

SOUTH AFRICA / JUDGMENT

**Peter v NTT Motor East London (Pty) Ltd t/a
Audi East London (NCT/243451/2022/75(1)(b))
[2024] ZANCT 23 (19 July 2024)**
[2024] ZANCT 23

COURT

National Consumer Tribunal

BEFORE

Zodwa Ntuli, Nomfundo Maseti, Selwyn Hockey

CASE / FILE NUMBER

NCT/243451/2022/75(1)(b)

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case number: NCT/243451/2022/75(1)(b)

In the matter between: GRISSEL THANDEKA PETER APPLICANT and NTT MOTORS EAST
LONDON (PTY) LTD RESPONDENT T/A AUDI EAST LONDON

Coram:

Ms Zodwa Ntuli - Presiding Tribunal Member

Ms Nomfundo Maseti

- Tribunal Member

Mr Selwyn Hockey - Tribunal Member

Date of Hearing - 24 April 2024

Date of Ruling

- 19 July 2024

RULING AND REASONS

APPLICANT

1. The applicant is Grissel Thandeka Peter (the applicant), an adult female. She is a consumer, as defined in section 1 of the Consumer Protection Act 68 of 2008 (CPA). At the hearing, Ms Zintle Matshaya, a candidate attorney at Drake Flemmer and Orsmond Attorneys, represented the applicant.

RESPONDENT

2. The respondent is NTT Motors East London (Pty) Ltd, trading as Audi East London (the respondent), a private company incorporated under the company laws of South Africa with registration number 2009/001421/07. The respondent is a supplier, as defined in section 1 of the CPA. At the hearing, Adv. Morgan Courtenay, instructed by Kruse Attorneys, represented the respondent.

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 rules of 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 his complaint to the National Consumer Commission (the NCC), which issued a non-referral notice on the basis that the remedy sought cannot be provided under the CPA.
5. If the NCC issues a non-referral notice, section 75(1)(b) allows the complainant to refer the matter directly to the Tribunal, with leave of the Tribunal. The Tribunal granted leave to refer on 9 February 2024.

ISSUE TO BE DECIDED

6. The Tribunal must decide whether the respondent engaged in prohibited conduct and whether the relief sought should be granted if the Tribunal finds in favour of the applicant.

RELIEF SOUGHT

7. On Form Tl/73(3) & 75(1)(b) & (2) CPA, the applicant requested the Tribunal to order that the respondent take back the vehicle and refund to the applicant all monies paid for the purchase of the vehicle. The monies are calculated as an R550,000,00 deposit, which included R130,000,00 in the form of a trade-in for the Audi A4, and R74,826,36, which is made up of R4 127,02 instalments paid over eighteen months. Furthermore, the applicant would like an order for the respondent to pay unquantified special damages, which include the cost of the new battery she purchased for the vehicle, towing fees, and the cost of following up on the matter via calls, emails, and faxes.

BACKGROUND

8. The applicant alleged that she purchased a new Audi Q2 3.0 TFSI Sport Tronic Black Edition 2020 model (the vehicle) from the respondent (also referred to as the dealership) on 30 September 2020 for R611,489.42. She paid a cash deposit of R420,000,00 and traded in her Audi A4 for R130,000,00. The total paid to the respondent was R550,000,00, and Audi Financial Services financed the remainder at R62,696,92. The applicant paid the installment of R4,157,02 over eighteen months, which came to R74,826,36.
9. The deal was concluded very late on 30 September 2020. She was told to collect the vehicle with the signed documents for the vehicle on 1 October 2020. She took delivery of the vehicle on 1 October 2020. No delivery slip was given to her. Upon inquiring about the vehicle documents, she was told they were in the cabin hole. Upon arriving home, she checked the vehicle documents and identified discrepancies regarding the vehicle's mileage on different documents. On the vehicle description document dated 10 September 2020, one document had 64 kilometers, while on the maintenance list document dated 11 September 2020, 10 kilometers were recorded. The vehicle specification document emailed to her by the respondent reflected 19 kilometers. The vehicle also had a bad smell.
10. These discrepancies made her suspect that the vehicle may have been represented to her as new when it was not or that it had been in an accident. She raised the concern with the respondent and went to the dealership the following day, where they showed her the vehicle recording on the system, which reflected the vehicle as new. However, her suspicion that the vehicle was not new persisted. On 14 December 2020, while she was driving, the brakes failed, and the vehicle wobbled off the road and broke down, with the recording on the screen stating, "Brake servo failed stop immediately". She notified the respondent, who advised her to contact Audi SA about the defect. The vehicle was towed to the respondent's dealership.
11. The applicant was concerned that the brake system of a new vehicle failed just over two months after she received it. This amplified her suspicion that she had been sold a used vehicle. As a retired elderly woman, she specifically traded the old vehicle in and purchased a new vehicle to avoid mechanical problems. Further, her husband was frail and under palliative care for cancer, which required her to drive him to and from doctors and hospitals regularly. Her husband subsequently passed away on 13 April
2022. She tried in vain to negotiate telephonically with the respondent to give her a new replacement vehicle or cancel the agreement for a purchase price refund.
12. On 6 January 2021, she expressed her choice of the new replacement vehicle or cancellation and refund to the respondent by email. The respondent declined the request by email on 7 January 2021 and insisted on repairing the vehicle under the warranty policy. On 16 January 2021, the respondent called her to collect the vehicle after repairs on 19 January 2021. She disagreed with the respondent's decision to repair the vehicle and complained to the Motor

Industry Ombudsman of South Africa (MIOSA). MIOSA advised her to collect the vehicle and park it in her garage and gave her complaint forms to complete so she could file a formal complaint.

13. On 19 January 2020, she collected the vehicle but noticed the bonnet could not open. The vehicle was returned to the respondent's workshop for repair while she waited. She requested the job card to see what had been repaired, but the respondent declined. From January 2021, she did not drive the vehicle as she feared for her life. She believed the vehicle was unsafe, particularly because she did not expect that a brand-new vehicle would have such defects so soon after buying it. Moreover, the respondent declined to provide any report so that she could understand what caused these defects.
14. She filed a formal complaint with MIOSA on 25 January 2021. On 8 June 2021, she noted that all remote functions of the vehicle had died, and she could not start the vehicle, even manually. She notified MIOSA, which advised her not to worry as her matter was still under consideration. On 25 August 2021, MIOSA recommended that she book the vehicle with the respondent or another Audi dealership for repairs, as it was still under warranty. The MIOSA case was subsequently closed. On the documents she received from MIOSA, she noted a delivery note for her vehicle dated 30 September 2020, which recorded the mileage as 0 kilometers and that her signature was forged.
15. She still believed the respondent undermined her right to choose a replacement or refund and disagreed with the MIOSA outcome. On 29 August 2021, she filed a complaint with the NCC. In her complaint, she alleged problems with the vehicle in that it was not new; it had a bad smell; there was a discrepancy in the mileage recorded on different documents; it had a tracker icon but no tracking device installed; the brakes system failed, and the vehicle broke down; the bonnet could not open after the repair of the brakes defect; all remote functions of the vehicle stopped; and her signature was forged on a document. She requested cancellation of the agreement and a refund of all monies paid for purchasing the vehicle.
16. While the matter was with the NCC, on 22 November 2021, she towed the vehicle to the respondent's dealership for the 12-month service with a mileage of 1045 kilometers. The respondent told her the vehicle battery was a problem, which was why it did not start. The respondent wanted to charge her R7,299,65 to address this battery problem, but she decided to tow the vehicle to a battery centre instead. She got the battery replaced so that the vehicle could be driveable. On 26 January 2022, the NCC issued a non-referral notice stating that the alleged facts, if true, do not constitute a ground for a remedy under the CPA. The NCC noted that the applicant had declined the tracking device she alleged was not fitted and that the respondent had repaired the vehicle and waited for her to collect it.
17. She was unhappy about the NCC outcome and escalated the complaint to the Tribunal as permitted under the CPA. Based on the case record, she applied for leave to refer her complaint directly to the Tribunal on 31 January 2023 against the respondent and (Audi

South Africa, Volkswagen South Africa (Pty) Ltd (Audi SA). She also applied for condonation as her application was out of time. The Tribunal issued the ruling condoning the late filing on 21 February 2023. The respondents had 15 days to file their answering affidavits. As no opposing papers were received, the notice of set down was issued for the leave to refer hearing on 3 April 2023.

18. The respondent filed its answering affidavit and condonation application on 31 March 2023. At the hearing on 3 April 2023, the Tribunal decided to adjourn the matter sine die to allow consideration of the condonation application. Audi SA filed a condonation application for the late filing of its answering

affidavit on 2 May 2023. Both condonation applications were heard on 6 July 2023, and the rulings were issued on 20 July 2023 to the respondents. The applicant had ten days to file a replying affidavit, but her attempt failed to meet the requirements.

19. The notice of set down for the application for leave to refer was issued on 22 August 2023 for 19 September
2023. The applicant applied for condonation of the late filing of her replying affidavit, and the matter was removed from the unopposed roll. The condonation was granted with the ruling issued on 18 December 2023. A notice of set down was issued on 9 January 2024 for the application for leave to refer to be heard on 8 February 2024.
20. Leave was granted against the respondent and dismissed against Audi SA. The ruling was issued on 9 February
2024. The respondent's answering affidavit in the main matter was received on 2 March 2024. The notice of set down was issued on 22 March 2024. The matter was heard virtually on 24 April 2024 via MS Teams.

THE APPLICANT'S

SUBMISSIONS

21. The applicant's submissions are substantially covered in the background above. At the hearing, Ms Matshaya reiterated the following allegations on behalf of the applicant:
 - 21.1 The respondent sold her a vehicle that did not meet the standards set in section 55 and declined to give her a new replacement vehicle or cancel the agreement and refund the purchase price in terms of the implied warranty contrary to section 56.
 - 21.2 The respondent contravened section 41 because the vehicle sold to her was not new and had the tracking icon, but no tracking device was installed. She also suspected that no alarm system had been installed.

21.3 The respondent violated section 48 by waiving the applicant's right to additional goods/services, including the tracking device and the NTT warranty, and claiming that she declined them. The applicant was never presented with the client declaration form, and her signature thereon was forged.

21.4 Further, although the vehicle's registration certificate reflects it as new, the odometer may have been altered because the respondent recorded different mileage on various documents and different engine codes on the maintenance list and license disk.

21.5 The respondent clarified the issue regarding engine numbers. However, the mileage discrepancies recorded remained a concern. The mileage is one of the critical indicators of the condition or nature of the vehicle. The discrepancies give credence to the suspicion that the vehicle is not new. The respondent should have proper systems to record the mileage readings as a reputable dealership.

21.6 The brakes failed just over two months after she took delivery. The defect was material because the message on the vehicle's screen warned against further driving it. Had it been a minor problem, the warning light would illuminate without instruction to stop the vehicle immediately. After the repair by the respondent, the vehicle bonnet could not open.

21.7 The applicant could not use the vehicle and had to be towed to the dealership, indicating the seriousness of the defect. The applicant did not expect this because she purchased a new vehicle to avoid mechanical problems. She requested a replacement vehicle or a refund of the purchase price, but the respondent refused and insisted on repairing the vehicle under the warranty. The applicant's email of 6 January 2021 and the respondent's email of 7 January 2021 confirm this.

21.8 Although the respondent claimed this was a minor defect, it had the vehicle for over a month to repair it. The fact that the vehicle could not be used until the defect was repaired indicates that this was not a minor defect. Even though the respondents had to wait for parts from Germany, it did not provide a courtesy vehicle for the applicant to use.

21.9 The respondent did not provide the applicant with a detailed report on what caused the brake failure or the bonnet problem. The vehicle braking system is an important safety feature. The vehicle was unsafe, potentially resulting in an accident that may injure the applicant and other road users.

21.10 Upon repair, the applicant begrudgingly collected the vehicle because the respondent insisted she must. MIOSA also advised her to do so. As this was a new vehicle, the applicant expected the respondent to be equally concerned instead of dismissing the problem as immaterial.

21.11 As a result, the applicant seldom used the vehicle as she felt unsafe driving it. Hence, she approached MIOSA for redress. On 8 June 2021, the remote functions of the vehicle died, and it could not start. She had to tow it to the dealership for the 12-month service. At the time, it had 1045 kilometers at the 12-month interval, which indicates minimal use.

21.12 The respondent has yet to replace the vehicle or refund the applicant. Instead, it offered to buy back the vehicle for about R420,745.95, which the applicant believed was far lower than its value. This further exacerbated the applicant's suspicion that the vehicle was not new in the first place.

22. Ms Matshaya said the respondent undermined the applicant's rights under the CPA. The vehicle had defects and did not meet the standards set in section 55. The applicant could not use and enjoy the new vehicle she bought. The fact that she is forced to use it as she has no alternative does not mean it is safe or has no defects.
23. Ms Matshaya said the applicant relies on section 56(2) for the Tribunal to order a refund of the monies she paid for the vehicle. Alternatively, she relies on section 20 for a refund with permitted deductions should the Tribunal find that the vehicle did not have defects. There is no hierarchy of these remedies, and the CPA grants the consumer a choice under section 56(2).

THE RESPONDENT'S

SUBMISSIONS

24. In its written and oral submissions, the respondent, through Adv Courtenay, opposed the application and denied any wrongdoing, citing that MIOSA and the NCC did not find the vehicle defective. According to the respondent, the vehicle was new at the time of purchase. Audi SA delivered the vehicle to the respondent on 9 September 2020. Audi SA's affidavit confirmed this vehicle description, and the applicant accepted it. The engine code/number was also confirmed to be correct. On 11 September 2020, the respondent booked the vehicle for service, a standard practice referred to as pre-delivery inspection (PDI) service.
25. The respondent averred that it is normal for a new vehicle to have a few kilometers recorded due to necessary handling and test driving by the dealership. This does not mean the vehicle was not new. In any event, the applicant could not have expected the vehicle to be at zero odometer. The discrepancies in mileage recording do not mean that the odometer was manipulated. Clerical and administrative errors caused the mileage entries to be different on various documents.
26. On 29 September 2020, the applicant visited the dealership to purchase a vehicle. She paid the deposit and signed the agreement on 30 September 2020. She collected the vehicle on 1 October 2020. On 2 October 2020, she questioned whether the vehicle was new. The dealership confirmed to her that it was new, and this was evident from the NATIS report and the licensing documents. The respondent said the applicant was the first owner of the vehicle.

27. The fact that the MIOSA report referred to the vehicle as “used” was an error, which the applicant cannot rely on because MIOSA also stated in the same report that the vehicle was repaired in line with the new vehicle warranty, which is not available for used vehicles. The applicant has not produced evidence that the respondent sold her a used vehicle as new. The claims of fraud and misrepresentation are, therefore, unsubstantiated.
28. On 14 December 2020, the respondent was informed that the vehicle brakes failed and was towed to the dealership. The respondent found that the brake failure was due to a failed brake servo, which had to be replaced. This is a singular unit that aids the braking system that is easily replaceable. This was not a material defect, so the respondent used the Original Equipment Manufacturers (OEM) warranty to repair the vehicle. The applicant did not request a replacement or refund after the vehicle was repaired.
29. While the vehicle was with the respondent, the applicant complained by email on 6 January 2021 that it was not new and requested that it be replaced or that the respondent refund the purchase price. On 7 January 2021, the respondent stated in an email that they would not replace the vehicle or grant a refund as it was new. The vehicle parts ordered from Germany were received on 7 January
2021. The vehicle was repaired, and the applicant was notified to collect it. The applicant collected it on 19 January
2021. By collecting the vehicle, the applicant accepted the repairs.
30. The respondent accepted that it did not provide the applicant with a detailed report about what caused the problems or a job card to indicate what repairs were undertaken. However, the invoice provided showed what the respondent did on the vehicle. This inexpensive component costs about R4,000,00, excluding labour, and is simple to replace.
31. The respondent said the dashboard warning lights are a built-in safety mechanism that makes a small error a systemic safety issue. However, it does not mean the vehicle was unsafe or defective. A brake servo failure is not a material defect that warrants vehicle replacement or cancellation of the agreement. There is also no documentary evidence presented that the vehicle is unsafe.
32. Adv Courtenay said the respondent’s technician said it was the first time he encountered this, but it was easy to replace. The respondent emphasised that things malfunctioning in a vehicle is not uncommon. The vehicle is safe and fit for purpose. The applicant has been using the vehicle without any problems.
33. The respondent said in *Motus Corporation (Pty) Ltd t/a Zambezi Multi Franchise (Renault) South Africa v Abigail Wentzel*[2], the Supreme Court of Appeal (SCA) held that not every small problem is a defect contemplated in section 53. In this case, the respondent believes a replacement or cancellation based on this minor issue would be drastic. Hence, the respondent declined the applicant's request and elected to repair the vehicle.

34. The applicant also reported that the vehicle's remote functions failed and could not start. It is common knowledge that the battery will go flat if the vehicle is parked for a long time, which was the case with the applicant's vehicle. Such also cannot be said to amount to a defect. The applicant is still using the vehicle and regularly services it, with a recent service of around 13,000 kilometers.
35. Accordingly, if a defective module in a vehicle can be easily repaired or replaced, it cannot be said to be a defect contemplated in section 53(1). The issue of materiality is important in deciding whether the vehicle was defective and whether a replacement or refund is warranted. Hence, the respondent reiterates that this fault was not material enough to trigger section 56(2). The consumer choice under section 56(2) relies on a defective product, which is not the case in this matter. The applicant has not presented

adequate evidence to prove that the defects were material.

36. The respondent denied infringing the applicant's rights under the CPA. It also denied contravening sections 20, 41, 48, 55, and 56 as alleged. The respondent said the applicant is not entitled to the relief sought. Even if the Tribunal were to find against the respondent, the applicant would only be entitled to a refund of the purchase price, excluding the instalments to the financier, interest, and other costs. The respondent acknowledged that Audi SA made a buy-back offer on 18 Jan 2023, three years after the fact, to try to resolve the matter, but the applicant declined the offer.

APPLICABLE SECTIONS OF THE CPA

37. 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.
38. 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.
39. Section 4(2) 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.
40. 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. 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.

41. Section 53(1)(a) states that when used with respect to 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.
42. 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.
43. 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 with respect of goods solely because better goods have subsequently become available from the same or any other producer or supplier.
44. Section 56(1) states that 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.
45. 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

46. The applicant alleged that the respondent contravened sections 55(2), 56(2), 41, and 48. The Tribunal is satisfied that the application is properly before it after the NCC issued a notice of non-referral. The Tribunal is required to consider the applicant’s complaint afresh in line with *Lewis Stores (Pty) Ltd v Summit Financial Partners (Pty) Ltd and Others*[3]. The parties were granted time to make their oral submissions.
47. Having considered the written and oral submissions made by the parties, the Tribunal determined whether the respondent contravened the alleged provisions of the CPA, whether the contraventions constitute prohibited conduct[4] and whether the applicant is entitled to the remedy sought.

48. Regarding the alleged contravention of sections 41 and 48, the Tribunal finds no evidence to support these allegations, as elaborated below:

48.1 The crux of the applicant's case in respect of these provisions is that the respondent sold her a used vehicle as new and had a tracking icon, but no tracking device installed in contravention of section 41. The respondent provided irrefutable evidence that the vehicle was new when the applicant bought it. According to the vehicle booking record (Vehicle Booking No. 548845), marked as Annexure LB1 of the answering affidavit dated 11 September 2020, the respondent received the vehicle on 9 September

2020. A standard PDI service was performed, as confirmed by the tax invoice dated 14 September 2020, marked as Annexure LB2 of the answering affidavit.

48.2 The vehicle certificate of registration (RC1) issued by the East London Traffic Authority on 1 October 2020, marked as Annexure LB6 of the answering affidavit, records the vehicle as new. The Tribunal noted the glaring discrepancies in the mileage recorded on various documents. While these are unacceptable, they cannot be a valid basis to label the vehicle as used or second-hand. The Tribunal accepts that the kilometers recorded are reasonable considering the necessary testing and handling before the vehicle could be delivered to a consumer. The allegations stand to be dismissed.

48.3 Furthermore, the applicant accused the respondent of waiving her rights and claimed she declined certain goods and services in contravention of section 48. She also alleged that her signature was forged. The respondent submitted a document titled Client Declaration Non-Acceptance of Advisor Recommendation (Client Declaration) dated 30 September 2020 and marked as Annexure LB3 of the answering affidavit, which the applicant signed. She declined additional products and services offered, including vehicle tracking for a monthly premium. These were not obligatory or part of the agreement. The applicant voluntarily declined them. Nothing was presented to convince the Tribunal that her signature was forged.

48.4 Contrary to the applicant's claim that the tracking device was not installed, the Certificate of Installation by CarTrack, dated 11 September 2020, submitted on page 50 of the record, confirms that the device was installed. However, the respondent did not activate it because the applicant declined the service. It would be absurd for the applicant to expect the tracking service to be activated without accepting the service and paying the applicable monthly premium. In any event, the applicant had no right to any additional products or services offered in terms of the CPA. Thus, no rights were waived by the respondent. The allegations stand to be dismissed.

49. Regarding the alleged contravention of sections 55 and 56, the Tribunal is satisfied that the applicant has proved, on the balance of probabilities, that the respondent contravened section 55(2)(a) – (c), read with section 53(1), and section 56(2)(a) –

(b) of the CPA, as elaborated below:

49.1 Section 55(2)(a) - (c) states that a consumer has the right to receive goods 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.

49.2 Section 56(1) provides that 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.

49.3 Section 56(2) gives the consumer the right to return the goods to the supplier within six months after delivery if the goods do not meet 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. Section 53(1) defines “defect,” “hazard,” “failure,” and “unsafe” within the context of goods or components of goods.

49.4 There are common cause facts, in this case, which include that the consumer expected to purchase a new vehicle; there were discrepancies in the respondent’s recording of the mileage of four different documents; the brakes failed on 14 December 2020; at the time, the vehicle had approximately 700 kilometers; the vehicle wobbled/shuddered with the warning message to stop immediately; the respondent towed the vehicle to its workshop the same day; the applicant made a written request on 6 January 2021 for a new replacement vehicle or cancellation of the agreement with a full refund of the purchase price; the respondent declined the applicant’s request by email on 7 January 2021; the respondent decided to repair the brake failure under the OEM warranty; and the respondent had to order parts from Germany to repair the vehicle, which parts were delivered on 7 January 2021.

49.5 The parties further agree that the respondent repaired the vehicle; the applicant collected it on 19 January 2021; the bonnet could not open; the respondent repaired the bonnet on the same day; on or around 8 June 2021, the remote functions of the vehicle failed and could not start; on 22 November 2021, the applicant had the vehicle towed to the respondent’s dealership for the 12-months service with a mileage of approximately 1045 kilometers; the respondent assessed the vehicle and advised that it had a battery problem; and the applicant took the vehicle to the battery centre where the battery was replaced. They also agree that the respondent did not provide the applicant with a report detailing the cause of the brake failure and the bonnet problem or a job card for repairs undertaken. The respondent provided the invoice for the brake failure repairs.

49.6 At the outset, the Tribunal believes that discrepancies regarding the mileage recording do not qualify as defects. However, suppliers must ensure that they have proper systems to accurately record the mileage, which is one of the critical factors in determining what the vehicle is worth and the extent of prior usage. Therefore, it was reasonable for the applicant to be

concerned about these discrepancies. The Tribunal also noted that the applicant provided insufficient information regarding the bonnet problem. The Tribunal cannot determine if it amounts to a defect contemplated in section 53(1). The battery issue falls outside the six months applicable to the implied warranty in section 56(1). Therefore, the Tribunal limits its analysis to brake failure.

49.7 The Tribunal considered whether the brake failure constituted a defect contemplated in section 53(1)(a). In the *Motus* case, the SCA stated that not every small fault amounts to a defect contemplated in section 53(1)(a). The Tribunal explored the nature and function of the vehicle braking system and a brake servo as a component thereof. Major components of a passenger vehicle braking system include the ABS control module, brake servo, disc brakes, drum brakes, emergency brake, master cylinder, brake pedals, and wheel speed sensor.[5] These are interconnected and work together to ensure the vehicle can be stopped safely and effectively.

49.8 The brake servo, also known as brake booster, is an essential safety feature that aids braking by reducing the effort required to apply brakes and allowing for more effective braking. The brake servo failure is considered a major defect. Brake servo failure severely compromises the safety and performance of the vehicle by, among others, increasing stopping distance, significantly reducing braking efficiency, stalling the engine, causing a complete brake failure, or affecting the ability to control the vehicle. This could lead to accidents that pose risks to the safety of the driver, passengers, and other road users. Thus, one can drive the vehicle further with a faulty brake servo if everything else is fine, but it is unsafe to drive with a brake servo failure or without a brake servo.[6] The difference is that regular service or maintenance may address a faulty brake servo, whereas brake servo failure requires immediate replacement.

49.9 The Tribunal accepts the applicant's version that brake failure was material as it rendered the vehicle unusable and unsafe. The dashboard warning light did not merely illuminate to warn of a servo problem or fault as is typical with minor defects, but it specifically instructed that the vehicle must be stopped immediately. These lights signal varying degrees of vehicle malfunction. In addition, the vehicle shuddered, wobbled off the road, and was difficult to control. This failure severely impacted the functioning and safety of the vehicle. This posed a significant risk of personal injury to the driver, passengers, or other road users or damage to the property. The vehicle was unsafe. The problem could not be more serious than this to be considered material.

49.10 The Tribunal rejects the respondent's submission that this was "a rather simple matter" addressed with the OEM warranty and simple and inexpensive to repair. The cost of repairs or the ease with which repairs can be done is not a factor or benchmark to determine whether a problem amounts to a defect within the meaning of section 53(1)(a). The applicant could not use the vehicle at all due to this defect. This rendered the vehicle unusable or less useful, practicable, or safe than persons generally would be reasonably entitled to expect. The applicant has persuaded the Tribunal that the brake failure in question, irrespective of the cause, amounts to a defect as defined in section 53(1)(a).

49.11 In determining whether the respondent contravened section 55(2), the Tribunal also considered the nature of section 55, which guarantees the consumer's rights to safe, good quality goods. In the Motus case, the SCA affirmed that a right afforded to a consumer under section 55(2) exists irrespective of whether it is contractually warranted. It exists by operation of law and is protected by section 56 if the standards in section 55 are not met. The consumer decides whether to enforce their rights under the CPA or in terms of an agreement with the supplier.

49.12 In this case, the applicant elected the CPA to enforce her rights against the respondent. Section 55 qualifies each right separately. Any of these transgressions under section 55(2) would give the consumer the right to request a refund in terms of section 56(2). The next question is whether the vehicle the respondent sold to the applicant failed to meet the standards set in section 55(2)(a)

- (c) to warrant the remedies under section 56(2).

49.13 The Tribunal noted the applicant's expectation to receive a brand-new vehicle without mechanical problems. Hence, she traded the old vehicle in for a new one. She intended to use the vehicle to transport her ailing husband to and from doctors and hospitals for his palliative cancer care. The vehicle failed to perform just over two months after purchase. The applicant could not use it, including transporting her husband as planned. The vehicle was not fit for the intended purpose. The Tribunal is convinced that the vehicle did not perform in a manner reasonably expected of a new vehicle and was not suitable for the intended purpose. Consequently, the vehicle did not meet the standard in section 55(2)(a).[7]

49.14 The vehicle had about 700 kilometers when the brake failure occurred. This is different from what the applicant expected of a new vehicle. Brake parts are expected to wear off, but that happens over time. Unlike brake pads, which may require changing between 25,000 and 70,000 kilometers on average[8], brake servos have a lifespan of about 240,000 kilometers on average to the vehicle's lifetime, depending on the quality, driving

conditions, and maintenance.[9] The respondent declined to disclose the cause of the brake failure within a short period. This veil of secrecy about the cause justifies the applicant's concern about the safety of this vehicle.

49.15 As it has been concluded that the vehicle was new, the Tribunal can reasonably conclude that the brake servo used in this vehicle was of poor quality or that it was a manufacturing defect because the applicant could not have caused the defect. The defect deprived the applicant of using and enjoying the new vehicle. This means the defect existed at the time the respondent sold the vehicle. The Tribunal finds that the vehicle was not of good quality, in good working order, and free of any defects in contravention of section 55(2)(b)[10].

49.16 With the lifespan generally expected for brake servos, it is abnormal that the defect manifested before the vehicle reached 1,000 kilometers. The vehicle did not last three months, as the defect rendered it unusable. The relatively low mileage of 1045 at the 12-month service interval supports the applicant's version that she uses the vehicle less after it was repaired as she

feels unsafe. The Tribunal is persuaded that due to this defect, the vehicle was not useable and durable for a reasonable period, considering the use to which they would normally be put and to all the surrounding circumstances of their supply. The Tribunal finds a contravention of section 55(2)(c).[11]

49.17 The Tribunal also considered if the respondent failed to comply with section 56(2). Failure to meet section 55(2) entitles the applicant to invoke remedies under section 56(2). The Tribunal is satisfied that the applicant notified the respondent of the defect and the choice of remedy within six months in line with the implied warranty provided in section 56(1). She emailed the respondent on 6 January 2021, stating that “...My request is replacement by a brand new car or cancelling of deal and getting my money back...” She also tendered the vehicle and gave the respondent ample time to act as directed. The implied warranty was operative from the date the applicant took delivery of the vehicle.

49.18 The respondent was obliged to act as directed by the applicant, as provided for in section 56(2). Instead, the respondent responded by email to the applicant on 7 January 2021, stating that “We will unfortunately not be able to replace your vehicle, as we sold you a brand new vehicle, with 'n full maintenance plan. All repairs to your vehicle will be done under AFP (Audi Freeway Plan)”. As expressed in section 56(4),[12] the existence of a contractual warranty to repair the vehicle is immaterial for the application of section 56(2). The use of the OEM warranty does not annul the rights the CPA bestows on every consumer. The Tribunal finds that the respondent contravened section 56(2)(a) - (b).

50. The Tribunal concludes that, based on the evidence before it, the brake failure in question amounts to a defect contemplated in section 53(1)(a); the vehicle did not satisfy the requirements set in section 55(2)(a) - (c); the respondent failed in its obligations to accept the vehicle tendered by the applicant and provide a replacement vehicle or a refund of the purchase price in terms of section 56(2); the respondent infringed on the rights of the applicant under the CPA; and not only did the respondent contravene

sections 55(2)(a) – (c) and 56(2)(a) – (b), but its conduct is an example of prohibited conduct that the CPA aimed to outroot.

51. The Tribunal also records its disappointment about the respondent's attitude towards the applicant regarding this problem. The respondent seemed indifferent and uninterested in what caused the defect, especially within such a short period in a new vehicle. The brake servo failures are infrequent, more so in new vehicles. If poor-quality products caused the defect, as the Tribunal concludes, what confidence should the applicant have that the new part the respondent installed is of good quality? The respondent's lack of sympathy for the applicant's plight, whereas it had the benefit of the applicant's purchase price, should also be condemned. This approach goes against the spirit and purpose of the CPA, and suppliers must do better and be exemplary.

THE RELIEF SOUGHT BY THE APPLICANT

52. The Tribunal has wide-ranging powers to make appropriate orders concerning prohibited conduct.[13] On Form T1/73(3) & 75(1)(b) & (2) CPA, the applicant requested the Tribunal to order that the respondent take back the

vehicle and refund to her all monies paid for the purchase of the vehicle. The Tribunal is empowered in terms of section 150, read with section 4(2), to provide redress concerning the purchase price to give practical effect to the right violated.

53. The definition of ‘price’ in section 1, when used in relation to the consideration of any transaction, means 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. Applying the definition to this case, the total undisputed amount paid to the respondent was R611,489.42, being a R420,000,00 deposit in cash, R130 000 from the Audi A4 she traded in, and R62,696,92 that Audi Financial Services financed.

54. The applicant’s purchase price calculation includes interest paid towards the financed portion of the deal, which amounts to R12,129,44. The applicant also would like an order for the respondent to pay unquantified special damages, which include costs for the new battery the applicant purchased for the vehicle, towing fees, and the costs of following up on the matter via calls, emails, and faxes.

55. The Tribunal has no authority to grant interest on the amount paid by the applicant for the financed portion of the purchase price, which the applicant has already settled. Any accumulated interest, together with the unquantified costs of replacing the battery and following up on the matter via emails, calls, and faxes, would amount to special damages, which the Tribunal cannot grant.

56. However, if the Tribunal finds prohibited conduct in a case, the applicant may consider pursuing special damages she claims she suffered through other processes. Specifically, she could apply for a certificate of prohibited conduct from the Chairperson of the Tribunal to institute a claim for damages in a civil court. 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 (i) certifying whether the conduct constituting the basis for the action is a prohibited or required conduct in terms of this Act; (ii) stating the date of the Tribunal’s finding, if any; and (iii) setting out the section of this Act in terms of which the Tribunal made its finding, if any.

57. The certificate referred to in section 115(2)(b) is sufficient proof of its contents.

ORDER

58. Accordingly, the Tribunal makes the following order:

58.1 The respondent contravened sections 55(2)(a) - (c) and 56(2)(a) – (b);

58.2 These contraventions are declared prohibited conduct;

58.3 The respondent is ordered to refund R611,489.42 to the applicant within 30 (thirty) business days after issuance of this ruling;

58.4 The applicant must make the vehicle available for collection by the respondent, at its risk and expense, immediately after the payment referred to in paragraph 58.3 has been made; and

58.5 There is no cost order.

[SIGNED]

Ms Z. Ntuli

Presiding Tribunal Member

Tribunal members Ms N Maseti and Mr S Hockey concur.

[1] 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).

[2] [2021] ZASCA 40.

[3] Case no 314/2020 [2021] ZASCA 91 (25 June 2021) SAFLII.

[4] Section 1 defines prohibited conduct as an act or omission in contravention of the CPA.

[5] <https://www.wagnerbrake.com/technical/parts-matter/driver-education-and-vehicle-safety/parts-of-the-braking-system.html>

[6] <https://nubrakes.com/blog/brake-booster/>.

[7] Section 55(2)(a) states that every consumer has a right to receive goods that are reasonably suitable for the purposes for which they are generally intended.

[8] <https://midasparts.co.za/shop/braking-system/#:~:text=Generally%2C%20brake%20pads%20need%20to,last%20up%20to%2070%2C000%20km.>

[9] <https://wrench.com/services/brake-power-booster-unit-replacement-mobile-mechanic/#:~:text=It's%20the%20part%20of%20the,and%20can%20last%20even%20longer.>

[10] Section 55(2)(b) states that every consumer has a right to goods that are of good quality, in good working order, and free of any defects.

[11] Section 55(2)(c) states that every consumer has a right to goods that 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.

[12] Section 56(4) states that 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.

[13] See *National Credit Regulator v Dacqup Finances CC trading as ABC Financial Services – Pinetown and Another* (382/2021) [2022]

ZACSA 104 (24 June 2022).

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