

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

Case number: **NCT/157953/2020/75(1)(b)**

In the matter between:

MUSHE MATHEVULA

APPLICANT

And

WILLOW CREST MOTORS CC

RESPONDENT

Coram:

Adv C Sassman - Presiding Tribunal Member

Mr S Hockey - Tribunal Member

Adv S Mbhele - Tribunal Member

Date of Hearing - 2 February 2023

Date of Judgment - 4 February 2023

JUDGMENT AND REASONS

APPLICANT

1. The Applicant in this matter is Mushe Mathevula (“the Applicant”). The Applicant is a consumer, as defined in section 1 of the Consumer Protection Act 68 of 2008 (“the CPA” or “the Act”). At the hearing, the Applicant represented himself.

RESPONDENT

2. The Respondent is Willow Crest Motors CC (“the Respondent”). The Respondent is a supplier, as defined in section 1 of the CPA. At the hearing, the Respondent was represented by Advocate Shaun McTurk, instructed by Beorn Uys, of Uys Matyeka Schwartz Attorneys.

TERMINOLOGY

3. A reference to a section in this judgment refers to a section of the CPA.

APPLICATION TYPE

4. 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 Respondent.
5. The Applicant alleges a breach of the Act because the Respondent allegedly failed to comply with the Applicant's request to repair his vehicle in accordance with section 56(2)(a) of the Act.

BACKGROUND

6. The Applicant purchased a used BMW 328, F30, 2012 model from the Respondent and took delivery of the vehicle on 28 August 2017. The mileage was 122 000km at the time of purchase, and the purchase price was R232 990.00.
7. On 28 December 2017, the vehicle broke down outside the Kruger National Park. The Applicant arranged for the vehicle to be towed to safety. The following day, the Applicant reported the incident to the Respondent's employee, who indicated that he would escalate the matter to the sales manager in early January 2018. The Applicant visited the Respondent in early January to resolve the issue and was requested to send the vehicle for a diagnostic test.
8. On 9 January 2018, the Applicant had the vehicle towed to BMW Modern Autohaus in Polokwane ("BMW"). On 16 January 2018, BMW assessed the vehicle and concluded that the engine had no compression when trying to start it. Upon further diagnosis, it was established that faults were stored in the vehicle's electronic system for oil pump failure and camshaft offset, which negatively affected the engine timing. They measured the camshaft end float and found it to be very high, causing damage to the engine. BMW concluded that the engine needed to be replaced and quoted an amount of R226 022,02 for the replacement.
9. The Respondent then arranged for the vehicle to be towed to Clutch and Brake Technologies ("CBT") for an independent component failure analysis to be done on the vehicle. On 31 January 2018, CBT issued a report confirming that the vehicle's timing

chain had broken and stated that it was reasonable to conclude that this was due to normal wear and tear. As a result, The Respondent maintained that it was not liable for any repairs to the vehicle.

10. During this time, and before CBT provided its report, the Applicant filed a complaint with the Motor Industry Ombudsman of South Africa ("MIOSA"), on 17 January 2018. In an email from the Respondent to MIOSA dated 2 February 2018, the Respondent indicated that it was not liable for the repair of the vehicle as the damage resulted from wear and tear. On 16 April 2018, MIOSA concluded its investigation and recommended that the Respondent repair the vehicle. The Respondent failed to do so.
11. On 21 June 2018, the Applicant filed a complaint against the Respondent with the National Consumer Commission ("the NCC"). On 20 January 2020, the NCC issued a notice of non-referral, indicating that the alleged facts, if true, do not constitute grounds for a remedy under the CPA. With the leave of the Tribunal, the matter was set down and adjudicated in May 2021. The judgment was subsequently rescinded in October 2022, and the matter is before the Tribunal afresh.

THE APPLICANT'S SUBMISSIONS

12. At the hearing and in his papers, the Applicant submitted that he heard a knocking noise coming from the engine before he took delivery of the vehicle. He asked the salesperson about it but was told that the vehicle had a powerful engine and therefore sounded noisy. He submitted that the noise disappeared after a while, but he suspects that the vehicle had existing engine trouble which the Respondent was aware of and failed to disclose at the time of purchase. When approaching the Respondent for repairs, he was given several reasons why they were not liable to repair any damage to the vehicle. These included the following:
 - 10.1 the vehicle was in good driving condition when it was sold to him;
 - 10.2 he had already driven approximately 16 000km in only four months;
 - 10.3 he never had the vehicle serviced since taking delivery of it; and
 - 10.4 the damage was caused due to normal wear and tear instead of a defect.
13. The Applicant denied that the vehicle was in good condition at the time of taking delivery. It was unsafe and was not due for a service while in use. The vehicle had a warranty in place at the time of the breakdown, but he was reluctant to provide the

details of his warranty to the Respondent as he felt it would interfere with the statutory process of the NCC after having reported the matter to them. The vehicle remained in the possession of the Respondent until he collected the vehicle in 2020 when he was informed that he would be charged for storage.

14. The Applicant further submitted that the Respondent's failure to comply with its statutory obligations has caused him financial loss since the vehicle is still financed, and he is still paying a monthly installment for it but has been unable to use it since December 2017. The vehicle has not been repaired, is still in his possession, and has deteriorated considerably. The Applicant seeks a full refund of the purchase price of the vehicle.

THE RESPONDENT'S SUBMISSIONS

15. The Respondent submitted that there is a lacuna in the CPA, in that it does not distinguish between a new vehicle and a used vehicle. It is important to remember that this was a used vehicle, and one must consider what a particular class of persons would view as a defect on a vehicle that, in this case, had already run 122 000km at the time of purchase. The Respondent denied that the vehicle had a knocking noise at the time of sale or that it was unsafe. The Applicant presented no evidence to support these allegations. The Respondent admitted that there was damage to the vehicle but that this was due to normal wear and tear and that the damage does not amount to a defect as defined in section 53 of the Act.
16. Counsel for the Respondent referred to the decision of the Supreme Court of Appeal in *Motus Corporation (Pty) Ltd v Wentzel*¹ ("Motus") and indicated that in this case, the court held that not every rattle or unfamiliar noise constitutes a defect in terms of the Act. He further submitted that in terms of the judgment, where a court or Tribunal considers it appropriate to refund a consumer, it must consider the use the consumer had of the vehicle, and section 20(6) of the Act finds application in any such calculation. In this case, the Applicant had full use and enjoyment of the vehicle for approximately four months.
17. The Respondent submitted that it was always willing to assist the Applicant but that the Applicant refused to cooperate by unreasonably withholding details of his warranty.

¹ *Motus Corporation (Pty) Ltd and Another v Wentzel* (Case no 1272/2019) [2021] ZASCA 40 (13 April 2021).

The Applicant has failed to prove any defect exists, and therefore, the application stands to be dismissed.

APPLICABLE SECTIONS OF THE ACT

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 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 that are of good quality and are in good working order. The goods must be free of any defects and be useable and durable for a reasonable time.
20. 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.
21. Section 56(3) states that if a supplier repairs any particular 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

22. The vehicle appears to have been presented and sold to the Applicant in an operational and functioning condition. In terms of section 55(2)(b) and (c), it ought to be free of any defects, usable, and durable for a reasonable period of time. The Respondent admits that the vehicle suffered some damage within the first six months of purchase but denies that the damage amounts to a defect. However, the damage has rendered the goods less acceptable and less useful than persons would generally be reasonably entitled to expect. The damage, therefore, amounts to a defect as defined in section 53(1)(a).

23. The Tribunal notes that this matter could likely have been resolved had the Applicant allowed the Respondent to affect the necessary repairs under the Applicant's warranty which was in place at the time. However, the Act does not place a duty on a consumer to use a paid warranty to absolve a supplier of its statutory duty.
24. The Applicant submitted that the vehicle has still not been repaired and has not been in use for the past five years. As a result, it has experienced considerable deterioration. No recent quotation was provided to indicate what the cost of repairs would be at present. However, one can only assume that the quoted amount of R226 022,02 in 2018 would have increased since then, rendering the cost of repairs more than the value of the vehicle in its current condition.
25. The Applicant's request for a full refund is contrary to the findings in Motus. In paragraph 43 of the judgment, the court held that the consumer was not entitled to claim a refund of the purchase price before all events stipulated in section 56(3) occurred. In this case, no repairs have taken place. The Respondent was not willing to repair the vehicle of its own accord, and the Applicant was not willing to use his warranty to cover the cost of the necessary repairs.

CONCLUSION

26. The Respondent failed in its statutory duty in terms of section 56(2)(a) to repair the Applicant's vehicle, and this failure has caused the Applicant financial prejudice.
27. On this basis, the Respondent is found to have engaged in prohibited conduct. A finding of prohibited conduct by the Tribunal entitles the Applicant to a certificate from the Chairperson of the Tribunal, which he can submit to a civil court to claim damages.

ORDER

28. Accordingly, the Tribunal makes the following order:
 - 28.1 The Respondent contravened section 56(2)(a) of the CPA;
 - 28.2 The Respondent's contravention of section 56(2)(a) is hereby declared prohibited conduct;
 - 28.3 The Applicant may approach the Chairperson of the Tribunal for a certificate in terms of section 115(2)(b) of the CPA to claim damages in a civil court; and

28.4 There is no cost order.

DATED ON THIS 4TH DAY OF FEBRUARY 2023.

Adv C Sassman

Presiding Tribunal Member

Tribunal Members Mr S Hockey and Adv S Mbhele concur.

Authorised for issue by The National Consumer Tribunal

National Consumer Tribunal

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