. Does that render the vehicle defective so as to entitle the purchaser to return it and demand repayment of the purchase price? Clearly not.”

50. In the end the court found that a consumer is not entitled to a refund of the purchase price unless the applicable legislative requirements are met. Ms Wentzel failed to show that the requirements of section 56 (3) were satisfied and that she was entitled to return the vehicle against refund of the purchase price of the vehicle. Thus, the SCA upheld the appeal.
51. In the case at hand, section 56 (3) is not applicable. However, the question arises whether the fatal failure of the engine and the cumulative effect of other problems could be considered a defect within the meaning of section 53 read with section 55 and 56 (2) of the Act. This question is considered, having regard to the nature of the vehicle: being a used vehicle, that had done about 112 388 kilometres on purchase and went on to do an additional 400 kilometres over a period of three days since purchase.

52. The Tribunal was proffered with evidence indicating that, although the vehicle passed the roadworthy test, the brake pads were faulty from the day of purchase. Although the brake pads were replaced by the Respondent, other defects remained. Accordingly, unbecoming to a vehicle in good working condition, the normal driving of the vehicle resulted in the seizing of the engine within 400 km after purchase.
53. The Tribunal is convinced that the cumulative effect of the defects as reported, rendered the vehicle unsafe and not in good working order. The Applicant's testimony, as supported by the Pinnacle analysis, is accepted as truthful by the Tribunal. Accordingly, the Tribunal accepts that the vehicle was "cutting out" while driving and that the cause of this problem existed at the time of sale. As a result of the cumulative effect of defects present in the vehicle at the time of purchase, the Tribunal believes that the vehicle was not useable and durable for a reasonable period of time, having regard to the use to which this type of vehicle would normally be put. The Tribunal is also convinced that the vehicle was not reasonably suitable for the purposes for which a vehicle is generally intended and that the defects in the engine could not be readily replaced. As the Respondent also showed unwillingness to repair or replace the engine, the Tribunal is convinced that the defects rendered the vehicle so defective that it entitled the Applicant to request a refund.
54. In an instance such as this, where the evidence supports no fault at the side of the consumer, the total failure by the engine within 400 km after purchase will render the vehicle defective, as opposed to being the result of normal wear and tear to be expected of a vehicle of this nature.
55. Further, the Respondent's testimony of debris in the vehicle and water damage to the air filter is rejected, based on the unreliability of some of its witnesses and the absence of supporting documents to that effect.

CONCLUSION

56. This matter clearly falls within the ambit of the CPA. It should be noted that, in line with section 56 (4) of the CPA, the implied warranty imposed by section 56 (1) of the CPA and the right to return goods as set out in 56 (2) of the CPA are each "in addition to any other implied or expressed warranty or condition stipulated by the producer or retailer."
57. In this matter, the consumer paid for a vehicle of which he hardly had the use of, due to it breaking down within the first three days of purchase. This indicates prohibited conduct in terms of the CPA.
58. The Applicant relies on sections 56 (2) of the CPA, which does not limit the Applicant's right to return the vehicle and reclaim the purchase price. If the legislature had intended to limit a consumer's rights under sections 56 (2), then it would have inserted a similar provision to that contained in section 20 (6) of the CPA.[6]

59. Consequently, the Applicant does not have to account for the use, depletion, deterioration or subsequent auction of the vehicle when exercising his rights under sections 56
- (2) of the CPA to return the vehicle and claim a refund of the purchase price.
60. Ultimately the consumer's statutory remedy remains, and any limitation of the consumer's rights must therefore lie in the CPA.
61. In the Tribunal's view, the vehicle, therefore, did not satisfy the requirements of section 55 (2) of the CPA 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.
62. Turning to the relief sought by the Applicant, unfortunately, events have overtaken us and the vehicle has already been sold by the Applicant's credit provider. However, the proceeds of the sale did not cover the Applicant's outstanding debt in this transaction.
63. Irrespective, this does not preclude the Tribunal from making a finding and ordering relief to the Applicant. Section 4 (2) (b) (ii) of the CPA behoves the Tribunal to make an appropriate or innovative order, to give practical effect to the consumer's right of access to redress.

FINDING

64. Having regard to the submissions made by the Applicant in this matter, the Tribunal finds, on a balance of probabilities, that the Respondent has contravened sections 55 (2) and 56 (2) of the CPA when it supplied the defective vehicle to the Applicant.
65. These contraventions constitute prohibited conduct. On this basis, the Respondent is found to have engaged in prohibited conduct. A finding of prohibited conduct by the Tribunal means that the Applicant is entitled to a certificate from the Chairperson of the Tribunal, which he can submit to a civil court to claim his damages. This will entail the incurring of further costs for the Applicant who, in the Tribunal's view, has suffered enough. The Applicant is, therefore, entitled to relief.

ORDER

66. Accordingly, the Tribunal makes the following order:
- 66.1. Declares the Respondent's contraventions of section 55 (2) and 56 (2) of the CPA prohibited conduct under the CPA;
- 66.2. Orders the Respondent to refund the Applicant the sum of R 262,172.78, representing the purchase cost of the vehicle, within 14 days of the issuing of this order; and
- 66.3. The Applicant may approach the Chairperson of the Tribunal for a certificate to claim his damages in the High Court; and
- 66.4. There is no order as to costs.

Thus, handed down on 31 March 2022

DR MC PEENZE PRESIDING MEMBER

Mr F Sibanda and Adv F Manamela concurred

- [1] Plascon-Evans Paints Ltd. v Van Riebeck Paints (Pty) Ltd. [1984]. ZASCA 51 [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634E to 635C
- [2] Dwele v Phalatse and Others (11112/15) [2017] ZAGPJHC 146 (7 June 2017)
- [3] Page 186 – 191 of the Tribunal bundle
- [4] Barnard, J. (2020). Suppliers, consumers and redress for defective vehicles — The reach of the National Consumer
- [5] SCA. Case no 1272/2019) [2021] ZASCA 40 (13 April 2021)
- [6] Section 20 deals with a consumer's right to return goods.

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Prepared on 11 October 2026 · Esheria