

**IN THE NATIONAL CONSUMER TRIBUNAL
HELD IN CENTURION**

Case number: **NCT/220739/2022/75(1)(b)**

In the matter between:

ABRAHAM LOURENS ERASMUS

APPLICANT

And

EARN A CAR ASSETS 1 (PTY) LTD

FIRST RESPONDENT

LINDSTRON BOTES

SECOND RESPONDENT

Coram:

Dr MC Peenze – Presiding member

Mr C Ntsoane – Member

Ms P Manzi – Member

Date of Hearing – 6 September 2022

Date of judgment – 12 September 2022

JUDGMENT AND REASONS

APPLICANT

1. The Applicant in this matter is Abraham Lourens Erasmus, a major male consumer residing in Kempton Park ("the Applicant"). The Applicant appeared on his own behalf.

THE FIRST RESPONDENT

2. The First Respondent is Earn A Car Assets 1 (Pty) Ltd, a private company duly registered in terms of the company laws of the Republic of South Africa ("the First Respondent").

3. The First Respondent's address is 8 Jubilee Street, Kempton Park, 1619. The First Respondent was represented by one of its Directors, Mr Marius du Plessis ("du Plessis").

THE SECOND RESPONDENT

4. The Second Respondent is Lindstron Botes ("the Second Respondent" or "Botes"), a major male supplier of motor vehicles.
5. The Second Respondent's last known address is 17 Steel Road, Kempton Park, 1619.
6. The Second Respondent did not oppose the application but attended the hearing in person.
7. The First and Second Respondents are jointly referred to as "the Respondents" in this judgment.

APPLICATION TYPE

8. This application is lodged in terms of Section 75(1)(b) of the Consumer Protection Act 68 of 2008 ("the Act" or "the CPA"). In this application, the Applicant, with leave granted by the National Consumer Tribunal ("the Tribunal"), seeks redress against the Respondents; and alleges breach of the Act on the basis that the Respondents allegedly failed to comply with the Applicant's request for a refund of the purchase price of a vehicle per Section 56(2)(b) read with Section 55 of the Act.

CONSIDERATION OF THE EVIDENCE

8. The First Respondent filed an answering affidavit and opposed the application.
9. The Second Respondent was duly served but did not oppose the application.
10. In terms of Rule 13 of the Tribunal Rules,¹ The Second Respondent had 15 business days to serve an answering affidavit and file with the Registrar. However, The Second Respondent failed to do so.

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), as amended.

11. The Applicant did not file an application for a default order in terms of Rule 25(2).
12. Rule 13(5) provides that:

"Any fact or allegation in the application or referral not specifically denied or admitted in the answering affidavit will be deemed to have been admitted."
13. Notwithstanding service of the application documents on the Second Respondent as contemplated under rule 30 of the Tribunal Rules, the Second Respondent did not file an answering affidavit as provided for under Rules 13(1) and (2) of the Tribunal Rules. On the day of the main matter's hearing, the presiding member was satisfied that the Second Respondent's application documents and notice of set down were adequately served.
14. Since the Second Respondent did not file an answering affidavit and did not formally apply for a postponement, the hearing of the application proceeded on a default basis as envisaged in Rule 25(3) of the Tribunal Rules, with respect to the Second Respondent.

JURISDICTION

15. Section 27(1)(a) of the National Credit Act, 2005 ("the NCA") empowers the Tribunal or a Tribunal member acting alone to adjudicate allegations of prohibited conduct by determining whether prohibited conduct has occurred and, if so, by imposing a remedy provided for in the NCA.
16. Section 150 of the NCA empowers the Tribunal to make an appropriate order concerning prohibited or required conduct under the NCA or the CPA. The Tribunal, therefore, has jurisdiction to hear this application.

ISSUES TO BE DECIDED

17. The Tribunal is required to consider and decide the following issues:
 - 17.1 Whether the Applicant has proved a contravention under the CPA by the Respondents;
and
 - 17.2 Whether the Applicant is entitled in law to the relief sought, namely the refund of the vehicle's selling price.

BACKGROUND

18. On 19 June 2021, the Applicant approached Botes, who was selling a Renault Clio.
19. After researching the Renault brand, he decided not to purchase the vehicle. On 21 June 2021, Botes asked him to indicate the brand names of cars he was interested in, the odometer readings, and the colour preferences. The Applicant advised Botes of the car brands that he was interested in and that the odometer reading had to be below 200 kilometres ("km").
20. On 22 June 2021, Botes advised the Applicant of a 2012 Ford Fiesta, a 1.4 model in excellent condition, with mag wheels, power steering, factory-fitted radio, aircon, electric windows, and a 157 000 km odometer reading ("the vehicle"). On 23 June 2021, Botes informed the Applicant that the vehicle belonged to the First Respondent. The Applicant forthwith attended a meeting with the Respondents and took the vehicle for a test-drive.
21. The Applicant was satisfied with the vehicle after taking it for a test-drive, whereupon Botes sent the Applicant the banking details of his personal bank account to deposit the amount of R70,000.00, albeit the purchase price. The parties did not enter into a written sales agreement.
22. Forthwith, the Applicant requested Botes to transfer the registration certificate into the name of his wife, whereafter he affected payment of the purchase price to the personal bank account of Botes. Subsequently, the Applicant collected the vehicle, which was stationed at the premises of the First Respondent, on the 24th of June 2021. The vehicle's battery failed, but the Applicant managed to push-start the vehicle.
23. The Applicant returned the vehicle the following day to the premises of the First Respondent, where the battery was tested and found to be faulty. The First Respondent replaced the battery.
24. On 9 August 2021, the Applicant experienced various challenges with the vehicle and heard an unfamiliar sound from the engine. He drove home and checked the water and oil levels. Both were low. He asked a mechanic to inspect the vehicle. The mechanic advised him that the head gasket was blown.
25. On 11 August 2021, the Applicant contacted Botes and explained the problem. Botes advised that the First Respondent was not able to assist. Subsequently, the First Respondent requested a service history and spares list from Botes. The Applicant later raised various questions

concerning the vehicle's service history. On the advice of an acquaintance, the Applicant asked a certain "Mr Henry Boshoff" of A.A CARE in Kempton Park to strip and test the vehicle's engine. The damages report, dated 10 September 2021, detailed all the damage to the engine and the cause for the head gasket to blow up. None of these defects had been disclosed to the Applicant before purchasing the vehicle.

26. The Respondents refused the repay the purchase price or to accept the return of the vehicle.
27. The Applicant subsequently referred the complaint to the Motor Industry Ombudsman of South Africa and thereafter to the National Consumer Commission ("the NCC"). The NCC issued a notice of non-referral on 15 February 2022.
28. After the necessary pleadings were filed and leave to refer granted by the Tribunal, the Registrar issued a notice of set-down on 15 August 2022.

THE HEARING

29. The Tribunal conducted the hearing via a Teams technology link.
30. The Applicant and representative of the First Respondent provided evidence under oath before the Tribunal. The Second Respondent, who was present during the hearing, was also called by the Tribunal to testify under oath.
31. Based on the evidence provided to the Tribunal during the hearing and substantiated by the affidavits filed by the parties, the following facts are not in dispute:
 - a. Upon taking delivery of the vehicle, the Applicant experienced technical and mechanical problems and reported the same to the Respondents;
 - b. These problems persisted and eventually resulted in a blown gasket;
 - c. The Applicant was not informed of the problems before taking possession of the vehicle;
 - d. The blown gasket occurred as a result of the inherent flaws and mechanical problems that existed at the time of the sale;
 - e. The vehicle did not comply with the expectations relating to good quality and condition as was expected at the time of the sale. More particularly, the vehicle was not in good working order and free of defects. As a result, the vehicle was not reasonably suitable

for the purposes for which the vehicle was generally intended, namely, to take the Applicant from point A to B safely.

32. The disputed issue revolved around the First Respondent's liability to refund the Applicant as the supplier.
33. According to the Applicant, Botes presented himself as an agent of the First Respondent. The Applicant alluded to the registration certificate that was transferred directly from the First Respondent to his wife and the place where the vehicle was collected, namely the premises of the First Respondent. According to the Applicant, he was brought under the impression that Botes acted on the First Respondent's behalf and that the sale was between the Applicant and the First Respondent. The Applicant testified that he believed there was an arrangement between the Respondents that allowed for the payment to be made directly into the bank account of Botes.
34. According to du Plessis, there was never any confirmation that "Earn A Car Assets Pty Ltd" was selling the vehicle to the Applicant. Du Plessis testified that he only entered into a sales agreement with Botes and sold the vehicle to Botes. Further, according to what was testified to be a "common practice", the First Respondent removed the vehicle from its stock but allowed Botes to keep the vehicle on the First Respondent's premises while Botes was attempting to sell the vehicle in his own name. Although the First Respondent was informed of Botes' attempts to sell the vehicle to the consumer, du Plessis testified that it was not a party to such a sale. Further, du Plessis testified that he sold the vehicle to Botes in the amount of R60,000.00.
35. The Tribunal called Botes to testify on its role in the sales transaction with the Applicant. Botes confirmed that he was not an employee or agent of the First Respondent but conducted the sale in his own name. He confirmed that the First Respondent sold him the vehicle through a verbal agreement, whereafter he resold it to the consumer.
36. He confirmed that liability for the sale rested on his shoulders as the supplier.

THE PROVISIONS OF THE CPA

37. Part H of the CPA sets out a consumer's right to fair value, good quality, and safety.

38. Section 53 of the CPA sets out the following-

53. (1) In this Part, when used concerning any goods, component of any goods, or services-

(a) **"defect"** means—

(i) any material imperfection in the manufacture of the goods or components, or in 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;

(b) **"failure"** means the inability of the goods to perform in the intended manner or to the intended effect;

39. Section 55 of the CPA sets out the consumer's rights to goods that are reasonably suitable for the purpose intended and are free of any defects-

Consumer's rights to safe, good quality goods

55. (1) This section does not apply to goods bought at an auction, as contemplated in section 45.

(2) 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 No. 29 of 1993), or any other public regulation.

40. Section 56 of the CPA provides a six-month period within which the goods can be repaired, replaced or returned for a refund-

Implied warranty of quality

56. (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.

THE EVIDENCE

41. It is common cause that the vehicle was purchased on 24 June 2021 and that the Applicant approached the Respondents regarding the state of the vehicle within six months after the purchase of the vehicle.
42. It is also common cause that the vehicle does not comply with the standards and conditions as required by section 55.

THE SUPPLIER

43. The Tribunal considered the Applicant's argument that the Second Respondent presented himself as an agent or "intermediary" of the First Respondent.

44. The CPA defines an "intermediary" as:

"a person who, in the ordinary course of business and for remuneration or gain, engages in the business of-

- (a) representing another person with respect to the actual or potential supply of any goods or services;
- (b) accepting possession of any goods or other property from a person for the purpose of offering the property for sale; or
- (c) offering to sell to a consumer, soliciting offers for or selling to a consumer any goods or property that belongs to a third person, or service to be supplied by a third person,

but does not include a person whose activities as an intermediary are regulated in terms of any other national legislation."

45. The Applicant could not provide adequate evidence that the sales agreement was entered into

between the First Respondent and himself. Further, the Applicant failed to provide acceptable

evidence that Botes presented himself as a representative of the First Respondent or that Botes offered to sell the vehicle on the First Respondent's behalf.

46. According to the evidence presented to the Tribunal, Botes explained to the Applicant that the First Respondent owned the vehicle before and was stationed on the First Respondent's premises. However, the actual payment into a personal bank account of Botes confirms on a balance of probabilities that the Applicant was aware that the sales transaction was concluded between Botes and the Applicant.
47. The testimonies of Botes and du Plessis were found to be truthful and confirm that ownership of the vehicle was moved to Botes before the sales transaction between Botes and the Applicant. Accordingly, the Tribunal is convinced that Botes did not act as an intermediary. The consumer understood that Botes acted as an agent in the field of second-hand vehicles. Still, it was not proved on a balance of probabilities that Botes acted as an agent of the First Respondent or that he misrepresented himself.
48. The Applicant argued that ownership moves by registration of the vehicle in the new owner's name. The Tribunal does not accept this argument, as transferring ownership without or before registration documents are confirmed in a new owner's name is lawful. However, the Applicant's testimony was also found to be truthful to the extent that he was under the impression that he would be able to hold the previous owner accountable. Irrespective, the CPA does not extend to the protection of the consumer's rights against the possible actions by a former owner of a vehicle.
49. The CPA further defines a **"supplier"** as a person who markets any goods or services, while a **"consumer agreement"** is defined as an agreement between a supplier and a consumer.
50. On the evidence presented in this matter, the Tribunal is convinced that the Second Respondent acted as the supplier in the consumer agreement between himself and the Applicant, regarding the sale of the vehicle.
51. Although the Tribunal takes a dim view of the failure by the Second Respondent to conclude a formal sales agreement with the Applicant, the prohibited conduct relating to the sales agreement is not before the Tribunal. The failure by the Second Respondent to keep the necessary sales records in compliance with section 26 of the CPA serves as an aggravating circumstance when considering his failure to provide goods in a good condition to the consumer.

52. The Tribunal is further not persuaded that the First Respondent provided disinformation to the Applicant nor that it assumed the position of the seller. However, the Tribunal frowns upon the practice where a supplier such as Botes executes a sale on the premises of a motor dealer and then fails to conclude a sales agreement in writing. The failure by the Second Respondent, as the supplier in the subsequent sales agreement, to respect the consumer's rights as protected by section 55 of the CPA is similarly unacceptable.

CONCLUSION

53. The Tribunal finds that the First Respondent was not a party to the consumer agreement entered into between Botes and the Applicant.
54. The Applicant's version, which stands unopposed with respect to the quality of the vehicle, is accepted by the Tribunal as true and correct. When applying the provisions of the CPA to the facts accepted by the Tribunal, it becomes clear that the vehicle, as supplied by the Second Respondent, was defective. Based on the evidence presented, the Second Respondent undertook to supply a safe vehicle, free from any defects. As the Second Respondent supplied the vehicle to the Applicant within the context of a transaction under the CPA, it can be held responsible for any defects in the goods.
55. The CPA aims to protect consumers such as the Applicant from exploitation and abuse in the marketplace. As outlined above, the CPA will be ineffective unless a proper enforcement mechanism is affordable to consumers.
56. Promoting an economic environment that supports and strengthens a culture of consumer rights and responsibilities, business innovation, and enhanced performance is desirable.
57. As outlined above, section 55(2) of the Act provides that all goods must be reasonably suitable for the purposes for which they are generally intended, of good quality, in good working order, and free of any (not only material) defects. The goods must be useable and durable for a reasonable period of time. When a latent defect is present, the product lacks the quality promised in the sale agreement. The consumer then has the choice of a refund, replacement or repair of the goods in terms of section 56. This responsibility of the supplier can, in turn, also be regarded as an implied warranty.²

² *Barnado v National Consumer Commission and Others* (47933/17) [2021] ZAGPPHC 531 (26 August 2021), par 46.

58. The Tribunal places a strong responsibility on the supplier to ensure that all defects of a particular vehicle are determined and explained to the consumer before selling a second-hand vehicle. Where such defects would render the vehicle non-compliant to the standard as set by the Act, it is subsequently expected from the supplier to ensure the consumer expressly agrees in writing to such defects before completing the sale and delivering the vehicle.
59. In his application before the Tribunal, the Applicant relied on the provisions of the CPA, in that the supply of the vehicle to him contravened the implied warranty of quality contained in section 55(2)(b) and (c) of the Act. The Applicant was a credible witness who made a favourable impression upon the Tribunal. Based on the evidence before it, the Tribunal finds that the only inference to be drawn was that the vehicle's mechanical problems and other damages must have been present at the time of its purchase from the Second Respondent.
60. According to the evidence before the Tribunal, the defects in the vehicle are serious. Accordingly, the Tribunal finds that the various defects constitute defects within the meaning of Section 53 (1)
(a) on several grounds, rendering the goods less acceptable, less practical or useful. These defects became apparent within one day after the consumer received the vehicle. All defects were identified within three months after purchase of the vehicle, and, therefore, within the statutory warranty period of six months. The Applicant, therefore, has recourse under Section 56 of the CPA.
61. By failing to respect the consumer's rights to return the vehicle and be refunded the purchase price, the Second Respondent committed prohibited conduct as defined in the CPA.³ The Second Respondent also infringed the Applicant's right to fair consumer practices and his right to safe and good quality goods.
62. Accordingly, the Applicant was well within his rights to insist on returning the vehicle without penalty, at the Second Respondent's risk and expense. Also, the Applicant was also acting within his rights to expect the Second Respondent to refund him the purchase price.

FINDING

63. The Tribunal, therefore, finds that the Second Respondent's conduct of selling a faulty vehicle to

³ Section 1 of the CPA defines prohibited conduct as “an act or omission in contravention of this Act”.

the Applicant is prohibited in terms of section 55 of the CPA. Consequently, a refund of the purchase price to the Applicant by Botes, in line sections 56(2) and (3) of the CPA, must follow.

64. The Tribunal wishes to express its utter disappointment in how the Second Respondent treated the Applicant as a consumer. The Tribunal noted with concern the Second Respondent's total disregard for the rights of consumers to receive honest and transparent dealings, proper service, and good quality goods. Second-hand vehicles are not excluded from the protection of the CPA, and such vehicles are sold with the supplier's accountability and responsibility for repairs. Therefore, by refusing the refund in terms of sections 56(2) and (3), the Second Respondent's conduct is a clear example of prohibited conduct in terms of the Act.

65. The Tribunal further finds that the Applicant is entitled in law to the relief requested in its application, namely the refund of the vehicle's selling price. The Second Respondent, in turn, is entitled at its cost to recover the vehicle from the Applicant.

ORDER

66. Accordingly, the Tribunal makes the following order:

66.1 The application is dismissed with respect to the First Respondent;

66.2 The application is granted with respect to the Second Respondent;

66.3 The Second Respondent is ordered to refund the Applicant an amount of R70,000.00 (seventy thousand rands), being the purchase price of the vehicle, within 15 business days after issuing of this judgment; and

66.4 There is no order as to costs.

DATED ON THIS 12th DAY OF SEPTEMBER 2022

[Signed]

Dr MC Peenze

Presiding Tribunal member

Mr C Ntsoane (Tribunal member) and Ms P Manzi (Tribunal member) concurring.

Authorised for issue by The National Consumer Tribunal

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