

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

Case number: **NCT/215614/2022/75(1)(b)**

In the matter between:

**GRETA VAN STRYP**

APPLICANT

And

**MAHINDRA EAST RAND CC**

1<sup>ST</sup> RESPONDENT

**NATIONAL CONSUMER COMMISSION**

2<sup>ND</sup> RESPONDENT

Coram:

Adv C Sassman                      - Presiding Tribunal member

Adv S Mbhele                      - Tribunal member

Ms Z Ntuli                         - Tribunal member

Date of Hearing                      - 28 March 2023

Date of Judgment                      - 31 March 2023

<b>JUDGMENT AND REASONS</b>
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**THE PARTIES**

1. The Applicant in this matter is Greta Van Stryp (the applicant). The applicant is a consumer, as defined in section 1 of the Consumer Protection Act 68 of 2008 (CPA). At the hearing, the applicant was represented by Advocate B Boot SC.
2. The First Respondent is Mahindra East Rand CC (the first respondent). The first respondent is a supplier, as defined in section 1 of the CPA. At the hearing, the first respondent was represented by Mr T Kapp, an attorney from JDB Attorneys.
3. The Second Respondent is the National Consumer Commission (NCC). The NCC is an organ of the state established in terms of section 85(1) of the CPA. It is tasked with, among other things, monitoring compliance with the CPA and enforcing consumer protection in the Republic. The NCC did not oppose this application and was not present

at the hearing. The Tribunal was satisfied that the application was duly served on the NCC, and the matter proceeded.

## **TERMINOLOGY**

4. A reference to a section in this judgment refers to a section of the CPA.
5. A reference to a rule in this judgment refers to the Rules of the Tribunal<sup>1</sup>.

## **APPLICATION TYPE**

6. This is an application in terms of section 75(1)(b). In this application, the applicant, with leave granted by the Tribunal, seeks redress against the first respondent.
7. The applicant alleges that the first respondent contravened sections 48, 51, and 56(2) by selling a defective vehicle to the applicant on prohibited and unjust contract terms and failed to repair it or refund the applicant.

## **BACKGROUND**

8. On 19 January 2019, the applicant purchased a used 2012 model Mahindra Scorpio vehicle (the vehicle) from the first respondent for R100 000.00. The vehicle is a utility vehicle and had an odometer reading of more than 200 000km at the time of purchase. The vehicle was sold without a warranty. The applicant took delivery of the vehicle the same day, and it broke down about 60km from the first respondent. The first respondent collected the vehicle, repaired it, and delivered it to the applicant in Lydenburg on 30 January 2019.
9. The applicant alleges that the vehicle continued to present many problems, including overheating, oil leaks, and issues with the turbo and starter. The vehicle is also alleged to emit white smoke from the exhaust pipe when running. She further asserts that when problems were reported to the first respondent, an employee named Rudi Le Roux advised her that the company would no longer assist her with further repairs since the vehicle was sold as voetstoots. The documents presented to the applicant on the day of purchase indicated that the vehicle was being sold as “metal content” and that the first respondent had no duty to repair any faults. The applicant took the vehicle to Mahindra Lydenburg, a separate franchise forming part of Mahindra South Africa, and was given a quotation of R235 157.92 for repairs.

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<sup>1</sup> 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).

10. Dissatisfied with the vehicle's condition, the applicant complained to the Motor Industry Ombudsman of South Africa (MIOSA) on 18 February 2019. On 11 September 2019, MIOSA found in favour of the applicant and recommended that the first respondent collect the vehicle, cancel the sale agreement, and charge the applicant a cost for usage. The first respondent failed to comply with the recommendation. MIOSA then referred the matter to the NCC on behalf of the applicant. On 23 February 2021, the NCC indicated that the redress sought by the applicant could not be provided in terms of the CPA and accordingly issued a notice of non-referral. On 26 April 2022, the applicant was granted leave to refer the matter to the Tribunal.

## **THE APPLICANT'S SUBMISSIONS**

11. The applicant submitted that the vehicle was advertised and presented as a used vehicle and not as metal content and that the first respondent's actions were consistent with that of the sale of a used vehicle. In addition, the company is also not registered as a second-hand goods dealer authorised to sell scrap metal. The salesperson was informed that the applicant's son would use the vehicle for business purposes. There was no doubt regarding what the vehicle would be used for, and the first respondent has not and cannot define "metal content". The applicant was under the impression that the vehicle was in a roadworthy condition, and there was never any discussion about deregistering the vehicle. The tax invoice indicated that the vehicle is used even though it contains a stamp stating, "sold as metal content".
12. The applicant signed a standard form contract that the first respondent drafted. The mere fact that a consumer signs a contract does not mean that the consumer read and understood it. The CPA supports an interpretation of the Parol Evidence Rule, favouring the applicant's version. Section 4(4) must be considered, which sets stringent rules for courts and tribunals to interpret standard form contracts and other documents prepared by the supplier or on behalf of the supplier. Any restrictions, limitations, exclusions, or deprivations of consumer rights in contracts must be limited to the extent a reasonable person would normally expect. The Tribunal is required to interpret any ambiguity in a contract in favour of the consumer.
13. No conversation is mentioned regarding the refusal of a warranty by the applicant. The practice of getting the consumer to refuse a warranty is aimed at changing the nature of the transaction from the sale of a used vehicle to the sale of metal content, and section

48(1)(c) prohibits this. Section 51(1)(a), (b) and (e) further prohibits these types of transactions and terms or conditions.

14. The applicant seeks an order stating that the first respondent's actions amount to prohibited conduct. The applicant also seeks a full refund and a certificate in terms of section 115(2), permitting the applicant to approach a civil court to recover further costs and damages. The applicant further requests the Tribunal to consider the degree of blameworthiness and use its discretion regarding imposing an administrative fine on the first respondent.

## **THE FIRST RESPONDENT'S SUBMISSIONS**

15. The first respondent's oral submissions were vastly different from the submissions contained in its papers before the Tribunal. In the papers, the first respondent consistently maintained that the vehicle was sold as metal content and that the applicant was told that the vehicle was not fit for regular use. Since the applicant failed to purchase a warranty with the sale of the vehicle, the first respondent was not liable to repair what it sold as metal content. However, at the hearing, the first respondent's representative conceded that the vehicle was sold as a used vehicle, not as metal content. He submitted that the applicant had not allowed the first respondent an opportunity to inspect the vehicle and had never tendered the return of the vehicle as required in section 56(2). In failing to do so, the applicant prevented the first respondent from fulfilling its statutory obligations.
16. The applicant's son was informed of the vehicle's condition and that such a vehicle would generally be sold for spare parts and not everyday use. The vehicle had already run more than 200 000km, and the applicant could not have expected it to be without any faults. The provisions of section 48 do not provide an infinite amount of liability toward a consumer. The applicant believes that every product covered by the CPA has an implied warranty. Unfortunately, this is not the case. Section 56(2)(a) and (b) excludes products where the consumer was informed that the goods were of a specific condition<sup>2</sup>, as was done in this case.
17. The applicant wishes to create an image of a David and Goliath scenario before the Tribunal. One in which she is facing a powerful enemy who operates unscrupulously. However, this is not the case. The first respondent was always willing to assist the

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<sup>2</sup> Section 55(6)(a) and (b).

applicant. It collected the vehicle and repaired it when it broke down. The vehicle was never delivered to the first respondent for inspection thereafter. Instead, the vehicle was taken to Mahindra in Lydenburg, a different supplier. Therefore, the implied six-month warranty has lapsed, and the first respondent is not responsible for any faults on the vehicle after that.

## **APPLICABLE SECTIONS OF THE CPA**

18. 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.
19. Section 48(1)(a)(ii) states that a supplier must not supply any goods on terms that are unfair, unreasonable, or unjust.
20. 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.
21. Section 51(1)(a)(i) and (ii) states that a supplier must not enter into an agreement with a consumer if that agreement is subject to any term or condition that aims to defeat the purpose and policy of the CPA or mislead or deceive a consumer.
22. Section 51(1)(b)(i), (ii), and (iii) states that a supplier must not enter into an agreement with a consumer if that agreement is subject to any term or condition that directly or indirectly aims to waive or deprive a consumer of a right stated in the CPA. It further prevents a supplier from entering into an agreement with a consumer subject to any term or condition that directly or indirectly aims to avoid a supplier's obligations or override the effect of any provision of the CPA.
23. Section 51(1)(e) states that a supplier must not enter into an agreement with a consumer if that agreement is subject to any term or condition that requires the consumer to enter into a supplementary agreement or sign a document, prohibited by subsection 2(a).
24. 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.

25. 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.
26. Section 56(3) states that if a supplier repairs any goods and within three months after the repair, the failure, defect, or unsafe feature has not been remedied, the supplier must replace the goods or refund the consumer the price paid for the goods.

## **CONSIDERATION OF THE EVIDENCE**

27. The applicant did not make an oral submission relating to the vehicle's faults and whether those faults amount to a defect, as defined in section 53(1). In *Motus v Wentzel*<sup>3</sup> (*Motus*), the court held that not every small fault amounts to a defect as defined in the CPA. However, considering the quotation for repairs received from Mahindra Lydenburg for R235 157.92, it would be reasonable to conclude that the vehicle has significant damage. Although the quoted amount was mentioned in the applicant's founding affidavit, a copy of the quotation was only provided to the panel during the hearing.
28. In *Motus*, the court held that for the consumer to be entitled to claim a refund of the purchase price of the vehicle, she had first to show that all the events in section 56(3) had taken place. In other words, the defective parts must have been repaired, and within three months after the repairs, the defects had not been remedied, or a further failure was discovered. In this case, the applicant brought the further failure to the first respondent's attention and requested that the vehicle be collected and repaired.
29. It is not disputed that the applicant asked the first respondent to collect the vehicle when it presented further problems. The submission that the applicant did not tender the return of the vehicle since she only asked for it to be collected carries no weight. The legislation provides for the return of goods at the supplier's risk and expense<sup>4</sup>. The vehicle was collected and repaired in the first instance and, on the recommendation of MIOSA, should have been collected from the applicant again to

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<sup>3</sup> *Motus Corporation (Pty) Ltd and Another v Wentzel* (Case no 1272/2019) [2021] ZASCA 40 (13 April 2021) para 41.

<sup>4</sup> Section 56(2).

cancel the sale.

30. The Tribunal is persuaded that the first respondent knew that the vehicle would be used for business purposes and was not sold as metal content. The applicant was therefore entitled to a good quality vehicle, in good working order, free of defects. Therefore, the six-month implied warranty provided in section 56(1) was operative from the vehicle's purchase date. In terms of section 56(2), the first respondent was obligated to repair the vehicle or refund the consumer when presented with the repair quotation. It failed to do so.
31. The first respondent appears to be intentionally misleading and deceiving consumers with the words "sold as metal content" stamped on invoices. The fact that a stamp was created for this purpose indicates that it is a frequent and common occurrence in the first respondent's business. The document presented to the applicant for signing, stating "Mahindra has no duty to repair the vehicle", further indicates that the first respondent is blatantly attempting to defeat the purposes and policy of the CPA. This is clear evidence that the vehicle was sold to the applicant on unfair, unreasonable and unjust terms, all aimed at getting the applicant to waive her consumer rights and the supplier's liability. The intention was clearly to get the applicant to assume an obligation to repair any defects and absolve the first respondent from doing so. These are serious contraventions that the Tribunal must discourage.

## **CONCLUSION**

32. The Tribunal finds that the first respondent has contravened the following sections of the CPA:
- 32.1 section 48(1)(a)(ii);
  - 32.2 section 48(1)(c);
  - 32.3 section 51(1)(a)(i)(ii);
  - 32.4 section 51(1)(b)(i)(ii)(iii);
  - 32.5 section 51(1)(e);
  - 32.6 section 55(2); and
  - 32.7 section 56(2).
33. The Tribunal further finds that the applicant is entitled, in law, to a full refund of the vehicle's purchase price.
34. The applicant did not convince the Tribunal that issuing a certificate in terms of section 115(2) is warranted in this case.

## CONSIDERATION OF AN ADMINISTRATIVE FINE

35. The Tribunal may, in terms of its statutory authority in terms of section 75(4)(b), make any applicable order contemplated in the CPA or section 150 or 151 of the National Credit Act 34 of 2005<sup>5</sup> (NCA).

36. Considering the nature of the contraventions and the importance of this issue for consumers, the Tribunal regards a fine as appropriate and justified. The sale of vehicles is a significant industry in South Africa. This industry impacts consumers daily. A clear message must be sent that non-compliance with the CPA will not be condoned or tolerated. When determining an appropriate fine, the Tribunal must consider the following factors.

36.1 The nature, duration, gravity, and extent of the contravention

The nature of the contravention is serious. A motor vehicle is an essential asset that a consumer will purchase. The applicant has been deprived of the proper and safe use of the vehicle since 2019.

36.2 Any loss or damage suffered as a result of the contravention

The applicant lost the sum of R100 000.00 paid to the first respondent, and she has yet to have the benefit of successful repairs to the vehicle or a refund. Although the vehicle is still in her possession, the vehicle is inoperable.

36.3 The behaviour of the respondent

The first respondent acts with blatant disregard for the provisions of the CPA. This behaviour indicates a dismissive attitude towards the rights of consumers, and in this case, the applicant.

36.4 The market circumstances in which the contravention took place

No specific evidence was provided to the Tribunal. However, based on the types of matters referred to the Tribunal, vehicle-related complaints against motor vehicle repairers are widespread. For the average consumer, purchasing a vehicle is a costly and essential transaction.

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<sup>5</sup> Coertze and Another v Young (NCT/7142/2012/73(3)&75(1)(b)&(2) CPA) [2013] ZANCT 25 (13 September 2013).



36.5 The level of profit derived from the contravention

No specific evidence was provided in this regard. However, the first respondent would have derived the significant benefit of having the applicant's purchase amount of R100 000.00 while failing to repair the vehicle or refund the applicant.

36.6 The degree to which the respondent has cooperated with the NCC and the Tribunal

The first respondent cooperated with the NCC and Tribunal based on their submissions but failed to adhere to the recommendations made by MIOSA.

36.7 Whether the respondent has previously been found in contravention of the CPA

No specific evidence was provided in this regard.

37. The applicant did not submit any evidence of the turnover of the first respondent. The Tribunal can, however, still impose a fine limited to a maximum of R1 000 000.00 (one million Rand).
38. In this matter, the Tribunal must send a clear message that a second-hand car dealer cannot escape the peremptory provisions of the CPA. Their services must be aligned with the CPA. Consumers must be protected against suppliers accepting the purchase amount and not repairing a consumer's defective vehicle or refunding the consumer. The Tribunal must, however, also consider that the fine must not be so punitive as to discourage second-hand car dealers from engaging in a necessary and lawful business. It must be kept in mind that the fine imposed would be for a first offender. Further transgressions would be met with significantly higher penalties.
39. The Tribunal finds a fine of R50 000.00 will be appropriate.

## **ORDER**

40. Accordingly, the Tribunal makes the following order:

- 40.1 The first respondent has contravened sections 48(1)(a)(ii); 48(1)(c); 51(1)(a)(i)(ii); 51(1)(b)(i)(ii)(iii); 51(1)e; 55(2) and section 56(2) of the CPA;
- 40.2 The contraventions are declared prohibited conduct in terms of section 150(a) of the NCA;

40.3 The first respondent is ordered to pay the applicant R100 000.00 (one hundred thousand Rand), being the purchase price of the vehicle, within 30 business days after issuing of this judgment;

40.4 The first respondent must, at its own cost, collect the vehicle within five business days of issuing this judgment from an address provided by the applicant;

40.5 The first respondent must, within 90 business days of issuing this judgment pay an administrative fine of R50 000.00 (fifty thousand Rand) into the National Revenue Fund's bank account using the following bank account details:

Bank: The Standard Bank of South Africa

Account holder: Department of Trade and Industry

Branch name: Sunnyside

Branch code: 010645

Account number: 370650026

Reference: NCT/215614/2022/75(1)(b) and the name of person or business making the payment; and

40.6 There is no cost order.

Adv C Sassman

Presiding Tribunal member

Tribunal members Adv S Mbhele and Ms Z Ntuli concur.

Authorised for issue by The National Consumer Tribunal

National Consumer Tribunal

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