

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: A103/2022

(1) **REPORTABLE:** NO
(2) **OF INTEREST TO OTHER JUDGES:** [Y/N]
(3) **REVISED:** [Y/N]
(4) **Signature:**
Date: 20/06/2024

In the matter between:

TOYOTA RANDBURG (A division of Motus Group Ltd)

Appellant

And

PAPANI CASSIUS NDLOVU

First Respondent

THE NATIONAL CONSUMER TRIBUNAL

Second Respondent

JUDGMENT

KUMALO J (WITH MBONGWE J CONCURRING)

- [1]. This is an appeal against the whole judgment of the National consumer Tribunal handed down on 31 March 2022 and is made pursuant to the provisions of Section 148(2)(b) read with Section 59(3) of the National Credit Act, Act No. 34 of 2005.
- [2]. The Appellant is Toyota Randburg (a division of Motus Group Limited with its principal place of business situated at 2[...] B[...] Drive, Kensington, Randburg, 3[...].

- [3]. The First Respondent is Papani Cassius Ndlovu of 1[...] C[...] Cresecent, Zacariyya Park , 13131.
- [4]. The Second Respondent is the National Consumer Tribunal, a statutory body established in terms of section 26 of the National Credit Act, act 34 of 2005 with its principal place situated at 2[...] W[...] Avenue, die Hoewes, Centurion 0[...].
- [5]. On 6 September 2017, the First Respondent bought a second-hand BMW 320i from the Appellant in Randburg. He however had to bring it in the following day for repairs which included brakes, a lose bonnet latch. Four days later, the First Respondent had a breakdown on the N17 at or near Trichardt in the Mpumalanga Province whilst he was on his way to Ermelo.
- [6]. The vehicle was towed by STR Towing Services and stored in their yard. The following day, First Respondent called the Appellant's offices and reported the incident . On 12 September 2017, the Appellant arranged for the motor vehicle to be towed to a nearest BMW dealership Pinnacle Auto in Secunda.
- [7]. The diagnostic was that the engine seized and required a new engine to be fitted. Pinnacle Auto quoted an amount of R250,000.00 to fit a new engine which quotation was forwarded to the Appellant.
- [8]. Appellant decided that the motor vehicle be towed to their sister company Sovereign Auto in Vereeniging which apparently is a BMW dealership. This was done on 27 September 2017.
- [9]. On 16 October 2017, the appellant manager called the First Respondent, and advised that the cause of the engine seize up was water ingress.
- [10]. The Appellant declined to repair, replace, or refund the First Respondent alleging that the damage was caused by the First Respondent's negligence of driving the motor vehicle into water. The First Respondent denied that he drove the motor vehicle into water and deposed in his affidavit that on the

three days that he had the car, there was no rain. As a matter of fact, the vehicle broke down on the national road N17 and it was dry where it was found.

- [11]. The First Respondent referred the dispute to the National Credit Regulator and was subsequently granted leave pursuant to the provisions of section 75(1)(b) of the Consumer Protection Act, Act 68 of 2008, to make an application to refer the complaint directly to the National Consumer Tribunal for the relief *inter alia* that he be refunded the purchase price of the motor vehicle.
- [12]. On 31 March 2022, the Tribunal handed down its judgment in favour of the First Respondent and ordered that he be refunded an amount of R262,172.78.
- [13]. The Appellant filed a notice of appeal against the Tribunal's judgment and submitted that the First Respondent did not satisfy the burden of proof against which applications of this nature are to be considered.
- [14]. At the end of the parties' arguments, this Court directed that the parties file further written supplementary heads of argument to deal with the following aspects of the matter:
 - 14.1 The issue of onus on an applicant in the National Consumer Tribunal and what is required of such an applicant when seeking relief from National Consumer Tribunal under the Consumer Protection Act of 2008;
 - 14.2 The repayment remedy granted by the National Consumer Tribunal under the circumstances, and what amount was to be refunded, where it was known to the Tribunal that the motor vehicle had been sold for an unknown amount of money, the vehicle having been repossessed and sold prior to the institution of the proceedings in the Tribunal;

14.3 Ancillary matters that the parties had to address included the following:

14.3.1 what order, if any, the court, either as a court of first instance, or sitting as a court of appeal, can make under the circumstances and more so if regard is to be had to section 19 of the Superior Courts Act, 2013 and section 4(2)(b)(ii) of the Consumer Protection Act, 2008.

14.3.2 The possible development of the common law.

[15]. The Appellant argued that the First Respondent would only be entitled to the relief that it sought if he successfully overcome the onus which section 117 of the CPA, read with the provisions of sections 53, 55 and 56 of the CPA, placed on him.

[16]. Section 117 of the CPA provides that the standard of proof in any proceedings before the Tribunal , or before a consumer court in terms of the Act is on the balance of probabilities.

[17]. It was further argued on behalf of the Appellant that the findings by the Tribunal that it contravened sections 55(2) and 56(2) of the CPA are misplaced because the First Respondent failed to place any evidence before the Tribunal that the vehicle was defective when it was sold to him. Moreover, the said defects known then other than the engine failure did not constitute defects of sufficient nature as defined in section 53 of the CPA to the extent that it invoked the provisions of sections 55 and 56 of the CPA.

[18]. The Appellant submitted that the First Respondent failed to show that there was a defect in the engine as defined in section 53 of the CPA and his complaint should have been dismissed with costs.

[19]. Section 53 of the CPA provides as follows:

(a) “defect” means-

- (i) Any material imperfection in the manufacture of the goods or component or in performance of the service, 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, predictable, or safe than persons generally would be reasonably entitled to expect in the circumstances,
- (b) “failure” means the inability of the goods to perform in the intended manner or to the intended effect.

[20]. The Appellant relied heavily on the decision of the Supreme Court of Appeals in the matter of *Motus Corporation (Pty) Ltd and Another v Wentzel*¹.

[21]. On the facts, the matter before this court is distinguishable from the facts in the *Motus* case. The First Respondent complaint related to a motor vehicle that was completely not functional. It is common cause between the parties that the engine of the motor vehicle that is the subject matter between the parties seized up three days after the First Respondent took delivery thereof. This happened on the N17 route at Trichardt when the First Respondent was enroute to Ermelo.

[22]. This is not disputed anywhere by the Appellant and what was challenged was the cause of the engine failure.

[23]. The Appellant suggested in its heads of argument that for the First Respondent to be successful, he needed to be specific as to the cause of the engine failure or seize up or lead evidence to the cause of the engine failure.

¹ (1272/2019)[2021] ZASCA 40; [2021] 3 All SA 98 (SCA) (13 April 2021)

- [24]. I am unable to agree with this submission. It goes beyond the standard stipulated in the NPA namely the balance of probabilities. There is undisputed evidence that the engine seized and that was within a period of four days that the First Respondent took delivery of the said motor vehicle.
- [25]. It was therefore for the Appellant to rebut same and indicate that it was not a defect but through the negligence of the First Respondent.
- [26]. To rebut same, the Appellant called an expert to testify on its behalf and I am of the view that the evidence of the expert fell short to rebut the First Respondent's case.
- [27]. The experts of the Appellant alleged that the cause of the engine failure or seizure, was the water ingress into the engine and alleged that the First Respondent negligently drove the vehicle in a pool of water. The First Respondent denied that he drove the motor vehicle in a pool of water.
- [28]. Further, it was not disputed that in the three or four days that the First Respondent had the car, there was no rain. The vehicle was stuck on the N17 national road, and it was dry where it was found.
- [29]. According to Appellant's expert, the car would not have moved from the place where the water ingress happened. Put differently, the motor vehicle should have been stuck in the pool of water and found there. There is no suggestion anywhere that it could have been moved to where it was found and the onus in that regard would have fallen on the Appellant to discharge.
- [30]. The First Respondent contended that the vehicle in question was not reasonably suitable for the purposes for which it was generally intended. It was not in good working order and free of any defect and was not usable and durable for a reasonable period having regard to the use for which it would normally be put.

- [31]. The First Respondent's contention in this regard cannot be faulted given the Appellant's explanation of the problem. It is not unreasonable to expect a motor vehicle to be able to perform on the road for a period much longer than what happened in this case.
- [32]. On the balance of probabilities in this matter, the said motor vehicle was defective as envisaged in section 53 of the CPA and it failed to perform in the intended manner.
- [33]. A consumer's right to fair value, good quality and safety is set out in part H of the CPA.
- [34]. The CPA allows for a consumer to lodge a complaint against a supplier for supplying them with defective goods, which if it is found that the goods are indeed defective the consumer will be entitled to remedies stipulated in the CPA.
- [35]. The supplied goods must comply with the requirements and standards of section 55 of the CPA. In this matter, the subsection that bears relevance is section 55(2) which stipulates the following:

“(2) 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 of time, having regard to the use to which they would normally be put and to all the surrounding circumstances of their supply; and

- (d) comply with any applicable standards set under the Standards Act, 1993 (Act No. 29 of 1993), or any other public regulation.”

[36]. This speaks to the kind of vehicle the first respondent was supposed to receive or rather entitled to receive which essentially was supposed to be a defect-free vehicle. However, the motor vehicle he received was defective from the onset.

[37]. Section 56 of the CPA deals with the implied warranty of quality in that the supplier warrants that the supplied goods comply with the standards and requirements contemplated in section 55 mentioned above. In this matter, the subsections that bear relevance are section 56(1) and (2) which stipulate the following:

“(1) 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.

(2) 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; or

(b) refund to the consumer the price paid by the consumer, for the goods.”

[38]. Section 117 referred to in paragraph 16 does not state on whom the burden of proof lies. However, the principle of law dictates that “he who alleges must

prove”.² This is the basis of one of the appellant’s grounds of appeal i.e. first respondent failed to satisfy this requirement of onus concerning the cause of the engine failure.

[39]. In *Ross v South Peninsula Municipality*,³ the court said the following:

“The Constitutional Court again cited Wigmore as approved in Mabaso v Felix (supra) to the effect that-

“...all rules dealing with the subject of the burden of proof rest ‘for the ultimate basis upon broad and undefined reasons of experience and fairness’” (at 1028G).

The court held that the difficulty of establishing who caused a fire required that as between the person who suffered the damage and the owner of the land on which the fire started, the latter would be in a much better position to show how and where the fire originated. Accordingly in deciding this case we need to consider broad reasons of experience and fairness to determine where the onus should be placed...Where the adversarial system is employed the parties are required to place the information before the court and it is in this context that the onus of proof is of such importance. Once determined the onus prescribes which party has to place particular facts and circumstances before the court and therefore what has to be alleged in pleadings or affidavits...”

[40]. This is to say that some circumstances permit in the name of fairness and experience for the burden of proof to be placed not necessarily on the ‘plaintiff’ but on the ‘defendant who may be in a better position with the necessary information required in the circumstances. I am of the view that consumer dispute resolution procedures can fall under these circumstances.

² *Pillay v Krishna* 1946 AD 946 952- 953.

³ [2000] 4 All SA 85 (C) page 91.

- [41]. The question of burden of proof is central to the object or purpose of the CPA which is to *inter alia*, "...promote and advance the social and economic welfare of consumers in South Africa by...protecting consumers from unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices...",⁴ This means ensuring effective consumer redress and access to justice.
- [42]. Section 117 is somewhat vague as to whom the burden lies, which leaves it to the discretion of the Courts which must be exercised judiciously. Laying the burden of proof on the consumer in these circumstances will in my view not only be burdensome but it would also be unfair on the consumer and would go against the object and purpose of the CPA especially where there is a need for in-depth knowledge that a consumer would ordinarily not have.
- [43]. In this instance, the consumer cannot reasonably be expected to know or show the cause of the seizure of the engine and whether this cause existed at the time the vehicle was sold. If anything, it is on the Appellant to prove how water ingress could possibly be the cause of the engine failure when the motor vehicle was found on a dry road and with no rain experienced around that period.
- [44]. In the *Motus Corporation (Pty) Ltd and Another v Wentzel*,⁵ although the issue of burden of proof was not in dispute, the Supreme Court of Appeal considered whether the consumer made out a case under the section 56(3) of the CPA which the consumer relied on for the relief she sought. There is no apparent reason why this Court cannot proceed to consider whether a case has been made out in terms of sections 55(2) and 56(2) of the CPA.
- [45]. In the *Motus* decision, the SCA did not dwell on section 53(1)(a) and whether the evidence, showing that section 53(1)(a) was sufficiently satisfied, was led by either party but it held the following in para 41:

⁴ CPA section 3(1).

⁵ [2021] ZASCA 40

“...It is not necessary to reach a firm conclusion as to whether the defects complained of by Ms Wentzel fall either under s 53(1)(a)(i) or s 53(1)(a)(ii). It must be accepted on the facts that are common cause that her vehicle did have certain issues, which she brought to the attention of Renault. It is more difficult to determine whether they amounted to defects as defined in the statute. Not every small fault is a defect as defined. It must either render the goods less acceptable than people generally would be reasonably entitled to expect from goods of that type, or it must render the goods less useful, practicable or safe for the purpose for which they were purchased. No evidence was led by either side to inform the court of what purchasers of entry level motor vehicles are reasonably entitled to expect. Is every rattle or unfamiliar noise a defect in terms of the statute? A defective module may be readily replaced, as occurred with the immobiliser. Does that render the vehicle defective so as to entitle the purchaser to return it and demand repayment of the purchase price? Clearly not.”⁶

[46]. In my view, it therefore would suffice to show that the goods in question are less acceptable than people generally would be reasonably entitled to expect from goods of that type for the consumer to be entitled to the CPA remedies. It will also suffice for the goods in question to be rendered less useful, practicable or safe for the purposes for which they were purchased. Even in circumstances where there is no evidence led regarding the reasonable expectations of motor vehicle purchasers as envisaged in section 53 of the CPA, the court can still decide on the matter based on the facts, circumstances and evidence presented to it that would indicate that the goods are less acceptable, as the Supreme Court of Appeal did in the *Motus v Wentzel* case, notwithstanding the finding in favour of the supplier.

[47]. In the circumstances, I do not believe that the Tribunal's findings can be faulted in so far as it concerns the issue of whether the First Respondent made out a case in terms of sections 53, 55 and 56.

⁶ [2021] ZASCA 40 para 41.

- [48]. The issue that remains to be dealt with is the remedy that the Tribunal ordered. Without doubt and on the facts of this case, it erred and misdirected itself.
- [49]. The Tribunal ordered the Appellant to refund the First Respondent in the amount of R262,172.78 representing the purchase price alleged owing to the First Respondent.
- [50]. As at the time that the matter came before the Tribunal, it was common cause between the parties that the said motor vehicle had already been sold in default of payment to the financier thereof.
- [51]. However, no evidence was led before the Tribunal in relation to the price that it was sold for. Thus, the amount of R262,172.78 would be an unjust enrichment for the First Respondent.
- [52]. The question then in this circumstance is whether this Court can substitute its own order for that of the Tribunal. The difficulty in this situation is that there is no evidence before this Court or the Tribunal how much the said motor vehicle was sold for and how much the First Respondent had paid towards his instalment for it.
- [53]. The question then that this Court needs to answer is whether in the circumstances, it has the powers to remit the matter back to the Tribunal for its consideration of the amount that ought to be given back to the first Respondent or that the Appellant be ordered to supply the First Respondent with a similar motor vehicle if he so chooses.
- [54]. This is the very reason that this Court requested the parties to provide supplementary heads to address the remedy issue.
- [55]. The entire debate on this issue is predicated on the provisions of section 19 of the Superior Courts Act and section 4(2)(b)(ii)(bb) of the CPA.

[56]. Section 19 of the Superior Courts Act provides:

“19. The Supreme Court of Appeal or a Division exercising appeal jurisdiction may, in addition to any power as may specifically be provided for in any other law-

...

(c) remit the case to the court of first instance, or to the court whose decision is the subject of the appeal, for further hearing, with such instructions as regards the taking of further evidence or otherwise as the Supreme Court of Appeal or the Division deems necessary; or...”

[57]. It was suggested that Section 19 of the Superior Courts Act, Act 10 of 2013 enjoins the Court to make an order that the matter be remitted to the Tribunal with directions that further evidence be adduced on what value was received by the financier so that a proper determination can be made vis-à-vis the refund remedy.

[58]. The Appellant is opposed to this on the basis that the wording of the section under discussion refers to ‘court’ and not a statutory body such as the Tribunal.

[59]. It is correct that there is no specific definition of a ‘court’ in section 1 of the Superior Courts Act and the only reference to a court of law is the High court, Magistrates courts, the Supreme Court of Appeals, the Constitutional Court and a court with similar status as a High Court.

[60]. It is argued that *ex facie* the wording of the section read with the definitions, this court is not empowered to refer the matter back to the Tribunal, even if it set as a court of appeal.

[61]. Considering this provision, it is important to note section 152 of the NCA which stipulates that an order that is granted by the National Consumer Tribunal has the same force and effect as a High Court order which can be interpreted to mean that an order or ruling by the Tribunal constitutes a judgment or court order equivalent to that of the High Court.

[62]. The High Court does not have jurisdiction to deal at first instance with matters that fall within the jurisdiction of the Tribunal, but the CPA permits the referral of the decision and orders of the Tribunal on appeal to the High Court.

[63]. It also ought to be noted that matters that can be referred on appeal to the High court are not limited to the question of law as normally it would be with most tribunals where the appeals are limited to the question of law. As such, it can be concluded that the Tribunal can be considered a court of first instance in matters that it adjudicates, matters which can be appealed in the High Court. Meaning section 19 of the Superior Courts Act can find application in instances where the High Court finds it proper to remit the matter back to the Tribunal.

[64]. There is also section 4(2)(b)(ii)(bb) to be considered.

[65]. Section 4(2)(b)(ii)(bb) provides:

“(2) In any matter brought before the Tribunal or a court in terms of this Act—

(a) ...

(b) the Tribunal or court, as the case may be, must—

(i) ...

- (ii) make appropriate orders to give practical effect to the consumer's right of access to redress, including, but not limited to—

(aa)

- (bb) any innovative order that better advances, protects, promotes and assures the realisation by consumers of their rights in terms of this Act (my emphasis)."

[66]. The court in *Four Wheel Drive Accessory Distribution CC v Rattan NO*,⁷ held the following regarding section 4(2)(b)(ii)(bb) of the CPA:

"For its part the court must not only promote the spirit and purpose of the CPA but also "make appropriate orders to give practical effect to the consumer's right of access to redress." An appropriate order is not limited to "any order provided for" in the CPA but also "any innovative order that better advances, protects, promotes and assures the realisation by consumers of their rights" in terms of the CPA. However, an innovative order "must be made within the constraints of the legislation and cannot afford consumers more rights than those specifically provided to them" for example by extending a time-bar clause in an agreement."

[67]. The CPA does not stipulate what form the innovative order should take, whether it should be procedural or substantive. It can be best interpreted to mean that the Court or the Tribunal can make an order that gives practical effect to the consumers' right of access to redress. "In appropriate circumstances, a court should be innovative and use its discretion as a tool 'for avoiding and minimising injustice.' Courts should not shy away from

⁷ [2018] JOL 40076 (KZD) para 49.

carefully fashioning orders which meet the demands of justice and equity.”⁸ A remittal in this instance is a more practical order that this Court can grant to ensure that the consumer’s rights in terms of the CPA are realised and to ensure that an injustice is minimised.

[68]. As was held in *Four Wheel Drive Accessory Distribution CC v Rattan NO*,⁹ an innovative order in terms of section 4(2)(b)(ii)(bb) of the CPA should not and cannot afford consumers more rights than those specifically provided for in the CPA.

[69]. It is not disputed that the CPA does not speak of a right to remittal but it does speak to the right to a refund. This Court cannot be expected to determine the amount for the refund as this duty lies with the Tribunal, it can however grant an order to remit the matter to the Tribunal ordering the Tribunal to determine the amount of the refund considering the value the financier received for auctioning the motor vehicle and what the consumer may be entitled to. It is only sensible and fair for the Tribunal to be allowed to properly adjudicate the matter seeing that it erred in the first place by ordering the full refund.

[70]. In conclusion, based on the above, there is no need for this Court to develop the common law because the law as it currently stands allows for an innovative order including remittal to the Tribunal, that promote and give practical effect to the consumers' right of access to redress.

[71]. In the circumstances, the following order is made:

1. The Appellant’s appeal is dismissed;
2. The matter is remitted back to the Tribunal to determine an appropriate amount to be paid to the First Respondent;

⁸ *Moseme Road Construction CC and Others v King Civil Engineering Contractors (Pty) Ltd and Another* 2010 (4) SA 359 (SCA) para 25B-D.

⁹ [2018] JOL 40076 (KZD) para 49.

3. The Tribunal is ordered to take evidence relating only to the amount the vehicle was sold for in the auction and what amounts the First Respondent had already paid when the motor vehicle was sold; and
4. The Appellant is to pay the costs of this appeal.

MP KUMALO J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
PRETORIA

APPEARANCES

Counsel for the Appellant:	Adv FW Botes SC; Adv S McTurk
Instructed by:	VK Attorneys
Counsel for the First Respondent:	Adv I Lindeque
Instructed by:	D & P Smit Attorneys
Date of the Hearing:	27 July 2023
Date of Judgment:	20 June 2024