

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

Case number: **NCT/273890/2023/75(1)(b)**

In the matter between:

EMMA JANE ATTWELL

APPLICANT

and

WHEELER DEALER AUTO SALES CC

RESPONDENT

Coram:

Ms N Maseti: Presiding Tribunal member

Ms Z Ntuli: Tribunal member

Mr S Hockey: Tribunal member

Date of hearing: 16 May 2025

Date of judgment: 6 August 2025

JUDGMENT AND REASONS

THE PARTIES

1. The applicant is Emma Jane Attwell (the applicant), a consumer as defined in section 1 of the Consumer Protection Act 68 of 2008 (the CPA). At the hearing, the applicant was represented by Gerhard van der Merwe of Trudie Broekman Attorneys.
2. The respondent is Wheeler Dealer Auto Sales CC (the respondent), a close corporation incorporated in terms of the laws of the Republic of South Africa under registration number 2009/179916/23. The respondent is a supplier, as defined in section 1 of the CPA. At the hearing, the respondent was represented by Adv. Barclay Beuthin, instructed by Werner Boucher Attorneys.

TERMINOLOGY

3. A reference to a section in this judgment refers to a section of the CPA. A reference to a rule refers to the rules of the National Consumer Tribunal¹ (the rules).

APPLICATION TYPE

4. The applicant referred this matter to the National Consumer Tribunal (the Tribunal) in terms of section 75(1)(b). The applicant initially referred his complaint to the National Consumer Commission (the NCC), which issued a non-referral notice. If the NCC issues a non-referral notice, section 75(1)(b) allows a complainant to refer the complaint directly to the Tribunal, with leave of the Tribunal.

ISSUE TO BE DECIDED

5. The Tribunal must decide whether the respondent engaged in prohibited conduct and whether the relief sought should be granted if the Tribunal finds in favour of the applicant.

RELIEF SOUGHT

6. The applicant seeks an order (a) declaring that the conduct of the respondent contravenes the provisions of the CPA, (b) declaring that the contraventions constitute prohibited conduct, (c) that the respondent be held liable, in terms of section 61, for the difference between the total repair costs and the warranty payout, being the sum of R32 225.75, together with interest thereon at the legal rate, payable within seven days of judgment, (d) in the event the Tribunal finds prohibited conduct, that she be granted leave in terms of section 115(2) to approach a court of competent jurisdiction for the recovery of the said damages, (e) if the Tribunal cannot adjudicate the claims under section 61, that the purchase price be reduced on the basis that it was unfair, unreasonable and unjust given the defects in the vehicle, (f) imposing an administrative fine on the respondent, and (g) that the respondent be ordered to pay her legal costs on an attorney and own client scale.

BACKGROUND

7. According to the applicant, she purchased an Opel Vivaro 1.9 CDTI (the vehicle) from the respondent on 11 March 2022. Mr Nicholas Grobler (Mr Grobler), a representative of the

¹ 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).

respondent, facilitated the sale. The transaction was financed through ABSA. The applicant collected the vehicle on 12 March 2022. Within a week of collection, the vehicle experienced a mechanical failure and did not start. Mr Grobler advised the applicant to lodge a claim under the warranty administered by Innovation Group (the contractual warranty). It turned out that the contractual warranty had not yet been activated. The parties agreed that the applicant take the vehicle to Supa Quick at the respondent's expense. Supa Quick repaired the faulty alternator on 29 March 2022. The applicant settled the repair invoice and was duly refunded by the respondent.

8. The applicant submitted that the vehicle performed satisfactorily following the repair. Although the applicant identified other issues, namely a faulty hazard light switch, malfunctioning back door handles, and windows that were difficult to operate, these were not reported to the respondent as they were minor and did not materially affect her use of the vehicle. Towards the end of June 2022, the applicant detected an oil leak. Suspecting a minor fault, she believed it could be rectified during a routine service. During this time, she had to relocate to her parents' residence due to illness, having been diagnosed with cancer in April 2022. She booked the vehicle in for a service at ST Motors for 26 July 2022 and requested that the cause of the oil leak be inspected as well.
9. When collecting the vehicle that same day, she was advised that the oil leak was not serious and that the vehicle was safe to drive. However, approximately 10 kilometres from ST Motors, the vehicle lost power. It was subsequently towed back to ST Motors. On 29 July 2022, the applicant notified the respondent of the breakdown. Mr Grobler instructed her to claim under the contractual warranty but did not offer to inspect or repair the vehicle. ST Motors requested the vehicle's service history to process the contractual warranty claim. Repeated requests by the applicant to the respondent to obtain the service history were unsuccessful. The applicant stated that this means the respondent had misrepresented the vehicle by advertising it as having a full-service history on its website. She said that on 12 March 2022, Mr Grobler told her that the service history was digital and would be obtained for her. On 15 March 2022, Mr Grobler informed her that Headzone had done all the servicing, and he would get the invoices for her.
10. The delay in obtaining the history impeded the lodging of the contractual warranty claim. On 10 October 2022, the applicant lodged a complaint with the Retail Motor Industry Organisation (RMI) against ST Motors and the respondent. Following RMI's directive, ST Motors submitted a contractual warranty claim, relying on invoices for a pre-sale service by the respondent and the service performed on 26 July 2022. ST Motors obtained authorisation under the contractual warranty to conduct a strip-and-quote, which revealed a blown head gasket and a cracked engine block. The engine was also sent to Headzone, which indicated that the engine was irreparable. ST Motors advised that there was grease on the screws, indicating that prior work

had been done on the engine, and whoever had worked on it knew that the engine was faulty. The applicant alleges that whoever opened the engine, closed it up and then tried to rid themselves of the vehicle as soon as possible by selling it soon thereafter. A fault report issued by ST Motors also indicated that the thermostat was faulty as it stuck from time to time, which may explain why the vehicle failed to trigger a warning light during overheating.

11. On 29 August 2022, the applicant notified Mr Grobler of the findings and submitted photographs via WhatsApp. In his response, Mr Grobler apologised for the delayed response and stated that, following consultation with his mechanic, the crack in the engine block was most likely caused by the recent overheating incident and was not a pre-existing defect. He stated that a crack of that nature would have rendered the vehicle inoperable, caused significant oil leakage, and resulted in a loss of compression. He declined to comment on any prior repair work and characterised the applicant's mechanic's opinion as broad and vague. Apart from enquiring whether a claim had been lodged with the contractual warranty, Mr Grobler again did not offer to inspect or repair the vehicle or take it back for a refund or assist in any way, despite the applicant's request for assistance.
12. ST Motors issued a quotation dated 12 October 2022 for R127 358.75. Subsequently, the contractual warranty authorised R40 000.00 for the repairs on 16 November 2022. The applicant moved the vehicle to LDR for an alternative quotation but was informed that LDR was not an approved supplier under the contractual warranty. She then took the vehicle to Car Service City, which confirmed the engine damage and issued a quotation of R73 225.75 on 11 January 2023. After applying the R40 000.00 contractual warranty contribution, a shortfall of R32 225.75 remained. The applicant requested the respondent to cover the shortfall, but her request was refused. The applicant complained to the Motor Industry Ombudsman of South Africa (MIOSA) on 13 October 2022. On 31 October 2022, MIOSA stated that it could not support the applicant's complaint because third-party repairs had voided the implied warranty under the CPA.
13. The applicant submitted that she ultimately settled the shortfall with financial assistance from her father, and the vehicle was released. On 31 January 2023, she complained to the NCC, which issued a notice of non-referral on 24 March 2023, endorsing MIOSA's conclusion. Dissatisfied with the outcome, she referred the matter to the Tribunal. The applicant alleged that the respondent is liable for the repair costs, as the damage constituted a defect within the meaning of section 53. According to her, the vehicle failed to meet the standards of quality, performance, and durability as contemplated in section 55(2).
14. She alleged that the respondent failed to remedy the defect which manifested within six months of delivery, in breach of section 56(2). She maintained that even if the contractual warranty was

found to be voided by the Tribunal, the respondent remained liable under section 61. The applicant submitted that MIOSA and the NCC misconstrued the CPA and failed to give proper effect to the implied warranty under section 56, as the vehicle had not been altered. She also submitted that the purchase price was unfair, unreasonable, and unjust considering the vehicle's defects, thus invoking section 48.

15. The respondent opposed the application, denying any liability under the CPA. In its answering affidavit, the respondent disputed that the vehicle was advertised online or as having a full-service history. It claimed that the applicant was aware of the absence of a service history at the time of purchase and proceeded to conclude the sale. According to the respondent, attempts were made to retrieve the records from the agents, which were unsuccessful due to the POPI Act² constraints. The respondent conceded that the alternator failure was reported and repaired at the respondent's expense. No further contact was received from the applicant until 29 August 2022, when the applicant notified it of the breakdown and provided photographs. The respondent contended that the applicant failed to report the oil leak and instead referred the vehicle to a third-party repairer without giving the respondent an opportunity to inspect or remedy the defect, despite the implied warranty still being active.
16. Further, the respondent stated that the applicant authorised a third party to completely strip the vehicle without prior notice to the respondent. The respondent averred that the applicant ought to have immediately notified it when the oil leak became apparent to enable the respondent to assess the cause before the engine was damaged. Instead, the applicant ignored the oil leak and drove the vehicle until the engine block cracked. It said the applicant also ignored a warning recorded in the 26 July 2022 ST Motors invoice referencing a "big engine oil leak". According to the respondent, the applicant's continued operation of the vehicle despite these warnings amounted to gross negligence. The respondent maintained that the vehicle was sold in perfect condition and driven for approximately 10 000 kilometres without complaint. The respondent further denied selling the vehicle with a defective thermostat. In its view, if a thermostat defect had existed, the vehicle would have exhibited overheating symptoms earlier. It contended that the cracked engine block and blown gasket were caused by extended operation without coolant, which was grossly negligent.
17. The respondent asserted that the applicant's engagement of a third-party repairer rendered the implied warranty under the CPA void, which excludes the respondent's liability. The respondent also stated that the applicant made negative remarks about the respondent on social media despite adverse findings from both MIOSA and the NCC. The respondent further denied receiving a complaint from RMI but acknowledged the referrals to MIOSA and the NCC.

² Protection of Personal Information Act 4 of 2013.

Consequently, the respondent disputed that it sold a defective vehicle and that it was liable. The respondent also denied misrepresentation and that the applicant is entitled to a price reduction, submitting that the vehicle was sold at market value and pursuant to the terms the applicant agreed to.

18. Leave to refer the matter to the Tribunal was granted on 6 November 2024. The applicant initially cited ABSA as the second respondent but subsequently withdrew the claims against it. This matter was heard virtually on 16 May 2025 via the MS Teams platform.

THE APPLICANT'S SUBMISSIONS AT THE HEARING

19. At the commencement of the hearing, the applicant sought leave to introduce additional material to clarify certain points in dispute, comprising of a document setting out a chronology of events for the Tribunal's convenience, a WhatsApp voice note of a conversation with Mr Grobler, a WhatsApp message between the applicant and her mother, and screenshots of the online advertisement for the vehicle. The applicant contended that this information already formed part of the applicant's founding and replying affidavits and had been sent to the respondent. The respondent did not object, and the Tribunal accordingly allowed the applicant to introduce the material during the witness testimony for clarification purposes.
20. The applicant testified during the hearing, and her evidence, largely traversed in the factual background, was supplemented by oral submissions. The key issues arising from her evidence during the hearing may be summarised as follows:
 - 20.1 The applicant averred that the respondent advertised the vehicle as having a full-service history on both the respondent's website and Auto Trader's. She said that at no stage did the respondent tell her the vehicle had no service history or that it could not be obtained due to the POPI Act. She averred that the respondent did not disclose this material fact about the vehicle and that not even the operating manual was provided. She said the vehicle history was also necessary as she was attempting to resell it.
 - 20.2 The applicant reiterated that she notified Mr Grobler about the vehicle defect on 29 July 2022, well before the strip and quote, and again on 29 August 2022 when she gave him the outcome of the diagnostic inspection, with photographs. The applicant reiterated that the respondent merely told her to claim under the contractual warranty and failed to avail itself of the opportunity to inspect or repair the vehicle. The applicant said she acted on the respondent's instruction.

- 20.3 The applicant denied that ST Motors or any third party carried out repairs. ST Motors only performed a lube service on 26 July 2022 and a subsequent strip-and-quote at the end of November 2022. She asserted that the strip-and-quote was done according to the direction from the contractual warranty the respondent referred her to, and that the vehicle was not altered in any way. She contended that the implied warranty under section 56(1) could only be voided if the goods were altered contrary to instructions or after they left the control of the supplier.
- 20.4 In her denial of gross negligence, the applicant submitted that she ceased operating the vehicle at the end of June 2022 upon detecting the oil leak and only drove it again on 26 July 2022 to ST Motors for a scheduled service. At the time, she was undergoing chemotherapy and did not need to drive extensively. Furthermore, she maintained that no dashboard warning light illuminated as expected to alert her that the vehicle was overheating. Additionally, ST Motors had expressly advised her that the vehicle was safe to operate, and as a layperson, she had no reason to doubt their advice.
- 20.5 The applicant testified that, even after repairs by Car Service City, the vehicle continued to experience failures, including entering limp mode, engine stalling, and electrical and brake faults. Subsequent repairs, such as injector and battery replacement, were done at her own cost. Eventually, she was advised that the vehicle was uneconomical to repair. Although a second opinion was sought and further repairs attempted, the defects persist. The applicant submitted that this indicates that the vehicle had pre-existing defects when the respondent sold it to her.
- 20.6 The applicant objected to the respondent's reliance on section 56(3) and the argument that section 61 was not applicable, as these had not been pleaded in the answering affidavit. The applicant contended that these constituted new defences raised in contravention of rule 13(4)(d), which obliges a respondent to set out all material facts and points of law relied upon in the answering affidavit. The applicant argued that as she was denied adequate opportunity to address these defences, they fall to be dismissed.
- 20.7 The applicant denied that section 56(3) applies and that the defect was subject to the three months contemplated therein, stating that this section does not have the effect of leaving a consumer without a remedy under section 56(2). The applicant argued that the respondent is liable under the six-month implied warranty. The applicant further argued that section 61 applied where the implied warranty could no longer be invoked, as the CPA aimed to avoid depriving the consumer of a remedy. In such cases, the applicant asserted, a consumer is entitled to claim economic losses in terms of section 61.

THE RESPONDENT'S SUBMISSIONS AT THE HEARING

21. At the commencement of the hearing, the respondent sought leave to introduce certain points in limine which, if upheld, could be dispositive of the applicant's case in its view. The respondent submitted that although these points had not been raised in its answering affidavit, they were, in any event, apparent from the facts before the Tribunal. The Tribunal directed the respondent to raise any such points during its oral submissions.

22. The respondent's oral submission focused on the new points that the respondent considered fatal to the applicant's case, arguing for its dismissal. Although the respondent had indicated its intention to call Mr Grobler to testify, that did not materialise. The salient issues arising from the respondent's submissions may be summarised as follows:

22.1 The respondent submitted that the applicant's reliance on section 61 as the basis for the application or relief sought was misdirected and a clear misinterpretation of the section. The respondent averred that section 61 provides for strict liability, which arises in circumstances where there is harm as a consequence of, for instance, defective goods. The harm contemplated is limited to illness or death of, or injury to, a natural person, loss of or physical property damage, or economic loss arising from such harm. Unlike sections 55 and 56, which apply when goods are defective, section 61 applies when such defective goods have caused the type of harm identified in the section. It is about the external consequences of goods supplied, not the goods themselves. The respondent submitted that the applicant, being aware that she had no case under section 56, sought to rely on section 61. In its view, the applicant's claim is purely that of damages over which the Tribunal has no authority.

22.2 The respondent further submitted that even if sections 55 and 56 were to be applied, based on the chronology of events submitted, the applicant has no recourse under the CPA as the vehicle was collected by the applicant on 12 March 2022 and experienced a defect within one week, which the respondent repaired at its expense on 29 March 2022 in terms of its obligations under section 56(2). The applicant said she noticed the oil leak at the end of June 2022 but did not report it to the respondent. The applicant claims the vehicle broke down on 26 July 2022 and notified the respondent on 29 July 2022. The engine damage was reported on 29 August 2022. The respondent argued that these further defects arose more than three months after the initial repair and do not fall within its liability.

22.3 The respondent submitted that in terms of section 56(3), where a supplier repairs goods or any component thereof, and within three months after that repair the failure, defect or

unsafe feature is not remedied, or a further failure, defect or unsafe feature is discovered, the supplier is obliged to either (a) replace the goods or (b) refund the consumer the price paid. The respondent contended that it repaired the vehicle following the applicant's report of a faulty alternator, thereby discharging its obligations under section 56(2). Any defect discovered after the repair constitutes a further defect that triggers the application of section 56(3). The defect at issue manifested outside the three months contemplated in section 56(3).

22.4 The respondent submitted that section 56(2) does not apply to the facts before the Tribunal. Once a defect has been repaired, the remedies in section 56(2) are no longer available for other defects. According to the respondent, the three-month warranty voids the six-month implied warranty. The respondent argued that only a replacement and refund remedy, which the respondent argued is in the interest of consumers, is available under section 56(3) if further defects are discovered within three months. The respondent averred that the CPA warranty periods must be strictly applied and cannot be extended. As a creature of statute, the Tribunal cannot depart from the ordinary interpretation of section 56(3). Accordingly, the respondent submitted that it had no obligation under the CPA for the defect because the applicant discovered it outside the three-month period, which was why it referred the applicant to the contractual warranty.

22.5 The respondent reiterated its submission that, even if it were accepted that the defect was discovered within the three months contemplated in section 56(3), the applicant failed to report the defect to the respondent. The applicant admitted that she discovered the oil leak and elected to take the vehicle to a third-party repairer without reporting it to the respondent. In *Motus Corporation (Pty) Ltd v Wentzel*,³ the Supreme Court of Appeal (SCA) held that it is required of a consumer to report further defects to the supplier that manifest themselves within three months after the repair of the vehicle as such reporting is necessary for enforcing the warranty provisions. The respondent also reiterated its submission that the applicant's involvement of a third-party repairer without allowing the respondent to inspect or remedy the defect voided the warranty under the CPA.

22.6 The respondent also denied that the vehicle was advertised as having a full-service history. It contended that the applicant was aware, at the time of purchase, that the vehicle did not have such a history. According to the respondent, Mr Grobler merely undertook to obtain it from the agents but was unsuccessful owing to restrictions imposed by the POPI Act. The respondent further submitted that, given the presence of a

³ *Motus Corporation (Pty) Ltd and Another v Wentzel* (1272/2019) [2021] ZASCA 40; [2021] 3 All SA 98 (SCA) (13 April 2021) paragraph 44.

Headzone sticker on the vehicle, the applicant also could have reasonably made enquiries with Headzone. It also contended that the copy of the online advertisement the applicant referred to during her testimony did not refer to a full-service history. The respondent denied any misrepresentation or that the applicant was misled.

APPLICABLE SECTIONS OF THE CPA

23. 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.
24. Section 3(1)(d) states that the purpose of the CPA is to promote and advance the social and economic welfare of consumers in South Africa by protecting them from unconscionable, unfair, unreasonable, unjust, or otherwise improper trade practices and deceptive, misleading, unfair, or fraudulent conduct.
25. Section 4(2) states that in any matter brought before the Tribunal under the CPA, the Tribunal must promote the spirit and purpose of the CPA and make appropriate orders to give practical effect to the consumer's right of access to redress, including any order provided for in the CPA and any innovative order that better advances, protects, promotes, and assures that the consumers realise their rights under the CPA.
26. Section 41(1)(a) states that with the marketing of 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.
27. Section 48(1)(a)(i) states that a supplier must not (a) offer to supply, supply, or enter into an agreement to supply, any goods or services (i) at a price that is unfair, unreasonable, or unjust. Section 48(1)(b) states that the supplier must not market any goods or services, or negotiate, enter into, or administer a transaction or an agreement for the supply of any goods or services, in a manner that is unfair, unreasonable, or unjust.
28. Section 53(1)(a) states that when used with respect to any goods, a component of any goods, or services, a "defect" means (i) any material imperfection in the manufacture of the goods or components, or the performance of the services, that renders the goods or results of the service less acceptable than persons generally would be reasonably entitled to expect in the circumstances; or (ii) any characteristic of the goods or components that renders the goods or

components less useful, practicable or safe than persons generally would be reasonably entitled to expect in the circumstances.

29. 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 of good quality and in good working order. The goods must be free of defects and be useable and durable for a reasonable time.
30. Section 55(5) states that it is irrelevant whether a product failure or defect was latent or patent or whether a consumer could have detected it before taking delivery of the goods and that a product failure or defect may not be inferred in respect of goods solely because better goods have subsequently become available from the same or any other producer or supplier.
31. Section 56(1) states that in any transaction or agreement pertaining to the supply of goods to a consumer, there is an implied provision that the producer or importer, the distributor, and the retailer each warrant that the goods comply with the requirements and standards contemplated in section 55, except to the extent that those goods have been altered contrary to the instructions, or after leaving the control, of the producer or importer, a distributor or the retailer, as the case may be.
32. 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 consumer's direction, either repair or replace the failed, unsafe, or defective goods or refund the consumer the price paid for the goods.
33. Section 56(3) states that if a supplier repairs any particular goods or any component of any such goods, and within three months after that repair, the failure, defect or unsafe feature has not been remedied, or a further failure, defect or unsafe feature is discovered, the supplier must (a) replace the goods; or (b) refund to the consumer the price paid by the consumer for the goods.

CONSIDERATION OF THE MERITS

34. The Tribunal considered all submissions made by the parties and noted that both parties sought to introduce additional information at the hearing. It is incumbent upon parties to ensure compliance with the rules and to raise all relevant issues in their founding, answering, and replying affidavits. Rule 21(11) provides that the Tribunal may at any stage of the proceedings condone any non-compliance with these rules or any irregularities in the conduct of the

proceedings. The Tribunal accordingly resolved to consider the additional submissions made by the parties.

35. According to the applicant, the respondent represented the vehicle as having a full-service history, the vehicle broke down on 26 July 2022, and she reported the defect on 29 July 2022. The respondent instructed her to claim the cost of repairs from the contractual warranty. The contractual warranty failed to cover the full costs of the repairs, and the respondent declined to cover the shortfall, despite the defect being within the six-month implied warranty. The applicant argues that the claim should be considered under section 61 if it is found that the implied warranty under section 56 was voided by third-party involvement.
36. According to the respondent, the applicant relied on incorrect provisions of the CPA. The applicant failed to report the defect to the respondent and allow it to inspect or remedy it. The applicant involved a third-party repairer, which voided the warranty. The damage to the engine was caused by the applicant's gross negligence and not a pre-existing condition in the vehicle, and the respondent is not liable for the defect in terms of section 56(2). At the hearing, the respondent averred that the applicant's case falls under section 56(3) and that section 61 is not applicable.
37. Regarding the allegation that the respondent advertised and represented the vehicle as having a full-service history, the Tribunal finds no evidence to support this allegation. Contrary to the respondent's denial, the vehicle was indeed advertised online as the applicant alleged, and the applicant submitted a copy of an online advertisement. However, the advertisement did not refer to the vehicle having a full-service history. The correspondence between the parties indicates that Mr Grobler promised to source the service history and make it available to the applicant. Therefore, it cannot be said that the respondent made false, misleading, or deceptive representations concerning a material fact to a consumer in contravention of section 41. The allegation stands to be dismissed.
38. Regarding the alleged defect in respect of the engine, the Tribunal is satisfied that the applicant has proved, on the balance of probabilities, that the respondent contravened section 55(2)(a)–(c), read with section 53(1), and section 56(2)(a), as elaborated below:
 - 38.1 Section 55(2)(a)-(c) states that a consumer has the right to receive goods reasonably suitable for their intended purposes. They have a right to goods of good quality and in good working order. The goods must be free of defects and useable and durable for a reasonable time.

- 38.2 Section 56(1) provides that in any transaction or agreement pertaining to the supply of goods to a consumer, there is an implied provision that the producer or importer, the distributor, and the retailer each warrant that the goods comply with the requirements and standards contemplated in section 55, except to the extent that those goods have been altered contrary to the instructions, or after leaving the control, of the producer or importer, a distributor or the retailer, as the case may be.
- 38.3 Section 56(2) gives the consumer the right to return the goods to the supplier within six months after delivery if the goods do not meet the requirements and standards contemplated in section 55. The supplier must, at the consumer's direction, either repair or replace the failed, unsafe, or defective goods or refund the consumer the price paid for the goods. Section 53(1) defines "defect," "hazard," "failure," and "unsafe" within the context of goods or components of goods.
- 38.4 It is common cause that the vehicle was second-hand with an odometer reading of approximately 204 000 kilometres on the odometer. Despite this, the vehicle must still meet the quality, performance and durability standards set in section 55(2). Instead, the vehicle broke down just four months after its collection, having accumulated approximately 10 000 kilometres. The diagnostic inspection by ST Motors revealed a cracked engine block, a blown head gasket and a faulty thermostat. Both ST Motors and Car Service City confirmed that the engine needs replacement. These faults are material as they rendered the vehicle inoperative. The Tribunal finds that the faults identified amount to a defect contemplated in section 53(1).
- 38.5 The defect deprived the applicant of the use and enjoyment of the vehicle. The vehicle could not fulfil its intended purpose. This was within six months of the delivery date. The probabilities are that the defect existed at the time of purchase, as the ST Motors inspection pointed to prior work on the engine. The vehicle was not of good quality, not free of defects, and not durable for a reasonable period. The respondent did not dispute the existence of a defect but denied liability for it. The Tribunal accordingly finds that the vehicle failed to meet the standards prescribed in section 55(2). Additionally, the vehicle broke down within the statutory warranty period contemplated in section 56(1).
- 38.6 In the *Motus* case, the SCA affirmed that a right afforded to a consumer under section 55(2) exists irrespective of whether it is contractually warranted. It exists by operation of law and is protected by section 56 if the standards in section 55 are not met. The consumer decides whether to enforce their rights under the CPA or in terms of an agreement with the supplier. Section 55 qualifies each right separately. A transgression

under section 55(2) gives the consumer the right to request a repair, replacement, or refund of the price in terms of section 56(2).

- 38.7 The Tribunal agrees with the respondent that once a defect is discovered, a consumer is required to report the defect to the supplier to enforce the provisions of the warranty. The Tribunal is satisfied, based on the evidence presented, that the applicant duly reported the defect to the respondent. This occurred between 26 July 2022 by phone, and again on 29 August 2022. In response, the respondent directed the applicant to claim from the contractual warranty. In the WhatsApp message dated 29 August 2022, the respondent merely denied liability and enquired whether a claim had been lodged with the contractual warranty. This mirrors the respondent's conduct when the alternator failure was reported in March 2022. It is disingenuous for the respondent to claim not to have had an opportunity to inspect the vehicle.
- 38.8 According to the respondent, the damage to the engine was caused by the applicant's negligence, but it provided no evidence to that effect. The applicant explained in her testimony that, although she did not initially consider the oil leak to be serious, she immediately ceased operating the vehicle, booked it in for routine servicing, and requested ST Motors to check the source of the oil leak. Upon collecting the vehicle, she said ST Motors advised her that the oil leak had been checked and that the vehicle was safe to drive. As a layperson, the applicant had no reason to doubt this advice. Furthermore, no warning light illuminated as expected. Without evidence to the contrary, it cannot be said that the applicant ignored the oil leak or any warnings. The Tribunal finds no basis upon which to conclude that the applicant was negligent.
- 38.9 At the hearing, the respondent belatedly contended that the applicant's claim falls within the ambit of section 56(3), in which case the three-month warranty had lapsed. It is important to note that the three-month warranty in section 56(3) applies to repairs done to goods or components thereof, the purpose of which is to safeguard consumers from repeated repairs of the same defect. It is common cause that the alternator failed within a week of delivery and was repaired on 29 March 2022. The engine failure occurred on 26 July 2022. The question is whether there exist events that trigger section 56(3).
- 38.10 The SCA in the *Motus* case held that to obtain a remedy under section 56(3), the consumer must show, firstly, that the supplier repaired the defective parts; secondly, that within three months after the repairs, the defects had not been remedied or that a further failure was discovered. On the evidence before the Tribunal, the respondent repaired the alternator on 29 March 2022, thereby satisfying the first requirement. The applicant raised no issues about the repairs to the alternator, and no further defect or

failure was identified with it. Accordingly, the second requirement is not satisfied to invoke the application of section 56(3).

- 38.11 In paragraph 42 of the *Motus* case, the SCA stated that *“It is common cause that the issues with the vehicle started to manifest themselves within six months after its delivery to Ms Wentzel on 7 December 2017. The vehicle was taken in for repairs by Renault on 27 December 2017, 23 January 2018 and 23 February 2018. Renault at its risk and expense, repaired the defective components in the vehicle. Assuming that these issues were defects, this is what Ms Wentzel was entitled to in terms of s 56(2).”*
- 38.12 The *Motus* case makes it crystal clear that each defective component of the vehicle entitles the consumer to the remedies under section 56(2). The repairs performed on 27 December 2017 for Ms Wentzel in the *Motus* case did not void the implied warranty for subsequent repairs on other components. The six-month implied warranty applies to goods and components thereof. The repair of one component does not extinguish or affect the warranty in respect of other components. Any contrary interpretation would undermine the provisions of section 56(4),⁴ which directs that the implied warranty is in addition to any other warranty. This means it cannot be negated by any other warranty, including a warranty contemplated in the CPA. The defective engine reported to the respondent constitutes a new defect, and no repairs had previously been conducted by the respondent on the engine after the vehicle was sold to the applicant.
- 38.13 The respondent is accordingly precluded from relying on section 56(3) to avoid liability for a new defect. Section 56(3) only applies where the repairs undertaken by the supplier fail to remedy the defect, or where a *“further failure, defect or unsafe feature”* is discovered within three months of such repairs. Had the legislature intended section 56(3) to apply to any new defect and void the six-month implied warranty, it would have used a phrase such as *“any other failure, defect or unsafe feature”*. The Tribunal accordingly rejects the respondent’s contention that section 56(3) applies to the applicant’s claim.
- 38.14 The Tribunal further considered whether the respondent failed to comply with section 56(2). The respondent appears to have adopted a consistent approach to the defects reported by the applicant, in that it referred the applicant to the contractual warranty on both occasions. In respect of the first incident, the respondent was compelled to

⁴ In terms of section 56(4), the implied warranty imposed by section 56(1) and the right to return goods in section 56(2) are each in addition to any other implied warranty or condition imposed by the common law, the CPA, or any other public regulation; and any express warranty or condition stipulated by the producer or importer, distributor, or retailer.

assume responsibility for the repairs as it subsequently emerged that the contractual warranty had not yet been activated. In the second incident, the respondent completely deferred the responsibility to the contractual warranty. However, the existence of a contractual warranty to repair the vehicle is immaterial to the application of section 56(2).

38.15 The reliance on a contractual or other warranty neither extinguishes the rights afforded to consumers under the CPA, nor does it absolve the supplier from its obligations in terms of section 56(2). Notwithstanding the respondent's instructions for the applicant to claim from the contractual warranty, the implied warranty remained operative for six months from the date on which the applicant took delivery of the vehicle. The respondent accordingly remained liable for the repair under section 56(2)(a).

38.16 The respondent's contention that the third-party repairer engagement voided the implied warranty is without merit. The evidence indicates that ST Motors did not effect repairs on the vehicle. This is corroborated by the service invoice and the strip and quote invoices, which clearly outline the services performed. In any event, in terms of section 56(1), the implied warranty may be voided only where the goods have been altered contrary to instructions or after leaving the supplier's control. The mere involvement of a third party does not in itself affect the implied warranty. The respondent did not place evidence before the Tribunal to indicate that the goods were altered or that any third-party repairs were conducted. The Tribunal is accordingly satisfied that the applicant has discharged the onus of proving that the respondent contravened section 56(2)(a).

39. The Tribunal finds, on the evidence before it, that the damage to the engine, in the form of a cracked engine block, a blown head gasket, and a faulty thermostat, constitutes a defect as contemplated in section 53(1). The vehicle failed to meet the standards required under section 55(2)(a) to (c). The respondent failed to comply with its obligations under section 56(2)(a) to repair the vehicle at its risk and expense following the applicant's report of the defect. In doing so, the respondent infringed the applicant's rights in terms of the CPA. The respondent's conduct accordingly not only contravened sections 55(2)(a) to (c) and 56(2)(a) but also constitutes a textbook example of the type of prohibited conduct the CPA seeks to eliminate.

40. The Tribunal agrees with the respondent that the applicant cannot rely on section 61, which establishes strict liability for harm arising from the supply of unsafe or defective goods, or goods supplied without adequate instructions or warnings. In particular, the applicant has failed to demonstrate that her claim arises from harm in the form of death or injury of, or illness to, a

natural person; the loss of, or physical damage to, any property; or any economic loss resulting from such harm, as contemplated in section 61(5).

41. In conclusion, the respondent demonstrated a complete disregard for the applicant's rights and the statutory remedies enacted by the legislature to protect consumers. The respondent failed to accept responsibility and persistently raised various defences in an apparent attempt to evade liability. Its repeated instruction to the applicant to claim under the contractual warranty is indicative of the respondent's general attitude towards consumers who report defects. The applicant has suffered considerable economic loss and remains out of pocket because of the legal costs she incurred in pursuing this matter. The cumulative effect of these circumstances has caused the applicant significant inconvenience and emotional distress. Such conduct must be strongly condemned.

THE RELIEF SOUGHT BY THE APPLICANT

42. The Tribunal has already found that the respondent contravened the CPA, and such contraventions must be declared prohibited conduct.⁵ The Tribunal is vested with wide-ranging powers to make appropriate orders concerning prohibited conduct.
43. In terms of section 150(i) of the National Credit Act (NCA),⁶ read with section 4(2)(b)(ii), the Tribunal is empowered to make orders that give effect to a consumer right, including innovative orders. Innovative orders must be appropriate and made if they better advance, protect, promote and assure the realisation by consumers of their rights in terms of the CPA.
44. The order directing the respondent to reimburse the applicant is not provided for directly under section 56(2). However, as the respondent remained liable to repair the vehicle at its risk and expense despite deferring its obligation to the contractual warranty, the Tribunal is satisfied that fairness, justice, and the protection of consumer rights require that the respondent be ordered to pay the shortfall in the amount of R32 225,75. Given that the applicant settled this shortfall at Car Service City, the respondent must accordingly reimburse the applicant.
45. Regarding interest, considering the period that has elapsed since the applicant personally paid the shortfall for the cost of repairs and the fact that the respondent's non-compliant conduct persists to date, the amount due to the applicant must be paid with interest calculated in terms

⁵ See National Credit Regulator v Dacqup Finances CC trading as ABC Financial Services – Pinetown and Another (382/2021) [2022] ZACSA 104 (24 June 2022).

⁶ Act No. 34 of 2005, as amended.

of the Prescribed Rate of Interest Act No. 55 of 1975, from the date on which the applicant made payment to Car Service City to the date of final payment by the respondent.

46. Regarding damages, the Tribunal does not have the authority to adjudicate such claims. However, where the Tribunal has made a finding of prohibited conduct, the applicant may, in terms of section 115(2)(b), apply to the Chairperson of the Tribunal for a certificate of prohibited conduct, to institute a claim for damages in a civil court. The certificate contemplated in section 115(2)(b) serves as sufficient proof of its contents. There is no requirement for leave to be granted by this Tribunal for the applicant to apply for the certificate.
47. On the imposition of an administrative fine, section 112(1) grants the Tribunal a discretion to impose an administrative fine not exceeding 10 per cent of the respondent's annual turnover or R1 000 000, whichever is the greater. Notwithstanding the seriousness of the respondent's conduct, the respondent cooperated with the investigation. There is also no record of any prior contraventions or enforcement action against the respondent. Furthermore, there was no information before the Tribunal indicating that the respondent derived any profit from the conduct in question. The respondent's decision to defend the application before the Tribunal, including its opposition to the condonation application, does not amount to obstructive behaviour as the applicant submitted. More so, the outcomes of MIOSA and the NCC found the respondent not liable. The respondent is cautioned to ensure full compliance with the provisions of the CPA, and future contraventions may result in the imposition of severe penalties, including an administrative fine.
48. Regarding the cost order, section 147(1) of the NCA states that each party participating in a hearing at the Tribunal must pay its own costs. Section 147(2)(b) allows the Tribunal to make a cost order in favour of the successful applicant who referred a matter to the Tribunal under section 75(1). The Tribunal seldom exercises its discretion to award costs against an unsuccessful party as it may deter parties, including consumers, from referring complaints to the Tribunal. To substantiate the request for a cost order, the applicant referred to *Patrick Mdluli v National Consumer Tribunal & Others*,⁷ where it was affirmed that the discretion to award costs must be exercised judicially. In *NCC v Univision & Others*,⁸ it was held that, where a complaint is upheld by the Tribunal, there is every good reason to award costs in favour of a successful complainant and that costs should follow the result.
49. The Tribunal has taken note that the applicant has incurred legal fees, having engaged the services of an attorney in pursuit of justice in this matter. Consequently, the applicant has

⁷ (Leave to Appeal) (A195/19) [2022] ZAGPPHC 333 (11 May 2022) paragraph 18.

⁸ (618/2017) [2018] ZASCA 44 (28 March 2018) paragraph 19.

suffered financial prejudice, which makes it reasonable to award costs in her favour. The issue for determination is whether the applicant's request for a cost order on an attorney and own client scale is justified. Rule 25(4) states that the Tribunal may award costs in the circumstances contemplated in section 147 of the NCA, limited to (a) the fees of a single representative may be allowed between party and party, (b) which costs must be taxed by the Registrar according to the tariff agreed between the parties or otherwise according to the tariff applicable in the High Court and (c) the Registrar may tax a bill of costs for services actually rendered in connection with proceedings, and call for any book, document, paper or account that in the opinion of the Registrar is necessary to properly determine any matter relating to the taxation.

50. Based on this, the Tribunal finds no basis to depart from the prescribed party and party scale and award costs on an attorney and own client scale. In the absence of any agreement between the parties on the applicable tariff, the taxation of the bill of costs must default to the tariffs applicable in the High Court.

ORDER

51. Accordingly, the Tribunal makes the following order:

- 51.1 The respondent contravened sections 55(2)(a) - (c) and 56(2)(a);

- 51.2 The contraventions listed above are declared prohibited conduct;

- 51.3 The respondent is to, within 30 business days of this judgment being issued, pay the applicant R32 225,75 (thirty-two thousand two hundred and twenty-five rand and seventy-five cents), into the bank account nominated by the applicant;

- 51.4 The respondent must pay the amount contemplated in paragraph 51.3 above with interest calculated in terms of the Prescribed Rate of Interest Act No. 55 of 1975, from the date on which the applicant made payment to Car Service City to the date of final payment by the respondent; and

- 51.5 The respondent is to pay the applicant's legal costs on the party and party scale to be taxed on tariffs applicable in the High Court in the absence of an agreement between the parties.

Ms Z. Ntuli - Presiding Member

Ms N Maseti and Mr S Hockey concur.

Authorised for issue by The National Consumer Tribunal

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