

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

Case number: **NCT/101932/2018/73(2)(b)**

In the matter between:

THE NATIONAL CONSUMER COMMISSION

APPLICANT

and

**HIGHENDS TRADING AND PROJECTS (PTY) LTD
T/A HIGHENDS AUTO SERVICES**

RESPONDENT

Coram:

Prof. T Woker – Presiding member

Mr A Potwana – Member

Ms P Beck – Member

Date of Hearing – 17 July 2017

JUDGMENT AND REASONS

APPLICANT

1. The Applicant in this matter is the National Consumer Commission (hereinafter referred to as “the Applicant” or “the NCC”), a regulatory entity created by section 85 of the Consumer Protection Act 68 of 2008 (“the CPA”).
2. At the hearing the NCC was represented by its employee, Mr J. Selolo.

RESPONDENT

3. The Respondent is Highends Trading and Projects (Pty) Ltd t/a Highends Auto Services a private company duly registered in accordance with the company laws of the Republic of South Africa

with its business premises at 360 Mitchell Street Pretoria West (hereinafter referred to as “the Respondent”). The Respondent is an entity that repairs motor vehicles.

HEARING OF THE APPLICATION ON A DEFAULT BASIS

4. The Respondent did not file an answering affidavit to the application. The matter was originally set down for a hearing on 11 May 2018. At that hearing the Respondent was represented by Mr Adam Komape. The parties advised the Tribunal that they were in the process of settling the matter and requested a postponement to draft a settlement agreement and submit it to the Tribunal.
5. The Respondent was informed by the Tribunal that no answering affidavit was on record in this matter. The Respondent was informed in an order issued by the Tribunal that if a settlement agreement was not concluded then it should file an answering affidavit and an application for condonation, otherwise the matter would proceed on a default basis.
6. On 11 May 2018 The Tribunal ordered that:
 - 6.1 the matter be postponed *sine die*;
 - 6.2 the Applicant submit a written settlement agreement, duly signed by both authorised parties to the Tribunal Registrar by 31 May 2018;
 - 6.3 the Tribunal would consider the settlement agreement and make it an order of the Tribunal, if appropriate; and
 - 6.4 if the settlement agreement was not received within the time period set down, the matter would once again be set down for a hearing.
7. The Tribunal did not receive a settlement agreement by 31 May 2018 and so the matter was set down for a hearing on 17 July 2018 at 10am.
8. The Respondent did not appear at the hearing but Mr Komape sent an email to the Tribunal at 10.39am stating that his legal representative could not make it to the hearing and that he was in Mpumalanga on business. He also stated that he was willing to settle the matter.

- 8.1 Rule 24(1)(b) of the Regulations for Matters Relating to the Functions of the Tribunal and Rules for the Conduct of Matters before the National Consumer Tribunal¹ (hereinafter referred to as the “Tribunal Rules” provides that:
- “If any party to a matter fails to attend or be represented at any hearing or any proceedings, and that party-*
- (a) ...*
- (b) is not the applicant, the presiding member may-*
- (i) continue with the proceedings in the absence of that party; or adjourn the hearing to a later date.”*

9. Due to the non-appearance of the Respondent and the fact that no formal application for a postponement of the matter was made, the hearing proceeded on 17 July 2018 on a default basis. Mr. Selolo also opposed a further postponement of the hearing.

APPLICATION TYPE

10. This is an application in terms of Section 73(2)(b) of the CPA. The NCC is alleging that it received a complaint, conducted an investigation and referred the complaint to the Tribunal.
11. Despite having been informed by the Tribunal on 11 May 2018, that it should file an answering affidavit if no settlement in the matter was reached, the Respondent has failed to do so.
12. Rule 13(5) of the Tribunal Rules provides as follows:
- “Any fact or allegation in the application or referral not specifically denied or admitted in the answering affidavit, will be deemed to have been admitted”*
13. Therefore, in the absence of any answering affidavit filed by the Respondent, the Applicant’s application and the allegations contained therein are deemed to be admitted.

¹ Published under GN 789 in GG 30225 of 28 August 2007 as amended.

14. Based on the information provided, the Tribunal is satisfied that the application documents and the notice of set down were adequately served. The matter therefore proceeded on a default basis in the absence of the Respondent.

BACKGROUND

15. On 15 July 2015, Mr Terrence Sibiya took his Audi A4 with registration number TMB 984 GP to the Respondent in order for his cambelt to be replaced.
16. The Respondent effected the repairs to the vehicle (which cost R16 590). It appears that Mr Sibiya needed time to pay off these repairs, hence there was a delay in the collection of the vehicle. Mr Sibiya was then informed (on 5 September 2015) by Mr Komape that the oil pump needed to be replaced. On 9 September Mr Sibiya lodged a claim with his insurer, Innovation Group (Innovation), for replacement of the oil pump in terms of his motor vehicle mechanical breakdown warranty policy. Authorisation for repairs to the oil pump was granted on 16 September in the amount of R6 499.99. It is unclear when this amount was paid to the Respondent but an invoice dated 22 October 2015 was issued for that amount.²
17. To date Mr Sibiya's vehicle has not been repaired. When Mr Sibiya initially asked the Respondent about the repairs (being aware that Innovation had paid the Respondent R6 499.99) he was informed that the engine had ceased to function and that further repairs were required because the engine needed to be overhauled.
18. Sometime after the first repair (replacement of the cambelt) was performed and before the oil pump could be repaired, the engine of the vehicle ceased to function. Exactly how this occurred has not been established. However, Mr Sibiya informed the NCC that Mr Komape was seen driving his vehicle at high speed in Soshanguve. A witness called Mr. Sibiya to complain about the fact that he (Mr Sibiya) had been driving at high speed. He explained to the witness that he in fact did not have possession of his vehicle because it had been taken in for repairs. He confronted Mr Komape about this allegation and Mr Komape confirmed that he had been driving the vehicle but stated that he was only taking the vehicle for a test drive. Mr Komape also confirmed to the NCC during the investigation that he had been driving the vehicle but stated that this was a test drive. He did not refute the claim that he was driving at high speed.

² See annexure M of Form T1.73(2) (b) CPA – the notice of referral of a complaint to the Tribunal

19. Mr Sibiya reported the matter to the Motor Vehicle Ombudsman of South Africa (MIOSA). MIOSA found that the Respondent had failed to perform a service to the standards contemplated in section 40 (1)³ of the of the CPA and further found that the Respondent must refund Mr Sibiya or Innovation “*the initial amount paid for the repairs on authorisation number 108812*”.
20. The Respondent failed to respond to the findings of MIOSA and so Mr Sibiya referred the matter to the NCC.
21. During the NCC’s investigation, Mr Komape stated that after assessing the vehicle on 15 September 2015 he established that repairs to the value of R28 145 were required, but Innovation only authorised the repair of an oil pump to the value of R6 499.00. Mr Komape stated that the engine ceased to function after the oil pump was replaced. He replaced the oil pump with a second hand oil pump because Innovation only authorised a repair to the value of R6 499.00. He then tested the vehicle and the engine ceased to function while he was driving back to the workshop.
22. During two interviews with the NCC (24 May 2017 and 29 June 2017), Mr Komape stated that he would provide the NCC with a written reply in response to the complaint and forward all relevant documents that support his version of the events. To date Mr Komape has not complied with this undertaking.
23. The NCC also followed the matter up with Innovation and was provided with an assessor’s report that revealed that the vehicle was assessed by an Innovation assessor on 15 September 2015 at which stage it was established that the engine had ceased to function.

APPLICANTS SUBMISSIONS

24. The NCC is alleging that the Respondent is in contravention of section 65 (2) (a) and section 65 (2) (b) or in the alternative section 56 (3) of the CPA and requests the Tribunal to make a finding of prohibited conduct in this regard

24.1 Section 65 (2) (a) and (b) reads:

³ Section 40 of the CPA refers to unconscionable conduct. It seems that MIOSA made an error and was instead considering this matter under section 54 which refers to the right of a consumer to receive quality service.

Supplier to hold and account for consumer's property

....

(2) When a supplier has possession of any ... property belonging to ... a consumer, the supplier

(a) must not treat that property as being the property of the supplier;

(b) in the handling, safeguarding and utilisation of that property, must exercise the degree of care, diligence and skill that can reasonably be expected of a person responsible for managing any property belonging to another person

24.2 Section 56 (3) reads:

Implied warranty of quality

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;

(b) Refund to the consumer the price paid by the consumer for the goods.

25. The NCC is relying on section 56 (3) as an alternative charge because if it is accepted that the Respondent did repair the vehicle's oil pump, then that oil pump failed within three months of the repair. As the NCC pointed out, section 56 (3) does not distinguish between second-hand and new parts and so the repair must last for at least three months regardless of whether second-hand or new parts are used.

26. The NCC is asking the Tribunal for the following orders -

26.1 That the Respondent be interdicted from engaging in prohibited conduct;

26.2 Directing the Respondent to return, at its own costs, Mr Sibiya's vehicle and all its components within 15 days of the judgment;

- 26.3** Directing the Respondent to refund to Mr Sibiya the amount of R6 499.00 being the amount paid to the Respondent for the replacement of the oil pump. This amount must be paid with interest in accordance with the Prescribed Rate of Interest Act No 55 of 1975 from the date on which it was paid to the Respondent to date of final payment;
- 26.4** Directing the Respondent to pay in terms of section 65 (2) (c) the sum of R28 145.00 being the amount representing the loss resulting from the failure by the Respondent to comply with sections 65 (2) (a) and (b);
- 26.5** Directing the Respondent to pay an administrative fine in the amount of R150 000;
- 26.6** Any other appropriate order contemplated in section 4 (2) (b) (ii) of the CPA. This section provides that:

“The Tribunal must make appropriate orders to give practical effect to the consumer’s right of access to redress, including but not limited to any innovative order that better advances, protects, promotes and assures the realisation by consumers of their rights in terms of this Act.”

- 27.** The NCC further provided an affidavit submitting the factors and reasons why an administrative fine should be imposed.

ASSESSMENT OF THE EVIDENCE

- 28.** On the evidence submitted to the Tribunal there is no dispute that Mr Sibiya took his vehicle to the Respondent for the vehicle’s cambelt to be replaced on 15 July 2015.
- 29.** After this repair was carried out it was also established that the vehicle needed to have its oil pump repaired. How or when this was established is unknown to the Tribunal, but Mr Sibiya was informed about this on 5 September 2015 and he submitted a claim to his insurer for this repair on 9 September 2015.

30. The vehicle was assessed by the insurer's assessor on 15 September 2015 and at that stage it was established that the engine had ceased to operate. So sometime between informing Mr Sibiya on 5 September 2015 that he needed his oil pump repaired and 15 September 2015 when the vehicle was assessed by the insurer, the engine ceased to operate. This whilst the vehicle was in the care of the Respondent.
31. The Respondent has failed to provide any evidence regarding when and how this happened but during the investigation, Mr Komape informed the Applicant that he had replaced the oil pump with a second hand oil pump because the insurer did not pay sufficient funds to cover the purchase of a new pump.
32. However, taking all the evidence before the Tribunal into consideration, this cannot be correct because the engine ceased to operate **before** the assessor had carried out his assessment and so the Respondent would not have known (before 15 September 2015) what the insurer's approach to the repairs was going to be. Hence, it could not have replaced the pump before the engine seized.
33. The only reasonable inference that can be drawn from the evidence before the Tribunal is that the engine seized whilst it was being driven by Mr Komape at a time when he knew that the oil filter needed to be repaired.
34. The NCC has submitted an affidavit from a witness who stated that she saw the vehicle being driven at high speed in Soshanguve. This statement has not been refuted by the Respondent and indeed Mr Komape confirmed to both the Applicant and Mr Sibiya that he was driving the vehicle.
35. The Respondent has been given ample opportunity by both the NCC and the Tribunal to place its version of events before the Tribunal, but has consistently failed to do so.
36. Further than this, Mr Komape has given numerous assurances that he will provide his version supported by relevant documents to the NCC, but he has never followed through and it has always been up to the NCC to follow up with Mr Komape.

37. Nevertheless, Mr Komape has consistently stated that he wants to settle the matter. The hearing held on 11 May 2018 was specifically postponed because he wanted to settle the matter and although he did not appear at the hearing on 17 July 2018 he again re-iterated in his email to the Tribunal that he wanted to settle the matter. No settlement offer has been forthcoming. The only reasonable inference that the Tribunal can draw from all these assurances is that the Respondent is ducking and diving.

PROHIBITED CONDUCT

38. The NCC has requested the Tribunal to make a finding that the Respondent contravened section 65 (2) (a) and (b) of the Act or alternatively that the Respondent contravened sections 56(3) and that this constitutes prohibited conduct.
39. On the evidence presented to the Tribunal, the Tribunal is satisfied that the Respondent contravened section 65 (2) (b) in that in the handling and utilisation of Mr Sibiya's vehicle it did not exercise the degree of care, diligence and skill that can reasonably be expected of a person responsible for managing property belonging to another person.

CONSIDERATION OF AN APPROPRIATE ORDER

40. The NCC has requested that the Tribunal impose an order on the Respondent which contains a number of terms including the imposition of a fine of R150 000. The NCC has submitted argument on the factors listed in section 112(3) of the CPA that the Tribunal must consider.
41. Considering the nature of the contravention and the conduct of the Respondent in dealing with the consumer, the MIOSA, the NCC and finally the Tribunal, the Tribunal regards a fine as appropriate and justified.
42. A motor vehicle is the second most important asset in which a consumer will invest (the other being a house) and consumers are dependent on responsible repairers to ensure that they keep their motor vehicles in good running order. Mr Sibiya did not take his vehicle to a "back street" repair shop for repairs; he took it to the Respondent which states that it is an RMI (Retail Motor Industry) approved workshop. Repairing vehicles is a large and important industry in South Africa. This industry affects consumers on a daily basis. A clear message must be sent that non-compliance with the CPA will not be condoned or tolerated.

43. Although the Tribunal has found that the Respondent has only contravened section 65 (2) (b) of the Act, this contravention has had serious consequences for Mr Sibiya as he has been without his vehicle for approximately three years. All attempts to resolve this matter have been rebuffed even though the Respondent has indicated on a number of occasions that it is prepared to settle the matter and Mr Komape has been given every opportunity to be true to his word. This has led to further and unnecessary delays in resolving this matter that have further inconvenienced Mr Sibiya. The NCC alone has been trying to resolve this matter for over a year (since 24 May 2017).
44. The fact that Mr Sibiya has been without his vehicle for over approximately three years is a matter of serious concern to the Tribunal. The Tribunal is of the view that the best possible outcome for this matter would be for Mr Sibiya to get his vehicle back in a proper running order and without defects. It is however, difficult to know how much it will cost to restore his vehicle. Three years ago, the Respondent submitted a quote stating that it would cost R 28 145.00 to repair the vehicle but that cannot be sufficient today.
45. A finding of prohibited conduct by the Tribunal means that Mr Sibiya is entitled to a certificate from the Chairperson of the Tribunal that he can then submit to a civil court in order to claim his damages. This will entail the incurring of further costs for Mr Sibiya who, in the Tribunal's view, has suffered enough.
46. Section 4 (2) (b) (ii) calls on the Tribunal to make an appropriate or innovative order which will give **practical** effect to the consumer's right of redress. The Tribunal is concerned that Mr Sibiya should have his vehicle returned to him in a proper state as soon as it is practically possible.

CONCLUSION

47. The Respondent is found to have contravened section 65 (2) (b) of the CPA and this constitutes prohibited conduct.
48. An administrative fine of R150 000.00 is appropriate under the circumstances. However, the payment of this administrative fine is suspended for a period of 90 days from the date of this

judgment on condition that the Respondent restores Mr Sibiya's motor vehicle to him in good working order and free of any defects within that period and in accordance with the provisions of section 57 of the CPA. The vehicle must be assessed by the Automobile Association (AA) at the cost of the Respondent in order for it to confirm that that vehicle is free of any defects and has been repaired to a good working order. This assessment is to be overseen by the NCC.⁴

- 49.** If the Respondent fails to repair the vehicle as required under paragraph 35 above, the Respondent, in addition to paying the administrative fine must also repay the R6 499.00 that it received from Innovation to Mr Sibiya.

ORDER

- 50.** Accordingly, the Tribunal makes the following order:

50.1 The Respondent must repair Mr Sibiya's motor vehicle to good working order and free of any defects within 90 days of the date of this judgment, such vehicle to be assessed by the AA within 90 days of the date of this judgement at the cost of the Respondent.

50.2 If the Respondent fails to repair the vehicle within 90 days of the date of this judgment, the Respondent is to pay an administrative fine of R150 000.00 (One hundred and Fifty Thousand Rand) into the National Revenue Fund referred to in section 213 of the Constitution within 120 days of the date of this judgment. In addition, the Respondent must refund the R6 499.00 received from Innovation to Mr Sibiya.

50.3 No order is made as to costs.

DATED ON THIS 22nd DAY OF JULY 2018.

[Signed]

Prof T Woker (Presiding member)

Mr A Potwana (member) and Ms P Beck (member) concurring.

⁴ At the hearing Mr Selolo confirmed that the NCC would be able to oversee this assessment.