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

Case Number: **NCT/269487/2023/73(2)(b)**

In the matter between:

**NATIONAL CONSUMER COMMISSION**

APPLICANT

and

**BNA MOTORS (PTY) LTD**

RESPONDENT

**Coram:**

Mr CJ Ntsoane - Presiding Tribunal Member Dr M

Peenze - Tribunal Member

Ms P Manzi - Tribunal Member

Date of Hearing - 20 July 2023 Date of

Judgment - 4 January 2024

**JUDGMENT AND REASONS**

**THE PARTIES**

1. The Applicant is the National Consumer Commission (the applicant), an organ of the state established in terms of section 85 (1) of the Consumer Protection Act, 2008 (the CPA), having its registered address at SABS, 1[...] D[...]

Road, G[...], Pretoria.

2. At the hearing, the applicant was represented by Ms Imrhan Magoro.
3. The complainant is Emmanuel Seekoei, an adult male consumer in terms of the CPA (the consumer).
4. The Respondent is BNA Motors (Pty) Ltd, a private company duly registered in terms of the company laws of the Republic of South Africa (the respondent). The respondent's registered business address is 4[...] V[...] Road, P[...], Cape Town.
5. There was no appearance by the respondent at the hearing.

## **JURISDICTION**

6. Section 27(1)(a)(ii) of the National Credit Act, 2005 (the NCA) empowers the Tribunal or a Tribunal member acting alone to adjudicate whether allegations of prohibited conduct have occurred and, if so, to impose a remedy provided in the NCA. The Tribunal, therefore, has jurisdiction to hear this application.

## **TERMINOLOGY**

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

## **APPLICATION TYPE**

8. The applicant brought this application to the Tribunal in terms of section 73(2)(b), which empowers the applicant to refer a matter to the Tribunal in the circumstances contemplated in section 73(1)(c)(iii).
9. Section 73 (1) (c) (iii) provides that: *"After concluding an investigation into a complaint, the commission may if the commission believes that a person has engaged in prohibited conduct, make a referral in accordance with subsection (2)."*

## **CONSIDERATION OF THE EVIDENCE ON AN UNOPPOSED BASIS**

10. On 3 May 2023, the applicant filed this application with the Tribunal. The application was served on the respondent by email on 3 May 2023. The Tribunal Registrar issued a notice of complete filing to the parties on 5 May 2023. A notice of set down was issued to all the parties on 8 June 2023.
11. In terms of rule 13 of the Tribunal Rules,<sup>1</sup> the respondent had to respond within 15 business days by serving an answering affidavit on the applicant. However, the respondent failed to do so.
12. The Tribunal was satisfied that the application was adequately served on the respondent. As the respondent failed to file an answering affidavit, the matter was considered on an unopposed basis.
13. In terms of rule 13 (5) of the Tribunal's rules, any fact or allegation in the application or referral not specifically denied or admitted in an answering affidavit will be deemed to have been admitted.

## **BACKGROUND AND FACTS**

14. On 29 October 2020, the consumer enquired about a 2012 Volkswagen Polo Comfortline (the vehicle) offered for sale by the respondent. The respondent's salesperson, Carrey Manuel, advised the consumer that the vehicle sale price was R160 000.00 and it had travelled 145 000 km, which was confirmed by email.
15. The consumer obtained finance from ABSA Assets & Vehicle Finance to purchase the vehicle on 3 November 2020.

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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).

16. On 8 November 2020, approximately five days after taking delivery of the vehicle, the consumer returned it to the respondent due to an expired licence disc. He was advised to collect the vehicle on 19 November 2020.
17. Upon collecting the vehicle, the consumer realised that the vehicle had a mileage of 190 000 km. He raised the discrepancy with the respondent but in vain.
18. In December 2020, the consumer also discovered that the vehicle had the following electrical and mechanical defects:
  - 18.1. The vehicle made a terrible sound when turning left or right;
  - 18.2. The headlights had issues;
  - 18.3. The vehicle failed to start on numerous occasions; and
  - 18.4. The vehicle could move while the hand brake was engaged.
19. On 16 December 2020, the vehicle refused to start. The consumer contacted his emergency insurer, who used a device to boost the battery and start the vehicle. The respondent was advised on this issue. The following day the problem persisted. The consumer bought a new battery, but the vehicle only started for a few days.
20. On 21 December 2020, the consumer contacted the respondent to return the vehicle. It eventually turned out that the fault was not the battery but the vehicle itself.
21. On 7 January 2021, the consumer expressed dissatisfaction with the respondent's services and requested the respondent to replace the vehicle. The consumer has still to receive a response from the respondent.
22. On 4 February 2021, the consumer referred the matter to the Motor Industry Ombudsman of South Africa. On 16 March 2021, the Ombudsman

recommended that the respondent cancel the purchase agreement within fifteen (15) working days of receiving the Ombudsman's correspondence. The respondent did not comply with the recommendation and resorted to fixing the vehicle.

23. Consequently, the applicant formed a reasonable suspicion that the respondent had contravened the CPA and directed one of its investigators, Velaphi Mabuza (the investigator), to investigate the complaint. A copy of the investigator's section 88(1) Directive is attached as annexure "G7" to the investigation report (annexure "FA1") in the founding papers. The investigator concluded that the respondent contravened various provisions of the CPA.
24. As redress, the consumer wants the transaction cancelled and to be refunded the purchase price.

## **RELEVANT LEGAL PROVISIONS**

25. The Tribunal sets out the relevant legal provisions of the CPA below.

25.1. Section 55(2)(a) to (c) provides that:

*"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, considering the use to which they would normally be put and to all the surrounding circumstances of their supply".*

25.2. Section 56(2)(a) provides that:

*"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,*
- b. refund to the consumer the price paid by the consumer for the goods."*

25.3. Section 41(1)(a) provides that:

*"In relation to the marketing of any goods or services, the supplier must not, by words or conduct –*

- a. directly or indirectly express or imply a false, misleading, or deceptive representation concerning a material fact to a consumer."*

25.4. Section 29(a) provides that:

*"A producer, importer, distributor, retailer, or service provider must not market any goods or services –*

- a. in a manner that is reasonably likely to imply a false or misleading representation concerning those goods or services, as contemplated in section 41."*

## **EVALUATION**

26. As already alluded to, the respondent did not file an answering affidavit opposing this application. In terms of rule 13 (5), the facts and allegations put up by the applicant must be deemed to have been admitted, as they have not been denied or admitted in an answering affidavit. That being so, the Tribunal finds that the respondent contravened the provisions of section 55(2) (a) to

(c) because it supplied the consumer with a vehicle that failed to meet the requirements and standards contemplated in that section and that such contraventions constitute prohibited conduct.

27. The evidence reveals that the consumer tried to engage with the respondent to resolve the problems encountered with the vehicle for the latter to make good in terms of the CPA. The consumer did not receive a response from the respondent to his request on 7 January 2021 in terms of section 56 (2) (a) to replace the vehicle. The respondent also failed to comply with the Ombudsman's recommendation on 16 March 2021 that the respondent cancel the purchase agreement. The Tribunal is satisfied that the consumer elected a refund in exchange for the return of the vehicle in terms of section 56 (2) (b). The election, therefore, was made within the six-month period as contemplated in section 56 (2).
28. Even if the consumer did not communicate its election to receive a refund to the respondent within six months after the delivery of the vehicle, in terms of section 56 (2) (b), the Tribunal can order the refund the consumer seeks in terms of section 150 of the NCA. Section 150 of the NCA empowers the Tribunal to make an appropriate order concerning prohibited or required conduct under the NCA or the CPA. Clearly, the respondent denied the consumer his rights under section 55. In the Tribunal's view, to give effect to this right, an appropriate order is an order that the respondent refunds the consumer the purchase price paid for the vehicle. The vehicle is not fit for purpose and does not meet the standards contemplated in section 55 (2).
29. Considering the other conclusions reached in the investigation report, it is the Tribunal's view that they cannot be faulted. Therefore, the Tribunal agrees that the respondent contravened sections 29 (1) (a) and (c), 41 (1) (a) and (c), and 56 (2) (a) and (b), and that these contraventions should be declared prohibited

conduct.

## **CONSIDERATION OF AN ADMINISTRATIVE FINE**

30. The applicant asks the Tribunal to impose an administrative fine on the respondent. In terms of section 151 (1) of the NCA, an administrative fine may be imposed in respect of prohibited or required conduct in terms of the CPA. Such a fine may not exceed the greater of 10% of the respondent's annual turnover during the preceding financial year or R1 000 000.00.

31. Section 151 (3) outlines the factors the Tribunal must consider when determining an appropriate fine. The Tribunal deals with each of these factors under the sub- headings below.

### **31.1. The nature, duration, gravity, and extent of the contravention**

The respondent sold a defective vehicle to the consumer and disregarded the consumer's rights under the CPA. The transaction in question occurred in November 2020. Various attempts were made to resolve the matter, with the respondent refusing to accept the MIOSA recommendation to cancel the purchase agreement and refund the purchase price to the consumer.

### **31.2. Any loss or damage suffered because of the contravention.**

As a result of the respondent's actions, the consumer has since November 2020 been out-of-pocket for R160 000.00, which is the purchase price he paid for the vehicle. The consumer has not been able to derive any benefit from the use of the vehicle. The respondent's actions are made worse because the consumer has been saddled with monthly instalments of R3 194.57 to Absa Bank, who financed the purchase of the vehicle. In addition, the consumer incurred



insurance premiums of R4 000.00.

31.3. The behaviour of the respondent

The respondent refused to comply with the Ombudsman's recommendation and ignored the present application to the Tribunal.

31.4. The market circumstances in which the contravention took place

Consumers in the South African market are generally vulnerable concerning suppliers, which is why protection has been given to them under the CPA.

31.5. The level of profit derived from the contravention

The Tribunal is unable to make a finding concerning the level of profit derived from the respondent's contravention. However, the respondent benefited from the purchase price the consumer paid to the respondent for a vehicle he used for less than a month.

31.6. The degree to which the respondent co-operated with the NCC

The respondent appears to have cooperated with the NCC's investigator to an extent.

31.7. Whether the respondent has previously been found in contravention of the CPA

There is no evidence that the respondent previously contravened the provisions of the CPA.

32. Considering the above factors, the Tribunal finds that an administrative fine

of R100 000.00 is appropriate.

## **ORDER**

33. Accordingly, the Tribunal makes the following order:

33.1. The respondent has contravened sections 29(a), 41(1) (a), 55 (2) (a) to (c), and 56 (2) (a) and (b);

33.2. The above contraventions are declared as prohibited conduct;

33.3. The respondent is to refund the consumer, Emmanuel Seekoei, the purchase price of R160 000.00 (one hundred and sixty thousand Rand) that he paid for the vehicle. This payment is to be made within 15 business days from the date of the issuance of this judgment into the consumer's selected bank account;

33.4. The consumer is to make the vehicle available to the respondent to collect at its own cost immediately after the payment in the preceding paragraph has been made;

33.5. The respondent is to pay an administrative fine of R100 000.00 (one hundred thousand Rand) within 30 business days from the date of the issuance of this judgment into the bank account of the National Revenue Fund, the details of which are as follows:

Bank: The Standard Bank of South Africa

Account holder: Department of Trade and Industry

Branch name: S[...]

Branch code: 0[...]

Account number 3[...]

Reference NCT/269487/2023/73(2)(b), with the respondent's name used

as a reference; and

33.6. There is no order as to costs.

**Mr CJ Ntsoane**  
**Presiding Tribunal Member**