

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

Case Number: NCT/13959/2014/75(1)(b)

In the matter between:

DANE JARVIS

APPLICANT

and

GM ALBERANTE MOTORS CC t/a GM ALBERANTE

RESPONDENT

Coram:

Adv. HFN Sephoti – Presiding member

Ms. P Beck – Member

Adv. J Simpson – Member

Date of Hearing – 14 August 2014

JUDGMENT AND REASONS

APPLICANT

1. The Applicant in this matter is Dane Jarvis, an adult male and a consumer as defined by the Consumer Protection Act 68 of 2008 ("the CPA") (hereinafter referred to as "the Applicant").
2. At the hearing, the Applicant represented himself.

RESPONDENT

3. The Respondent is Alberante Motors CC trading as GM Alberante, a close corporation duly incorporated in accordance with the Close Corporations Act, 69 of 1984 (as amended) and trading in Alberton (hereinafter referred to as "the Respondent". Mr Earl Austin is the Dealer Principal of the Respondent.

4. At the hearing the Respondent was represented by Ms Gail Hardy, an advocate duly briefed by the law firm Klopper, Jonker Inc. of Alberton. The instructing Attorney, Ms Lee - Ann Klopper, was also present at the hearing.

APPLICATION TYPE

5. This is an application in terms of Section 75(1)(b) of the CPA. The Tribunal derives the jurisdiction to hear this matter, under Section 4 of the CPA. The Applicant lodged a complaint with the National Consumer Commission ("NCC") and was subsequently issued with a notice of non-referral in response to his complaint. He is now approaching the Tribunal to seek relief against the Respondent. The Applicant is seeking to enforce his right to good quality service (Section 54 of the CPA). His complaint arose out of his car being damaged whilst in for repairs with the Respondent. The Respondent refuses to take responsibility for the damage to the vehicle.

PRELIMINARY ISSUES:

6. The Respondent brought an application for condonation to the Tribunal for non-compliance in terms of Rule 34 of the Rules of the Tribunal¹.
7. On the 10th of June 2014 the Respondent received the Applicant's Replying Affidavit (erroneously described by the Applicant as an Answering Affidavit). The Respondent wished to reply to the specific allegations made by the Applicant in the replying affidavit, however the Rules of the Tribunal do not provide for the Respondent to file a further affidavit in response to a Replying affidavit.
8. The Respondent therefore filed a condonation application to request the Tribunal to afford it the opportunity to file its *seriatim* reply to the Applicant's "Replying Affidavit".
9. Rule 34(1)(d) empowers the Tribunal to condone any other departure from the rules or procedures.
10. Rule 34(1) and (2) of the Rules of the Tribunal respectively provides that a party may apply to the Tribunal for condonation for non-compliance with the Rules of the Tribunal and the Tribunal may grant such an order on "good cause shown". It should also be considered that the Respondent has

¹ For the Conduct of Matters before the National Consumer Tribunal published under GN789 in GG30225 of 28 August 2007 as amended by GenN428 in GG34405 OF 29 June 2011 (hereinafter "the Rules of the Tribunal").

articulated its grounds fully in the affidavit, the substance whereof is the fundamental principle envisaged by Form T1.r34.

11. The Rules provide the Tribunal with discretion to grant condonation on "good cause shown".
12. The Tribunal in considering this matter must act fairly to both parties and it must take a number of factors into consideration including *inter alia* any possible prejudice the parties may suffer.
13. In this instance, there is no indication before the Tribunal that either of the parties would suffer any prejudice by the filing of a further affidavit. In this specific instance the affidavit simply serves to further clarify the dispute between the parties.
14. The Respondent had, by their prompt response, shown that they did not wish to delay the matter. The Respondent wished to file their response to allegations levelled by the Applicant as speedily as possible to enable the Tribunal to be in full possession of all the facts that will allow the Tribunal to reach a fair and just conclusion.
15. The application for condonation was accordingly granted in the hearing and the Respondent's further affidavit is accepted as part of the pleadings before the Tribunal.

POINT IN LIMINE

16. Respondent raised the following point *in limine* against the Applicant's application for leave to refer the matter to the Tribunal:
 - a. Respondent noted that the Applicant filed an application in terms of section 75(1)(b) in which leave to refer the matter to the Tribunal with the leave of the Tribunal is sought;
 - b. Respondent referred the Tribunal to the Table 2 of the Regulations, under the column "Limitation on time for submission". Table 2 states that an application must be lodged within 20 business days of the date of the Notice on Non-Referral, or within a longer time permitted by the Tribunal;

c. Respondent submits that -

- i. The application dated 3 April 2014 had lapsed in terms of Rule 8(2);
- ii. That the application submitted by the Applicant dated 5 May 2014 is defective due to the failure of the application to comply with the Rules in respect of documents not attached, late filing and failure to apply for the condoning of such later filing as well as the affidavit setting out the grounds for leave to refer to the Tribunal.

Applicant's response:

17. Applicant stated that he waited for the notice of non-referral from the NCC. Whilst waiting, he approached the Tribunal and met with Tribunal staff who advised him on what the process was to lodge a matter with the Tribunal;;
18. Applicant completed the papers but still had some documents missing;
19. The Tribunal Registrar sent out a notice of incomplete filing and gave Applicant 15 business days as per the Rules to file all the missing documentation;
20. Applicant submitted the missing documents within the stipulated period. Before a notice of complete filing could be sent, Respondent served papers on the Applicant and the papers did not have a case number.
21. Applicant stated that it was his first time dealing with rules and procedures of the Tribunal and he relied on guidance from the staff on what processes, papers and documents he would need to have, to constitute a complete file and he complied fully with all the directives within the stipulated time;
22. The Tribunal adjourned to consider the points raised and found as follows:
 - 22.1 The Notice of Non-Referral by the NCC shows that it was signed by the Commissioner on 26 March 2014;

- 22.2 Applicant filed his application with the Tribunal on 08 April 2014. The application was therefore filed within 20 business days of the date of the notice as required by Table 2 of the Regulations. A notice of incomplete filing was then sent which gave the Applicant 15 days to file all the missing papers;
- 22.3 Applicant filed all the required information within the allocated 15 days.
- 22.4 A notice of complete filing was then issued by the Tribunal Registrar on 27 May 2014;
23. The Tribunal therefore finds that the application was filed within time and the point *in limine* raised by the Respondent is therefore dismissed.

THE HEARING

The Applicant's Case

24. At the hearing of the matter the Applicant elected to testify under oath. He was duly sworn in by the Tribunal. A summary of his testimony follows below.
25. The Applicant owns a 2006 model Opel Astra OPC with approximately 120 000 kilometres on the odometer. On 6 November 2012, the Applicant took his vehicle in to the Respondent to check the smoking and mis-firing of the engine. This was after the Applicant noticed that the vehicle was smoking following his refuelling of the vehicle.
26. Applicant was informed by Breyten, a technician of the Respondent, that they suspected fuel contamination. This would have necessitated the fuel being sent in for testing. Motorite, Applicant's insurers were informed of the problem and they authorised the testing. The results were that the problem was not related to fuel contamination. At this point, the Respondent was closing for the holidays and this meant them keeping the car until the dealership opened in January the following year.
27. In January 2013, the Applicant called the Respondent to check on the progress on the car and a Mr Ramsden ("Ramsden") of the Respondent told him that his car might need a new engine. Ramsden

informed Applicant that they have been testing the car and the engine management light keeps coming on and they had no idea what was causing it.

28. Ramsden continued to enquire if Applicant was not looking to sell the car as the car was giving him so much trouble. At this point, Ramsden could not tell Applicant what was wrong with the car and the Respondent had had possession of the Applicant's car for a period of three (3) months.
29. In March 2013, with Respondent still not sure what was wrong with Applicant's car, an arrangement was struck to provide Applicant with a loan car. Applicant continued to call Respondent on a weekly basis to check on the progress on the car.
30. On the 10th of April 2013, Applicant went to Respondent's premises to pick up the car. Ramsden still did not explain what was wrong with the car and seemed more pre-occupied with the paint work on the car than explaining what was wrong with the car that had been with them since November 2012.
31. Before leaving the premises, Breyten, the technician, came out and made the statement "Your car is much faster than you would remember". The Applicant then drove the vehicle to his home.
32. On the 14th of April 2013, the car exhibited the same problem as on the 6th of November 2012. On the 15th of April 2013, Applicant called Ramsden regarding the problem with the car. Ramsden then told Applicant to bring the car into the dealership for them to see what was wrong. Upon arrival, Breyten met with Applicant and opened the bonnet and told Applicant that the engine was "gone".
33. Applicant was not pleased that Respondent has kept the car for 5 months yet the car was exhibiting the same problems as when it went in, in November 2012.
34. On the 18th of April 2014, Ramsden requested Applicant's permission to open up the engine to see what could be wrong with the car. Applicant granted him permission to open up the engine but made it clear that he was not going to be held liable for any costs associated therewith.
35. In the meantime, Applicant lodged a complaint with the Motor Industry Ombudsman and informed the Respondent of this. Respondent submitted a forensic report, marked "JJ1" and the report stated that

the damage to Applicant's car engine was due to driving techniques. The Ombudman, on receipt of the report, proceeded to close the case file on the matter.

36. The Respondent demanded the loan car back which Applicant eventually returned. Applicant arranged to have his car towed to Williams Hunt in the Glen and asked Ramsden for the car parts which Respondent had claimed to have replaced on his car and Ramsden responded that they had burnt the parts. Applicant was never shown the parts nor was he asked if he would like the replaced parts returned to him. Applicant had no way of knowing if anything was replaced at all as the proof was "burnt" by Respondent.
37. Before Applicant could have the car towed away, Mr Austin, the dealer principal, demanded an amount of R8 000 which he claimed was for the forensic investigation that was done on Applicant's car. Applicant disputed that he owed any money to the Respondent as he had made it clear when Ramsden requested permission to open up the car that he would not be paying for anything associated with that.
38. Applicant's car was eventually towed away and stored at Williams Hunt. Applicant sought help from GM South Africa and was assisted by Mr Yusuf Patel. Applicant further sought the expertise of assessors and appointed JBG Assessors to look at the car and give Applicant a report on what was wrong with the car. JBG Assessors did their assessment and submitted a report on 26 July 2013.
39. On 30 September 2013, the Motor Industry Ombudsman appointed JPA Mechanical Appraisals CC to assess the vehicle which report was received on 4 October 2013, marked "FF1". As a result of this report, the Ombudsman reversed the earlier decision which led to the complaint being withdrawn.
40. Applicant stated that the only people that looked at his car and opened up the engine was the Respondent. The car in question had been with them for over four months yet in the week that he was told to come collect his car, he experienced the same problems as when the car went in, in November.
41. Respondent appealed the decision of the Ombudsman.
42. On 24 October 2013 the Applicant lodged a complaint with the NCC.

43. On 18 March 2014, the NCC issued Applicant with a notice of non-referral and Applicant approached the Tribunal to have the matter heard and resolved.
44. During cross examination, the Respondent put numerous questions and statements to the Applicant with the intention of illustrating that the damage to the engine was as a result of the Applicant driving the vehicle in an improper manner after collecting it from the Respondent. The Respondent further sought to illustrate that the driving of the vehicle back to the Respondent's premises caused further damage. The Respondent sought to ascertain the distance travelled by the Applicant each day to and from work and the type of road that he uses (freeway/open road as opposed to stop and starts). Applicant responded that he used all types of roads and that the road from his home to the airport is relatively open and traffic-free. The Respondent sought to suggest that Applicant took advantage of the open road to "open up the valves" and drive the car at a high speed which conclusion the Applicant flatly denied. The Respondent further sought to make the point that when Applicant experienced problems with the car again and he reported it to the Respondent, he was told to "bring the car in" which meant that the vehicle should have been towed to the Respondent, not driven. These allegations were denied by the Applicant as Respondent had used the words "bring the car in" and there was never any suggestion of towing the vehicle to the dealership.
45. The Applicant's father, Mr Desmond Albert Jarvis, also elected to testify and was duly sworn in by the Tribunal. Mr Despond Jarvis corroborated the evidence presented by the Applicant as to the reason the car was taken to the Respondent and the enquiries made. He further testified to the mis-firing and smoking, which was within the week that the Applicant had collected the car from the Respondent. He testified that this occurred when he was driving the car in their neighbourhood and that he had been driving slowly as this was a busy neighbourhood, with children playing in the streets, potholes in the road and several stops and speed humps in the area.. He was almost at the house when the warning light came on and the mis-firing and the smoking began again. He immediately alerted the Applicant and the following day, Respondent was contacted and Applicant was told to bring the car in.
46. Applicant's father indicated that he had knowledge of engines and confirmed that they would not have driven the car recklessly as they knew they had to "work the engine in" and because his son would not have wanted to be in the position that he had been for the past 4-5 months without a car.

47. Both Applicant and his father disputed the conclusions drawn by the Respondent that they caused the damage to the vehicle.
48. Applicant seeks to be put in the same position that he was in before his car went to Respondent for repairs. Applicant wants his car to be fixed completely and that the repairs should not take any longer than they did the first time he entrusted his car into Respondent's care.
49. Alternatively, if Respondent cannot restore him to the position that he was in, i.e. if Respondent is unable to fix the vehicle, that Respondent acquire another car of the same make, model and similar kilometres. The warranty plan that exists on the Applicant's car is to be carried over to the car to be acquired or to ensure that that car has a warranty similar to what Applicant had on the car; Respondent to reimburse Applicant for all instalments and insurance paid during the time that Respondent was in possession of Applicant's car.
50. The Applicant then closed his case.

RESPONDENT'S CASE

51. Respondent elected not to testify but called an "expert witness", Mr Larry Wayne Jenkinson, to speak to the report compiled by the expert after the Applicant had raised his dissatisfaction with the service of the Respondent on his car. Mr Jenkinson was sworn in by the Tribunal as an expert witness.
52. Mr Jenkinson stated that he had 30 years' experience in Automotive Forensic Services as the Founding member of Enigma Automotive Forensic services.
53. He testified that he was instructed to conduct an inspection/ investigation on the car of the Applicant. The investigations were done on the 19th of April 2013, 23rd of April 2013 and on the 6th of May 2013. When he first encountered the vehicle it was still in a fully assembled state.
54. Mr Jenkinson's full report is marked "JJ1" titled "Technical Investigation Report: LJ14-0413.
55. The report by Mr Jenkinson's states that the following material conclusions can be reached regarding the damage to the engine:

- 55.1 The engine had been subjected to abnormally high load conditions prematurely (before the engine had achieved a normal operating temperature).
- 55.2 The vehicle was driven to the dealership and this most probably led to most of the prevailing damage occurring.
- 55.3 No evidence was found to suggest any abnormalities or irregularities with the way in which the engine was overhauled or with the components used in the repair.
56. Mr Jenkinson testified that the vehicle's display panel indicated that the vehicle's fuel usage was high. This led him to conclude that the vehicle had been driven "hard" as such. The Tribunal asked Mr Jenkinson whether he knew what the average consumption of this particular vehicle was so as to compare it to the usage indicated. Mr Jenkinson conceded that he was unable to provide the normal average fuel usage for this vehicle and could therefore only compare the indicated fuel usage to an average 4 cylinder vehicle.

APPLICATION FOR LEAVE

57. Before the Tribunal considers the evidence placed before it, the question regarding leave must first be considered.
58. The question of whether an application for leave is a separate step in a section 75(1)(b) application has been considered in many previous Tribunal cases.² Section 75(1)(b) of the CPA stipulates that the Applicant may, in the event of the issuing of a Notice of non-referral by the NCC, refer the matter directly to the Tribunal, with the leave of the Tribunal. In the matter of *Westinghouse Brake and Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd*³, the following was held:

"...that, if possible, a statutory provision must be construed in such a way that effect is given to every word or phrase in it.... The reason is, of course, that the lawgiver, it must be supposed, will choose its words carefully in order to express its intention correctly, and will

² Refer to *MV Chauke v Standard Bank et al* TRIBUNAL/4658/2012/141(1)(P) and *Coertze and Burger v Young* TRIBUNAL/7142/2012/73(3)&75(1)(b) CPA

³ 1986 (2) SA 555 (A) at par 15.

therefore not use any words that are superfluous, 'meaningless or otherwise otiose' "(per TROLLIP JA in S v Weinberg 1979 (3) SA 89 (A), at p 98 E - F)..⁴

59. The specific provisions of Section 75(1)(b) of the CPA and the requirement of the granting of leave to refer contained therein must be construed as a specific intention of the legislature. By including this requirement, the legislature expressed its intention of a separate requirement namely that a section 75(1)(b) referral cannot be adjudicated on without the Applicant in a specific matter first having obtained leave from the Tribunal to make such a referral.

60. In determining whether the Applicant should be granted leave to refer the matter to the Tribunal, the Tribunal must consider the requirements for the granting of "leave". A similar application can be found in the High Court practice, where an Applicant applies for leave to appeal a judgment. It was held in the *Westinghouse Brake and Equipment (Pty) Ltd* – matter, as cited above, that -

"in applications for leave to appeal properly brought before the appropriate court in terms of the old sec 20, read with sec 21 as it then was, the only relevant criteria were whether the applicant had reasonable prospects of success on appeal and whether or not the case was of substantial importance to the applicant or to both him and the respondent."

61. The Tribunal will therefore, when considering whether to grant the Applicant leave to refer or not, use the same test as applied in the High Court for applications for "leave" and will therefore consider:

61.1 Whether the matter is of substantial importance to the Applicant or Respondent;

61.2 The Applicant's reasonable prospects of success with the referral.

62. Based on the lengths the Applicant has gone to lodge the complaint with the Motor Industry Ombudsman, the NCC and ultimately the Tribunal, the value of the claim and finally the volume of pleadings placed before the Tribunal, it is clear that the matter is of substantial importance to the Applicant. The Tribunal therefore finds that this requirement has been met.

63. The Applicant has further established a clear basis for a claim in terms of section 54 of the CPA.

64. The Tribunal therefore grants leave for the matter to be referred to the Tribunal.

⁴ See Barrett, N .O. v Macquet, 1947 (2) SA 1001 (AD) at p 1012; Port Elizabeth Municipal Council v Port Elizabeth Electric Tramway Co Ltd 1947 (2) SA 1269 (AD) at p 1279.

CONSIDERATION OF THE EVIDENCE

65. Both the Applicant and his father provided their versions to the Tribunal in a coherent and clear manner. Their versions did not change in any way when cross-examined. Their versions further corroborate each other in every material respect. In the Tribunal's view there is no reason to doubt the truth of their testimony.
66. Mr Jenkinson also provided a clear and consistent version to the Tribunal. He provided an opinion of how the damage to the engine arose and what could have caused it. While the Tribunal does not have the technical expertise to determine whether his conclusions are correct, it can evaluate whether the evidence he provided supports a finding that the most probable cause of the damage to the engine was the manner in which it had been driven by the Applicant after collecting it from the Respondent.
67. The evidence before the Tribunal regarding the cause of the damage to the Applicant's vehicle is anything but clear. The Applicant and the Respondent both submitted various reports from different experts who examined the engine and came to certain conclusions regarding the cause of the damage to the engine. The Applicant submitted a report by JPA Mechanical Appraisals CC dated 30 September 2013 (commissioned by the Motor Industry Ombudsman) which concludes that dry bore sleeves are not made for this engine by the manufacturer and therefore their fitment to this vehicle by the Respondent was not recognised engineering practice. Based on this report the Ombudsman ruled that the Respondent must repair the vehicle at their cost. The report further argues that although the engine did run hot, it did not fail due to overheating.
68. A report by JBG Assessors dated 25 July 2013 states that the engine in question, as per manufacturer specifications, should not have been re-sleeved. The report states that while driving techniques cannot be ruled out as a factor, there is a strong indication that some form of distortion took place when the sleeve was inserted (by the Respondent). This was then the cause of the engine damage and failure.
69. Although the Applicant did not call the experts who drafted the reports to testify, the reports were submitted by the Applicant as part of the application and it can therefore be considered within the general context of the evidence before the Tribunal.
70. Ultimately the Tribunal is faced with the following facts which are not in dispute – The Applicant's vehicle was malfunctioning. He took the vehicle to the Respondent to be repaired. After a period of approximately 5 months the Respondent repaired the vehicle and returned it to the Applicant. Within a

few days of the vehicle being collected and after it had covered a distance of approximately 400 kilometres, it exhibited exactly the same problems as before and the engine will now again need major repairs.

71. The only defence the Respondent has offered in the Applicant's claim is to allege that the Applicant drove the vehicle from the Respondent's premises and back in some manner that caused undue stress on the engine, resulting in the engine failing again.
72. While the Tribunal takes note of the conclusions drawn by the Respondent's expert witness, his opinion as to the cause of the damage appears to be a lonely one. The reports submitted by the Applicant conclude that either the fitting of sleeves to the vehicle or the fitment of these sleeves in an inappropriate manner caused the damage.
73. There is further no direct evidence, by an eye-witness for example, that the Applicant drove the vehicle in an improper manner.
74. The only reasonable conclusion the Tribunal can draw from the evidence is that the Respondent had not repaired the engine as instructed.
75. On the evidence placed before the Tribunal it is therefore found that the Applicant has proven, on a balance of probabilities, that the Respondent did not repair the vehicle to the standard that a reasonable person would expect.

APPLICABLE SECTIONS OF THE CPA

Definitions:

"consumer", in respect of any particular goods or services, means—

(a) a person to whom those particular goods or services are marketed in the ordinary course of the supplier's business;

(b) a person who has entered into a transaction with a supplier in the ordinary course of the supplier's business, unless the transaction is exempt from the application of this Act by section 5(2) or in terms of section 5(3);

- (c) if the context so requires or permits, a user of those particular goods or a recipient or beneficiary of those particular services, irrespective of whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those particular goods or services; and*
- (d) a franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5(6)(b) to*
- (e);*

“person” includes a juristic person;

“service” includes, but is not limited to—

- (a) any work or undertaking performed by one person for the direct or indirect benefit of another;*
- (b) the provision of any education, information, advice or consultation, except advice that is subject to regulation in terms of the Financial Advisory and Intermediary Services Act, 2002 (Act No. 37 of 2002);*
- (c) any banking services, or related or similar financial services, or the undertaking, underwriting or assumption of any risk by one person on behalf of another, except to the extent that any such service—*
 - (i) constitutes advice or intermediary services that is subject to regulation in terms of the Financial Advisory and Intermediary Services Act, 2002 (Act No. 37 of 2002); or*
 - (ii) is regulated in terms of the Long-term Insurance Act, 1998 (Act No. 52 of 1998), or the Short-term Insurance Act, 1998 (Act No. 53 of 1998);*
- (d) the transportation of an individual or any goods;*
- (e) the provision of—*
 - (i) any accommodation or sustenance;*
 - (ii) any entertainment or similar intangible product or access to any such entertainment or intangible product;*
 - (iii) access to any electronic communication infrastructure;*
 - (iv) access, or of a right of access, to an event or to any premises, activity or facility; or*
 - (v) access to or use of any premises or other property in terms of a rental;*
- (f) a right of occupancy of, or power or privilege over or in connection with, any land or other immovable property, other than in terms of a rental; and*
- (g) rights of a franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5(6)(b) to (e), irrespective of whether the person promoting, offering or providing the services participates in, supervises or engages directly or indirectly in the service;*

“supplier” means a person who markets any goods or services;

76. **Section 54(1)** of the Act deals with a consumer's right to demand quality service. In terms of such section:

- (1) When a supplier undertakes to perform any services for or on behalf of a consumer, the consumer has a right to;
- a. The timely performance and completion of those services, and timely notice of any unavoidable delay in the performance of the service;
 - b. The performance of the services in a manner and quality that persons are generally entitled to expect;
 - c. The use, delivery or installation of goods that are free from defects and of a quality that persons are generally entitled to expect, if any such goods are required for performance of the services; and
 - d. The return of any property or control over any property of the consumer in at least as good a condition as it was when the consumer made it available to the supplier for the purpose of performing such services,

Having regard to the circumstances of the supply, and any specific criteria or conditions agreed between the supplier and the consumer before or during the performance of the services.

- (2) If a supplier fails to perform a service to the standards contemplated in subsection (1), the consumer may require the supplier to either-
- a. Remedy any defect in the quality of the services performed or goods supplied; or
 - b. Refund to the consumer a reasonable portion of the price paid for the services performed and goods supplied, having regard to the extent of the failure.

77. In applying the provisions of the CPA to the matter before the Tribunal it appears that section 54 finds application. The Applicant approached the Respondent and requested it to provide a service by repairing the vehicle's engine. The Applicant only received his vehicle back after a period of approximately 5 months and the engine only functioned for a few days before it malfunctioned again. In the matter before the Tribunal there has been no reasonable explanation offered for why it took so long to repair the Applicant's vehicle. The period of approximately 5 months is therefore regarded by the Tribunal as unreasonable and not in accordance with section 54(a) which requires a supplier to

render the service in a timely manner. Further, a consumer has a right in terms of section 54(b) to expect services to be performed in a manner and quality that persons are generally entitled to expect. Where an engine fails within a very short period of time and within a short distance travelled, as in this case, the services cannot be seen to have been rendered to the required standard of quality.

77. Based on these findings, the Respondent failed to provide a timely service (section 54(a)) and did not perform the services in a manner and quality that persons are generally entitled to expect (section 54(b)).

78. Section 54(2) of the CPA provides as follows:

“(2) If a supplier fails to perform a service to the standards contemplated in subsection (1), the consumer may require the supplier to either-
(a) Remedy any defect in the quality of the services performed or goods supplied; or
(b) Refund to the consumer a reasonable portion of the price paid for the services performed and goods supplied, having regard to the extent of the failure.”

79. The Respondent in this matter did not deny that it was a supplier within the definition of supplier in terms of the CPA. On the evidence placed before the Tribunal the Respondent appears to market its services as a repairer of motor vehicles and the Tribunal therefore accepts that the Respondent is a supplier within the context of section 54. The CPA further includes a juristic person as a person within the context of section 54.

80. Section 150(i) of the National Credit Act, 34 of 2005 (“the NCA”), read with section 75(4)(b) of the CPA, empowers the Tribunal to make any appropriate order required to give effect to a right, as contemplated in the CPA.

81. In the matter of *Coertze and Burger v Young*⁵ the Tribunal stated that a ‘refund’ is defined as returning money to somebody, usually because he or she paid too much or did not receive what was paid for, and “pay back (money), typically to a customer who is not satisfied with goods or services bought.”

82. It was also confirmed by the Tribunal in the *Coertze*-matter that the Tribunal may in terms of Section 75(4)(b) of the CPA make any applicable order contemplated in the CPA or in section 150 or 151 of

⁵ NCT/7142/2012/73(3)&75(1)(b).

the NCA. In terms of Section 150(i) of the NCA the Tribunal may make any other appropriate order required to give effect to a right, as contemplated in the CPA.

83. CONSIDERATION OF APPROPRIATE REDRESS FOR THE APPLICANT

83.1 The Applicant has the right in terms of section 54(2) of the CPA to require the Respondent to either remedy the defect in the quality of the services or refund to the consumer a reasonable portion of the price paid for the services and goods.

83.2 Based on the evidence before the Tribunal the Applicant did not pay anything for the repairs to the vehicle. The repairs were paid for by the Applicant's insurer. The Tribunal is therefore unable to apply section 54(2)(b). The Tribunal can therefore only apply section 54(2)(a) which requires the Respondent to remedy the defect.

83.3 Ordinarily this would entail the Respondent again having to repair the engine yet again. However, the Applicant attached an e-mail sent to him by Mr Yusuf Patel, the National Customer Care and Support Manager for General Motors South Africa, dated 19 September 2013. In this e-mail Mr Patel suggested that a genuine GM remanufactured engine be fitted to the Applicant's vehicle and proceeded to set out the costs for such an engine which came to R72 025.00.

83.4 The Parties did not make any specific submissions in this regard but it appears to the Tribunal that attempting to repair the vehicle's engine yet again, after a major malfunction, creates a high risk for further engine failure and dissatisfaction on the part of the Applicant. In the Tribunal's view the only reasonable way to remedy the defect which has occurred is to replace the engine with a genuine GM remanufactured engine as suggested by Mr Patel.

ORDER:

84. The Tribunal makes the following order:

84.1 The Respondent is hereby ordered to replace the Applicant's vehicle engine with a genuine General Motors remanufactured engine within three months from the date of this judgment.

84.2 No order as to costs.

Handed down on this 5th day of December 2014

Adv HFN Sephoti

Presiding Member

Ms P. Beck (Member) and Adv. J Simpson (Member) concurring.

Authorised for issue by the National Consumer Tribunal
Case number NCT/13959/2014/75(1)(b)
Date 2014/12/08
ccyy/mm/dd

National Consumer Tribunal
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