

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

Case Number: **NCT/215218/2022/73(2)(b)**

In the matter between:

NATIONAL CONSUMER COMMISSION

APPLICANT

And

JOHAN and PHILLY AUTO TRADERS CC

Trading as CARS.COM II

RESPONDENT

Coram:

Dr L. Best Presiding Member

Ms P. Beck Tribunal Member

Dr M. Peenze Tribunal Member

Date of Hearing: 5 July 2022

Date of Judgment: 10 July 2022

JUDGMENT AND REASONS

APPLICANT

1. The Applicant in this matter is the National Consumer Commission, a juristic person established by section 85 of the Consumer Protection Act 68 of 2008 (“the CPA”) (“the Applicant or “the NCC”).
2. At the hearing, the Applicant was represented by Mr Ludwe Biyana, Senior Legal Advisor in the employ of the Applicant.

RESPONDENT

3. The Respondent is Johan and Philly Auto Traders CC trading as Cars.Com II, a dealer in motor vehicles (“the Respondent” or “Cars.Com”).
4. At the hearing, the Respondent was represented by Mr Steve Bester of Steve Bester Attorneys.

JURISDICTION

5. Section 27(a)(i) of the National Credit Act, 2005 (“the NCA”) empowers the Tribunal or a Tribunal member acting alone to adjudicate in relation to any application that may be made to it in terms of the NCA or the CPA. 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.

APPLICATION TYPE AND THE RELIEF SOUGHT

6. The Applicant brings this application in terms of Section 73 (2) (b) of the CPA.
7. The NCC alleges that it received a complaint, conducted an investigation, and referred the complaint to the Tribunal. The NCC seeks an order:
 - a. Declaring the Respondent’s contravention of Section 55(2)(a) to (c) and Section 56(2)(b) of the CPA as prohibited conduct.
 - b. Interdicting the Respondent from engaging in future prohibited conduct.
 - c. Directing the Respondent to refund the Consumer the Purchase Price paid for the Motor Vehicle as contemplated in Section 56(2)(b) of the CPA.
 - d. Directing the Respondent to pay the refund within 15 days of the date of Judgment.

- e. Directing the Respondent to pay an administrative fine as contemplated in section 112(2).

BACKGROUND

8. The NCC filed an application with the Tribunal on 13 January 2022, in terms of section 73(2)(b) of the CPA. It is convenient to set out the background to this matter as reflected in the documents before the Tribunal.
9. The NCC alleges Cars.Com sold a defective vehicle to Ms Banyatsang Gladys Medupe (“Ms Medupe”) in July 2018.
10. Ms Medupe purchased the vehicle, a 2013 model Ford Kuga, with 118 558 km on the clock, from Cars.Com on 25 July 2018. Upon driving the vehicle on the date of purchase, she noticed a warning light on the dashboard but was told by Cars.Com that it was not of concern. She continued to drive the vehicle and did not communicate again with Cars.Com.
11. On 10 October 2018, she took the vehicle to Leon’s Motors Rustenburg for a regular 120 000km service. She had driven 2 880km with the vehicle before taking it to Leon’s Motors for the service. After collecting the vehicle, she noticed a sound emanating from the engine.
12. A dispute arose as to the cause of the sound. Cars.Com alleges that the problems with the engine are due to Leon’s Motors not adding oil to the engine. On 23 October 2018, she took the vehicle to Cars.Com and asked that it be repaired. Cars.Com arranged for the vehicle to be assessed by a third party, V & N Workshop. As a courtesy, Cars.Com also assisted Ms Medupe to put in a claim to M-Sure Warranty as she had taken out this cover at the time of purchasing the vehicle. M-Sure declined the claim and as a result, the vehicle was not repaired.
13. Ms Medupe lodged a complaint with the Motor Industry Ombudsman of South Africa (“MIOSA”). MIOSA issued a letter dated 2 April 2019 recommending that Cars.Com repair the vehicle. Cars.Com responded to MIOSA, and later to the NCC, through its attorneys indicating that it would not comply with the MIOSA recommendation as it had no basis to accept responsibility for the malfunctioning of the vehicle.
14. On 24 June 2019, Ms Medupe lodged a complaint with the NCC.

15. On 13 January 2022, the NCC filed the application with the Tribunal. It was served on the Respondent's attorney by email (by consent) on the same day. Cars.Com filed a notice of intention to oppose dated 14 January 2022 but did not file an answering affidavit.
16. The matter was set down for a default hearing to be held on 23 March 2022. On 8 March 2022, Cars.Com filed its answering affidavit and an application to condone the late filing, which was subsequently granted.
17. The hearing was set down for 5 July 2022, and the matter was duly heard.

ISSUES TO BE DECIDED

18. The Tribunal is required to consider and decide the following issues:
 - a. Whether the Applicant has proved a contravention under the CPA; and
 - b. Whether the Applicant is entitled in law to the relief sought, which the NCC amended at the hearing to be the repair of the vehicle.
19. However, before the Tribunal can consider the merits of the matter, the Tribunal must first determine whether the complaint is prevented from being referred to the Tribunal in terms of section 116 of the CPA.

THE HEARING

20. During the hearing on 5 July 2022, the Tribunal panel requested the parties to foreground their respective submissions by addressing the Tribunal on the applicability of section 116 of the CPA. This would allow the Tribunal to apply its mind and determine whether in fact, the merits of the matter can proceed to be considered.

The Applicant's Submissions

21. The Applicant submitted that the complaint is not prevented from being referred to the Tribunal in terms of section 116 of the CPA.
22. The Applicant submitted that the act that is the cause of the complaint is the refusal by the Respondent to accept responsibility for the defective Motor Vehicle; and a

continuing refusal by the Respondent to consequently attend to the repairs of the Motor Vehicle.

23. The Applicant submitted that the Respondent refused to attend to the repairs to the motor vehicle only after MIOSA issued a recommendation to do so. This recommendation was issued on 2 April 2019.
24. The Applicant submitted that the Respondent's refusal to repair the vehicle could constitute continuing conduct. The date from which to determine the three-year time period within which a complaint is to be referred to the Tribunal should be calculated from the date that the Respondent refused to repair the vehicle. This date of refusal should be the date on which the Respondent indicated the same to MIOSA, namely 14 February 2019; alternatively, the date that MIOSA issued its recommendation on 2 April 2019 that the Respondent should repair the vehicle.
25. Given that the referral in this matter by the Applicant to the Tribunal was on 13 January 2022, this is less than three years before the act that is the cause of the complaint, namely the Respondent's refusal to MIOSA to repair the vehicle.
26. The Applicant submitted that the complaint could be referred to the Tribunal on this basis as the timeline limitations of section 116 of the Act are not yet applicable.
27. The Applicant submitted that the Respondent's continuing refusal to attend to repairs of the vehicle constitutes a contravention of Section 56(2) of the CPA.
28. The Applicant submitted that the Respondent supplied a defective vehicle; the defect is a defect as defined in Section 53 of the CPA; thus, the Respondent contravened section 55 of the CPA by failing to supply safe and good quality goods.

The Respondent's Submissions

29. The Respondent submitted that the complaint is prevented from being referred to the Tribunal in terms of section 116 of the CPA. The application was served on the Respondent on 13 January 2022, more than three years after the purchase and delivery of the vehicle on 25 July 2018, which the Respondent submits is the cause of the complaint.

30. Even if the cause of the complaint is considered to be the date on which Ms Medupe became aware of the alleged defect when she heard the noise from the vehicle's engine, on her own version, she first heard this on the day after the service performed by Leon's Motors on 10 October 2018. This, too, is more than three years prior to the application being served on the Respondent.
31. Furthermore, Ms Medupe for the first time informed the Cars.Com about her concerns about the engine noise on 23 October 2018, which is again more than three years prior to the application being served on the Respondent.
32. The Respondent submitted that there is no indication of any performance problem with the vehicle before it was taken to a third party, Leon's Motors, for a routine 120 000km service. On the contrary, Ms Medupe had enjoyed full use of the vehicle and driven a substantial distance of 2 880km since the date of delivery from Cars.Com. It was only after the vehicle was returned to Ms Medupe by Leon's Motors that she heard the engine noise and became concerned about the condition of the vehicle.
33. The Respondent further submitted that it has no knowledge of what Leon's Motors did or did not do to the vehicle when it serviced the vehicle; and that this service work was beyond the control of the Respondent.
34. The Respondent refutes that the vehicle had any defects when it was sold to Ms Medupe. The Applicant has provided no evidence in this regard but merely relies on hearsay. Ms Medupe further did not complain to Cars.Com after the delivery of the vehicle about any performance-related concerns when using the vehicle.
35. Thus, the Respondent submitted that any of these three dates place the referral more than three years after any act which should be regarded as the cause of the complaint. Hence the referral is outside the three-year provision of Section 116 (1)(a) of the CPA.
36. Consequently, the Respondent argued that the Tribunal does not have the jurisdiction to attend to matters referred to it more than three years after the cause of the complaint.

APPLICABLE SECTIONS OF THE ACT

Section 55 (2) of the CPA states:

- (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 as set under the Standards Act, 1993 (Act 5 No 29 of 1993) or any public regulation.*

Section 56 of the CPA provides that –

- (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.*

Section 116 of the CPA states:

(1) A complaint in terms of this Act may not be referred or made to the Tribunal or to a consumer court more than three years after-

(a) the act or omission that is the cause of the complaint; or

(b) in the case of a course of conduct or continuing practice, the date that the conduct or practice ceased.

ANALYSIS

37. The Tribunal must first determine the applicability of Section 116 of the CPA, to determine whether or not the Applicant may refer the complaint to the Tribunal. Section 116 of the CPA defines two different scenarios when a complaint cannot be referred to the Tribunal after the expiry of three years.

Scenario 1: Section 116 (a)

- a. In line with section 116(1)(a) of the CPA, a complaint cannot be referred to the Tribunal after the expiry of three years after a particular act or omission that is the cause of the complaint occurred. Notably, the particular act or omission date must be determined, and the complaint must be based on such act or omission.
- b. Examples of such an act would be the “sale of a defective vehicle”.

Scenario 2: Section 116(b)

38. In line with section 116(1)(b) of the CPA, a complaint cannot be referred to the Tribunal after the expiry of three years **after the date that a course of conduct or continuing practice ceased**. This clause is applicable where there is a case of a **course of conduct or continuing practice**.
39. The failure by a supplier to repair defective goods when required to do so in terms of the CPA, may constitute a course of conduct or continuing practice if an applicant can prove, *inter alia*, that the goods did not meet the requirements and standards prescribed under section 55 and that the complainant returned the goods within the prescribed period of six months after delivery. Significantly, the date when such

conduct or practice ceased must be determined. The respondent's refusal to repair the vehicle could constitute continuing conduct.¹

Analysis of the Facts

40. It is common cause that the Respondent supplied the goods (namely the vehicle) on 25 July 2018. Ms Medupe drove the vehicle from that point onward. Other than indicating to Cars.Com on the day of delivery that there was a light illuminated on the dashboard, she did not approach Cars.Com about any performance-related complaints regarding the vehicle. After having the vehicle serviced by a third party, Ms Medupe heard a noise emanating from the engine and believed this to be a fault with the vehicle. It is only at that point, in October 2018, that Ms Medupe contacted Cars.Com and alleged that there was a performance problem with the vehicle. At that point, she wished for a refund of the purchase price of the vehicle, and other related financing costs. During the Applicant's submissions at the hearing, the relief was amended to repairs to the vehicle.
41. The Applicant alleges that the vehicle was faulty as of the date of delivery on 25 July 2018 and that as a result, the Respondent infringed on the Applicant's rights as outlined in section 55 (2) of the CPA.
42. The Respondent disputes that the vehicle was faulty or defective in any way on the date of delivery.
43. If a consumer alleges an infringement of section 55, the *dies* start to run on the date of delivery on 25 July 2018. Applied to the matter at hand, the cause of action insofar as it relates to the alleged receipt of faulty or poor-quality goods occurred on 25 July 2018. Section 116 (a) applies to this scenario. As the cause of action arose more than three years before the complaint was referred to the Tribunal on 13 January 2022, the referral of the complaint that the Respondent contravened sections 55 (a), (b), and (c) of the CPA was made after the expiry of three years since the act that is alleged to be the cause of the complaint, namely, the delivery of a defective motor vehicle. The Tribunal thus does not have the requisite jurisdiction to make a finding whether the Respondent committed prohibited conduct in terms of section 55 of the CPA.

¹ Also see Paul August Winter v Kove Empire CC t/a Pinetown Vehicles NCT/176395/2021/75(1)(b), par 47.

44. The Tribunal does not have the statutory authority to make a finding on the state of the vehicle at the date of delivery. Consequently, the Tribunal will also not be able to make a finding on the nature of the Respondent's conduct in refusing to perform repairs, as such a finding must in law be based on a finding on the state of the vehicle at the date of delivery.

45. Regarding section 56, the Applicant argued that the prohibited conduct before the Tribunal is the failure by the Respondent to repair the vehicle after Ms Medupe returned the vehicle in October 2018; and further after MIOSA recommended that the Respondent do so in 2019. However, prior to returning the vehicle, Ms Medupe had taken the vehicle to a third party for a regular 120 000km service. The third party worked on the vehicle and its engine of Ms Medupe's own accord, three months after it had left the control of the Applicant.

46. Due to the Ms Medupe's failure to return the vehicle to the Respondent before it was worked on by a third party, or even inform the Respondent that she was experiencing performance problems with the vehicle, the Respondent was not put in a position to rectify any alleged defect that could have impacted the warranty outlined in section 56. There is no definitive evidence before the Tribunal that the vehicle was indeed defective at the time it was taken to the third party for regular service. Accordingly, the section 56 warranty and the subsequent responsibility of the Respondent to repair the vehicle in terms of section 56 was voided by the Ms Medupe's failure to return the vehicle to the Respondent before the third party worked on the vehicle and its engine.

47. The Applicant's submission that the date on which the Respondent indicated to MIOSA on 14 February 2019 its refusal to repair the vehicle, should be the date from which to determine the three-year time period within which a complaint is to be referred to the Tribunal, appears as an attempt to open a back door to stretch the date of referral to bring this in line with the three-year time provisions of section 116 of the CPA.

48. The Applicant did not provide reasons for the approximately two-and-a-half-year period, from 24 June 2019 to 13 January 2022, that lapsed since the consumer referred the matter to the NCC.

CONCLUSION

49. Section 116 of the CPA restricts bringing an action before the Tribunal three years after the act or omission that is the cause of the consumer's complaint. As the applicant brought its action in this matter outside the statutory period, the Tribunal does not have jurisdiction to hear this matter.

ORDER

50. Accordingly, for the reasons set out above, the Tribunal makes the following order:

- a. The Tribunal is unable to consider this application as the complaint has prescribed.
- b. The application is dismissed.
- c. No order is made as to costs.

DATED ON THIS 10TH DAY OF JULY 2022

(signed)

Dr L Best

Presiding Member

Tribunal members Ms P Beck and Dr M Peenze concur with this judgment.

Authorised for issue by The National Consumer Tribunal

National Consumer Tribunal

Ground Floor, Building B

Lakefield Office Park

272 West Avenue, Centurion, 0157

www.thenct.org.za

