

IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case number: NCT/4058/2012/101(1)(P)CPA

In the matter between:

AUDI SA (PTY) LTD

APPLICANT

and

THE NATIONAL CONSUMER COMMISSION

RESPONDENT

Coram:

Ms D Terblanche – Presiding member

Mr F Sibanda – Member

Ms P Beck – Member

JUDGMENT AND REASONS

1. The Applicant in this matter is Audi, a division of Volkswagen of South Africa (Pty) Limited, a company duly registered as such in terms of the Company Laws of South Africa with physical address at 103 Algoa Road, Uitenhage, 6230 (hereinafter "the Applicant").
2. The Applicant's' Founding Affidavit is deposed to by James Chipunza, Legal Advisor of the Applicant.
3. The Respondent is the National Consumer Commission, an organ of state within the public administration established in terms of Section 85 of the Consumer Protection Act ("the CPA") with physical address at Berkley Office Park, 08 Bauhinia Street, Highveld Techno Park, Centurion (hereinafter "the Respondent").

4. The Applicant was issued with a Compliance Notice by the Respondent in respect of alleged contraventions of sections 55(2)(b), 56(2)(a) and (b) of the CPA.
5. The Compliance Notice is dated 2 March 2012. The Compliance Notice was received by Applicant on 02 March 2012. On 22 March 2012, the Applicant filed an application with the Tribunal objecting to the Compliance Notice and requesting that it be reviewed in terms of Section 101(1) of the CPA and set aside.

Jurisdiction

6. This National Consumer Tribunal (Tribunal) has jurisdiction to hear this matter in terms of section 101 of the CPA which empowers the Tribunal, to confirm, modify or cancel all or part of a compliance notice.

Preliminary matters

7. The Respondent filed an answering affidavit with the Tribunal after the period allowed for the filing thereof expired. Respondent purportedly applied for condonation for the late filing of its Answering Affidavit which was not brought properly before the Tribunal in that –
 - a. It appeared not to have been served on Applicant as proof of service in terms of the Rules were not attached; and
 - b. The application was lodged in the form of Form T.I r34, accompanied by an unsigned affidavit and was accordingly not considered.
8. At the hearing the Applicant indicated to the Tribunal that the Respondent agreed to withdraw the Compliance Notice issued. Since the CPA only allows for the Respondent to issue a certificate of compliance after a party has complied with the Compliance Notice and the Tribunal may cancel a Compliance Notice on application for review by the party against whom it is issued, Applicant persisted with its application to the Tribunal to have the Compliance Notice set aside.

The Hearing

9. The matter was heard on 3 August 2012 on a default basis and on consideration of Applicant's pleadings filed of record and the oral submissions made by its Counsel. Having stated the basis for adjudicating and determining this matter the Tribunal is nevertheless duty bound to consider all relevant and applicable legal principles in determining whether to grant the relief sought by Applicant or not.
10. Applicant based its application for the review of the Compliance Notice and for it to be set aside on the basis that –
 - a. Inasmuch as the Compliance Notice alleges that the conduct by the Applicant amounts to a contravention of Section 55(2)(b); Section 56(2)(a) and (b) of the CPA, the Applicant denies that Sections 55 and 56 of the Act apply retrospectively to cover the sale transaction which forms the subject matter of the Compliance Notice.
 - b. The Applicant contends that no breach of any law is either alleged or has occurred in relation to the transaction forming the subject of the Compliance Notice to exercise any power in terms of a repealed law as provided for in Schedule 2, item 8(1) of the CPA.
 - c. The Applicant questions the citation on the Compliance Notice reflecting "Audi SA (Arcadia)" which entity, to the best of its knowledge, does not exist, albeit sent to Applicant's address.
 - d. The Applicant further contends that the NCC is not entitled to adjudicate disputes as it attempts to do. Accordingly, the NCC's finding is *ultra vires*.
 - e. The Applicant denies that it was a party to the sale transaction, except to the extent that the Applicant offered a warranty and the Audi Freeway Plan ("AFP").

- f. With regard to the administrative penalty proposed by the Respondent and the alleged aggravating circumstances raised by the Respondent, Applicant denies that it has not displayed any effort to address the issues presented to it and to co-operate with the Respondent.
- g. The Applicant denies that it issued the Complainant with a defective motor vehicle and that it is liable to repair it.
- h. The Applicant avers there is no basis *"To refund the Complainant an amount of R24 000 00 (twenty four thousand rand) that he paid for repairs performed on his motor vehicle"* and / or for *"The Respondent must ensure that the above directive is implemented within 15 working days from date of issue of this Compliance Notice, which is on or before the 22nd of March 2012 failing which an administrative fine in the amount of R100 000 00 (one hundred thousand rand) as laid out in paragraph 3 below, will be sought from the Tribunal in terms of section 112."*

BACKGROUND

- 11. Before considering the law and the considerations applied by the Tribunal in coming to its final decision on this matter it is appropriate at this point to set out the events leading up to the issuing of the Compliance Notice.
- 12. On or about 22 July 2010 Mr J Mathevula (hereinafter "the Complainant") purchased a motor vehicle from the McCarthy Audi Arcadia Dealership of McCarthy Limited ("the Dealer").
- 13. The Applicant was not a party to the transaction except to the extent of providing a warranty, maintenance plan and roadside assistance. The Applicant issues a vehicle warranty on all new Audi vehicles for a period of 1 (one) year from the date of first registration, which warranty in the case of the vehicle in question expired on 22 July 2011. The Complainant's vehicle was damaged on 27 August 2011 which falls outside of the warranty period.

14. In addition to the abovementioned warranty new vehicles are issued with a 5 (five) years or 100 000 km maintenance plan known as the AFP which covers the costs of maintenance arising from normal wear and tear and certain other consumables.
15. Upon inspection of the vehicle by the Dealer it diagnosed that the vehicle's clutch had burnt out as a result of the manner in which the vehicle was driven. As a result of the nature of the damage the Dealer found that there was no obligation on the Applicant to affect the repairs to the vehicle or meeting the costs relating to these repairs. The Complainant was accordingly advised by the Dealer that the costs of repairing the vehicle would not be covered by the AFP. The Applicant subsequently confirmed the advices of the Dealer to the Complainant.
16. On 31 August 2011 the Complainant lodged a complaint with the National Consumer Commission (hereinafter "the NCC"). On 20 September 2011 the NCC addressed a letter to the Applicant enclosing a copy of the complaint by the Complainant. On 5 October 2011 the Applicant responded to the NCC providing reasons for its decision not to repair the damage to the vehicle being as follows:
 - a. The sale of the vehicle preceded the commencement of the CPA;
 - b. The vehicle's warranty had expired prior to the cause of complaint;
 - c. There was no manufacturing defect;
 - d. The damage to the vehicle was not covered by the AFP.
17. The Applicant received 2 day notice of a conciliation hearing from the Respondent. The hearing was set down for 20 October 2011. It was agreed that it be re-scheduled.
18. On 24 October 2011 the telephonic conciliation hearing took place between the Applicant and the Complainant. The discussions included the following:

- a. Complainant alleged that when purchasing the vehicle, the terms of the AFP were not brought to his attention or explained to him;
 - b. Complainant denied that the damage to the vehicle was attributed to the manner in which the vehicle was driven and contended that the repairs should be covered by the AFP;
 - c. At no point during the hearing did the Complainant allege that the vehicle failed to comply with the standards specified in Section 55 of the CPA or that Section 56 was of any application;
 - d. Applicant contended that the damage to the vehicle was attributable to the manner in which the vehicle was driven and the Complainant denied this;
 - e. Applicant agreed to investigate the allegation that the terms of the AFP were not brought to the Complainants attention;
 - f. The Applicant agreed to cover the costs of an independent report relating to the damaged component;
 - g. The hearing was scheduled to re-convene on 10 November 2011.
19. The Applicant enquired from the Dealer whether the terms of the AFP was brought to the attention of the Complainant and the Applicant was provided with a copy of the Offer to Purchase and Delivery Checklist. The Dealer advised that both it and the Complainant had signed the Offer to Purchase and Delivery Checklist ("Annexure 2" and "Annexure 4" to the Founding Affidavit) which reflect the Complainant's acknowledgment that he received and read the manufacturer's conditions relating to the vehicle, and the in-car package comprising the owner's manual, warranty and AFP booklets, was in the vehicle at the time of delivery.
20. The Applicant could not obtain the damaged component from the Dealer as the component had already been disposed of. Although disposed of, Applicant requested

LUK South Africa ("LUK"), an independent clutch expert, for an opinion based on photographs of the damaged component provided by the Dealer. LUK's opinion was that the damage was attributable to the manner in which the vehicle was operated.

21. The Applicant advised the Respondent that the damaged component was not available for assessment and provided the Respondent with the view of LUK as well as a copy of the delivery document signed by the Dealer and Complainant.
22. The second hearing took place on 10 November 2011 which included the following –
 - a. Complainant reiterated his denial of knowledge of the terms of the warranty and AFP, despite having acknowledged receipt of the in-car package;
 - b. Applicant reiterated its position that the AFP does not cover repairs arising from excessive wear and tear or any other factors excluded by the AFP;
 - c. Complainant maintained that the damage to the component arose from a manufacturing defect;
 - d. At this point the matter remained unresolved and no further interactions took place.
23. Subsequently, the NCC issued a Compliance Notice against the Applicant.

ANALYSIS OF LAW AND FACTS

24. When the Respondent elects to deal with a complaint in accordance with section 99(b) it effectively elects to investigate the complaint in terms of Part B of Chapter 3 of the Act. Upon concluding such an investigation it may choose to, amongst others, issue a compliance notice. Such compliance notice must set out the following information (required by Section 100(3) of the CPA):
 - a. The person or association to which the conduct applies;

- b. The provision of the Act that has not been complied with;
 - c. Details of the nature and extent of non-compliance;
 - d. Any steps that are required to be taken and the period within which those steps must be taken – steps the commission may require of the party, against whom the notice is issued, to take; and
 - e. Any penalty that may be imposed in terms of this Act if those steps are not taken – this relates to a penalty that might be imposed by the Tribunal in the event of non-adherence to the compliance notice.
25. The Applicant objects to the steps the Respondent requires of it to take on the basis that there is no basis (in law) for the steps prescribed.
26. The Respondent sets out the following steps in paragraph 2 (page 5) of the compliance notice –
- “2.1 To refund the complainant an amount of R24000,00 (twenty four thousand rand) that he paid for repairs performed on his motor vehicle”.
 - 2.2 The respondent must ensure that the above directive is implemented within 15 working days ...failing which an administrative fine will be sought from the Tribunal in terms of section 112”, thus conflating the requirements of section 100(3)(d) and (e).
 - The above is followed in the compliance notice by paragraph 3 setting out the penalty that may be imposed if the steps are not taken, containing text that substantially repeats the text contained in 2.2.
27. When considering the content of a Compliance Notice and specifically the steps the Respondent requires of the Applicant to take, and whether the Respondent is entitled to prescribe such steps, one has to consider amongst others, the functions and powers of the Respondent.

28. The Respondent is responsible to carry out functions and exercise the powers assigned to it by or in terms of this Act or any other national legislation.¹
29. The enforcement² functions of the Commission are set out in section 99 of the CPA. From the plain reading of the words and the expansion of what is meant with the enforcement function it is clear to us that the enforcement function does not include a function to order parties to provide redress³ to complainants. This power has been reserved to the courts and to the Tribunal, albeit in the latter instance to a limited extent.
30. The powers of the Tribunal are similarly circumscribed and do not extend to the Tribunal awarding damages to parties. At its high water mark the CPA empowers the Tribunal to impose an administrative penalty, order refunds of amounts overpaid to consumers and issue a certificate⁴ of prohibited conduct from the Chairperson of the Tribunal as provided for in Rule 29⁵ after a finding that prohibited conduct took place, to enable a consumer to approach the high court for damages.
31. Following on the exposition of the Respondent's enforcement function in the CPA, the consequences of non-compliance with a Compliance Notice are set out in section 100(3)(e) in that it lays the basis where it provides for "*...any penalty that may be imposed in terms of the CPA if the steps are not taken.*" That penalty being an administrative fine imposed by either the Tribunal or a prosecution in terms of section 110(2) by the National Prosecuting Authority⁶.

¹ Section 92(1) of the Consumer Protection Act, Act 68 of 2008

² the act of compelling observance of or compliance with a law, rule, or obligation
<http://oxforddictionaries.com/definition/english/enforcement>

³ *verb [with object]* 1 remedy or set right (an undesirable or unfair situation): *the question is how to redress the consequences of racist land policies* 2 *archaic* set upright again: *some ambitious Architect being called to redress a leaning Wall*
noun - remedy or compensation for a wrong or grievance: *those seeking redress for an infringement of public law rights* <http://oxforddictionaries.com/definition/english/redress>

⁴ Section 115(2)(b) of the Consumer Protection Act, Act 68 of 2008

⁵ Rule 29 in the Rules for the Conduct of Matters before the National Consumer Tribunal

⁶ Section 100(6) - Consumer Protection Act, Act 68 of 2008

32. It is accordingly an untenable interpretation of the CPA to read into the powers and functions of the Respondent the power to impose a requirement in the Compliance Notice, which in effect amounts to the imposition of an order for damages, refunds or return of goods. The route to achieve redress for a consumer is through a prosecution either for prohibited conduct or by agreement with the transgressor to pay compensation.
33. Furthermore, Section 150 of the NCA provides the Tribunal with a mandate to *"requiring repayment to the consumer of any excess amount charged, together with interest at the rate set out in the agreement"*. No similar provision exists that gives the Respondent the right to order repayment. It is evident that such a right should be specifically provided in terms of the Act (as it is awarded to the Tribunal), and therefore, that the Respondent, not being specifically so empowered to do so, may not order repayment.
34. It would therefore be beyond the powers of the Respondent to include a step in a Compliance Notice that in fact amounts to the award of damages or redress to a Complainant.
35. In this respect the compliance notice does not meet the peremptory requirements of section 100(d) of the CPA and stands to be set aside.
36. In the result the Tribunal will not consider the numerous other grounds put forward by the Applicant in its challenge to the compliance notice.
37. For all the reasons set out above the Tribunal concludes that the compliance notice issued by the Respondent against the Applicant in this matter is fatally flawed and stands to be set aside.
38. In the result the Tribunal makes the following order :
The compliance notice is set aside and no order is made as to costs.

DATED AT CENTURION THIS 21st DAY OF JANUARY 2013.

[signed]

DIANE TERBLANCHE
Presiding member

F Sibanda (Member) and P Beck (Member) concurring.

Authorised for issue by the National Consumer Tribunal

Case number

Date: 2013 / 01 / 21
Day / mm / dd

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