

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

Case number: **NCT/324648/2024/75(1)(b)**

In the matter between:

SYLVESTER HENRY BARTES

APPLICANT

and

**HYUNDAI AUTOMOTIVE SOUTH AFRICA (PTY) LTD
T/A HYUNDAI N1 CITY**

RESPONDENT

Coram:

Dr A Potwana - Presiding Tribunal member

Ms P Manzi-Ntshingila - Tribunal member

Adv C Sassman - Tribunal member

Date of hearing - 10 October 2024

Date of judgment - 11 October 2024

JUDGMENT AND REASONS

THE PARTIES

1. The applicant is Sylvester Henry Bartes (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 represented himself.
2. The respondent is Hyundai Automotive South Africa (Pty) Ltd, trading as Hyundai N1 City (the respondent). The respondent is a retailer and supplier of goods, as defined in section 1 of the CPA and sells vehicles to consumers in the ordinary course of its business. At the hearing, Ms Lynn Strydom, the in-house counsel for the Motus Group, represented the respondent.

TERMINOLOGY

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

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. The applicant alleges that the respondent contravened his rights in terms of the CPA by misrepresenting the model of the vehicle sold to him.

BACKGROUND

5. On 30 August 2022, the applicant concluded a sale agreement with the respondent to purchase a pre-owned 3 series (G20) 320i M Mzansi edition BMW (the vehicle) for R667 013.03. The price included a delivery fee, tracker fee, registration fee and VAT. The applicant paid the respondent a deposit of R50 000.00, and MFC¹ financed the remainder of the purchase price.
6. On 28 November 2022, the vehicle's carbon front splitter was allegedly damaged in the applicant's driveway. The applicant's appointed panel beater sourced a quotation for the part replacement from BMW South Africa. On 14 December 2022, an agent from BMW South Africa emailed the applicant that the vehicle in question was not a Mzansi edition BMW. The applicant alleges that he then discovered that some of the parts on the vehicle were also not original BMW parts. The applicant avers that the respondent misrepresented the vehicle model to him and provided him with an inferior model to the one he thought he was purchasing.
7. The applicant is seeking relief and the imposition of an administrative penalty on the respondent. The respondent opposes the application, and while it does not dispute the fact that the vehicle is not a Mzansi edition model, it objects to the relief the applicant is seeking. The respondent contends that the relief the applicant is seeking is unreasonable and will amount to an unjustified enrichment.

THE APPLICANT'S SUBMISSIONS

8. The applicant submitted that he feels his rights as a consumer have been contravened by the respondent's conduct or lack thereof. He does not believe that the orders he is

¹ The Motor Finance Corporation, a division of Nedbank Limited.

seeking are unreasonable. As a consumer, the applicant did all that he was required to do but the respondent did not comply with its contractual obligations. The applicant set out to purchase and own a particular luxury vehicle and cannot be expected to be satisfied with anything less. Some of the parts on the vehicle are not original BMW parts and are of inferior quality. The respondent should have known the vehicle it sold was not a Mzansi edition model, as a simple vehicle identification number check would have revealed its correct model name. The respondent presents two different versions of how the vehicle was mistakenly identified. In one version, it says that it was a bona fide administration error. The second version states that the vehicle was mistakenly identified because its features resemble that of the Mzansi edition.

9. The applicant called his spouse, Ms Blanche De Vries-Bartes (the witness), to testify to the vehicle's insured value. The witness testified that her insurance broker insured the vehicle under her insurance policy for R863 692.00. The vehicle was insured as a Mzansi edition BMW, and although the purchase price was less than the insured value, she and the applicant had no reason to query the values. The witness further confirmed that she paid the deposit of R50 000.00 from her bank account before the applicant took delivery of the vehicle on 1 September 2022.
10. On 7 February 2022, the applicant sourced a quotation from BMW South Africa for upgrading the vehicle to a Mzansi edition model. The upgrade would require installing and replacing some thirty-one items on the vehicle and would have cost R352 833.70 at that time. The applicant requests an order for the respondent to at least cover a portion of this expense. In the alternative, the applicant seeks an order to cancel the agreement between himself and the respondent, including the return of his deposit with interest. He further seeks an order to reimburse his legal costs and the imposition of an administrative penalty on the respondent in either order.

THE RESPONDENT'S SUBMISSIONS

11. The respondent submitted that it does not dispute that the vehicle sold to the applicant is not a Mzansi edition BMW. In May 2022, an inventory was re-organised within the respondent's dealerships. The respondent acquired the applicant's vehicle, and during a stock entry process, an incorrect stock code was mistakenly applied, indicating that the vehicle was a Mzansi limited edition vehicle.
12. The respondent is not primarily engaged in trading BMW vehicles and had no prior knowledge of the vehicle's history, so the error went unnoticed. Consequently, the

respondent and its personnel believed the vehicle to be a Mzansi edition model and marketed it that way.

13. Despite the error, the applicant was not charged for a Mzansi edition BMW. The cost was in line with the lower-level BMW model provided to him, and he was not financially prejudiced when purchasing the vehicle. A limited edition Mzansi model BMW would have cost the applicant approximately R100 000.00 more than he paid.
14. The relief that the applicant is seeking is unreasonable. For the respondent to pay for the upgrades to the vehicle would amount to an unjustified enrichment since the applicant was not charged for a Mzansi model BMW. Furthermore, the applicant's request to cancel the sale agreement with a return of his deposit, with interest, would be unjustified since he had full use of the vehicle, which has depreciated in value by now.
15. The applicant has proposed two options to resolve the matter, but both are unreasonable. The respondent proposed two options to the applicant to resolve the matter. The first included the cancellation of the sale agreement and return of the vehicle, leaving the applicant liable for the vehicle's usage and depreciation and the charges due to MFC. The second option included the respondent replacing the applicant's vehicle with the correct model subject to the applicant being liable for the same conditions and fees as in the first option and paying the difference in value of approximately R100 000.00. The applicant has declined both options, and the respondent remains unsure of what the applicant wants. Therefore, the only remedy for the parties is for the status quo to remain.
16. The respondent's proposals are in line with the South African Automotive Industry Code of Conduct, the CPA, and the agreement concluded between the parties. They are fair and reasonable and do not resort to any form of penalty or prejudice that disadvantages the applicant.
17. The respondent did not contravene the provisions of the CPA. The respondent denies that it fraudulently or negligently misrepresented the vehicle's model, and it would be inappropriate for the Tribunal to make the orders sought by the applicant. The evidence unambiguously shows that the applicant was not overcharged for the vehicle but paid the appropriate price for the vehicle he received. Therefore, the applicant is not entitled to the relief sought. The respondent prays that this application be dismissed.

APPLICABLE SECTIONS OF THE CPA

18. Section 29(a) states that a producer, importer, distributor, retailer or service provider must not market any goods or services in a manner that is reasonably likely to imply a false or misleading representation concerning those goods or services, as contemplated in section 41.
19. Section 29(b)(v) states that a producer, importer, distributor, retailer or service provider must not market any goods or services in a manner that is misleading, fraudulent or deceptive, in any way, in respect of any material aspect of the goods or services.
20. Section 41(1)(a) states that in relation to marketing any goods or services, the supplier must not, by words or conduct, directly or indirectly express or imply a false, misleading or deceptive representation concerning a material fact to a consumer. Section 41(1)(c) further states that the supplier must not, by words or conduct, fail to correct an apparent misapprehension on the part of the consumer, amounting to a false, misleading or deceptive representation.

CONSIDERATION OF THE EVIDENCE

21. The parties do not dispute that the vehicle sold to the applicant is not the vehicle model he requested from the respondent and that the respondent provided the incorrect vehicle model. Whether the respondent acted intentionally or negligently in doing so is not a question before the Tribunal and, therefore, not one which requires consideration or an answer. The two questions before the Tribunal are whether the respondent's conduct, resulted in a contravention of its statutory obligations under the CPA and, if so, what the appropriate relief for the applicant would be.
22. Section 41(3)(b)(iii) states that it is a false, misleading or deceptive representation to falsely state or, imply, or fail to correct a consumer's misapprehension that any goods or services are of a particular standard, quality, grade, style or model. From the evidence before the Tribunal, the respondent clearly misled the applicant in its words and conduct by misrepresenting the vehicle as a Mzansi edition BMW. By their words and conduct, the respondent failed to correct the applicant's misapprehension regarding this material aspect of the vehicle he was purchasing. In doing so, the Tribunal finds that the respondent has contravened sections 29(a), 29(b)(v), 41(1)(a), and 41(1)(c). The respondent has, therefore, engaged in prohibited conduct, and the applicant is entitled to relief.

23. In determining the appropriate relief in this matter, the Tribunal considered that the evidence indicates that the applicant was not charged for a Mzansi edition BMW. Holding the respondent accountable for upgrading the vehicle to that level would be unreasonable and would unjustly enrich the applicant. At the hearing, the applicant conveyed his dissatisfaction with the purchase of a vehicle inferior to the luxury model he intended to purchase from the respondent.
24. The rights afforded to consumers in terms of the CPA are there to protect the consumer. An infringement of those rights could have serious financial consequences for a consumer. Section 4(2)(b)(ii) requires the Tribunal to make appropriate orders to give practical effect to a consumer's right of access to redress, which includes making any innovative order that better advances, protects, promotes and assures the realisation by consumers of their rights in terms of the CPA. Section 150(i) of the National Credit Act 34 of 2005 (NCA) further empowers the Tribunal to make any appropriate order required to give effect to a consumer's right in terms of the NCA or CPA.
25. In applying the Tribunal's mandate in terms of its governing legislation and restoring the applicant's status to what it was before the transaction occurred, the Tribunal finds that it would be appropriate in this instance to cancel the sale agreement concluded between the parties and for the applicant to return the vehicle to the respondent for a full refund.

CONCLUSION

26. The Tribunal finds that by misrepresenting the vehicle sold to the applicant and further failing to correct his misapprehension regarding a material aspect of the vehicle, the respondent has contravened sections 29(a), 29(b)(v), 41(1)(a), and 41(1)(c). The respondent's conduct amounts to prohibited conduct and has caused the applicant financial prejudice for which he is entitled to relief.

ORDER

27. Accordingly, the Tribunal makes the following order:

27.1 The respondent has contravened sections 29(a), 29(b)(v), 41(1)(a), and 41(1)(c) of the CPA;

27.2 The respondent's contravention of sections 29(a), 29(b)(v), 41(1)(a), and 41(1)(c) of the CPA is declared prohibited conduct;

27.3 The sale agreement concluded between the parties in respect of the vehicle is cancelled;

27.4 The respondent is ordered to, within ten business days of the issuing of this judgment, collect the vehicle in question from the applicant at its own expense and refund the applicant R667 013.03 (six hundred and sixty-seven thousand and thirteen rand and three cents);

27.5 The applicant is ordered to surrender the vehicle to the respondent upon collection thereof and cede his rights, title and interest in respect of the vehicle to the respondent; and

27.6 There is no cost order.

(signed)

Adv C Sassman

Tribunal member

Presiding Tribunal member Dr A Potwana and Tribunal member Ms P Manzi Ntshingila concur.

