

THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Held Virtually Via MS Teams

Case Number: **NCT/226747/2022/73(2)(b)**

In the matter between:

THE NATIONAL CONSUMER COMMISSION

APPLICANT

and

SHIMMYKC TRADING ENTERPRISE CC t/a MMIRWA AUTOWORLD

RESPONDENT

Coram:

Prof B Dumisa – Presiding member

Ms. D Terblanche – Member

Mr. T Bailey – Member

Date of Hearing – 06 July 2022

Date of Judgment – 16 August 2022

JUDGEMENT AND REASONS

APPLICANT

1. The Applicant in this matter is the **NATIONAL CONSUMER COMMISSION** (“the Applicant”), a juristic person established in terms of Section 85 of the Consumer Protection Act 68 of 2008 (“the CPA” or “the Act”) with offices at 1 Dr Lategan Road, Groenkloof, Tshwane, Gauteng.
2. At the hearing, the Applicant was represented by its Senior Legal Advisor Mr. Ludwe Biyana.
3. The Applicant’s Founding Affidavit is deposed to by Ms. Thembi Mabuza, Acting Commissioner and Deputy Commissioner, in the Applicant’s employ.

RESPONDENT

4. The Respondent is **SHIMMYKC TRADING ENTERPRISE CC t/a MMIRWA AUTOWORLD**, a close corporation duly registered with Company Registration Number 2005/149216/23 (“the Respondent”).
5. There was no Answering Affidavit from the Respondent.
6. The Respondent did not appear at the hearing and was not represented.

APPLICATION TYPE AND ORDER SOUGHT

7. This Tribunal derives the jurisdiction for hearing this matter under Section 73(2)(b) of the CPA, which allows the Applicant to directly refer the matter to the Tribunal after concluding an investigation into a complaint.
8. The Applicant sought an order for the Respondent to:
 - 8.1 Return the affected consumer’s motor vehicle Mazda 6 Motor Vehicle with Registration Numbers FFK 136 NW, within ten business days of the date of this order;
 - 8.2 In the event that the Respondent fails to return the motor vehicle as directed above the Respondent be ordered to pay the consumer the sum of R61 300,00, being the retail value of the Complainant’s motor vehicle, within 15 business days from the expiry of the period mentioned in 8.1 above;
 - 8.3 Directing the Respondent to pay an administrative penalty in the amount of R1 000 000 (One Million Rand); or
 - 8.4 Any other appropriate order contemplated in Section 4(2)(b)(ii) of the CPA.

BACKGROUND

9. The Applicant received a complaint from Mr Frans Louis Mfetane (“the consumer”) alleging that:
 - 9.1 On the 2nd of April 2017, his vehicle broke down near Mokopane while driving from Polokwane to Rustenburg. His motor vehicle had overheated, and the top was damaged;

- 9.2 Derrick, a breakdown service provider, offered to help him to store the motor vehicle for R400.00 for three weeks;
- 9.3 Derrick also offered to fix the motor vehicle and quoted him R1 300.00 for the top to be sent for repairs. He required a deposit of R800.00 for labour;
- 9.4 Derrick was unable to fix the engine but took the motor vehicle to the Respondent, alleging that he works with them;
- 9.5 The consumer met Shimy, a representative of the Respondent. They verbally agreed that the repairs would not exceed R3 600.00 and the amount paid to Derrick would be considered;
- 9.6 Shimy called the consumer asking for R1 500.00, which would be the total costs. The consumer paid that amount;
- 9.7 The following month, Shimy asked for R3 400.00, which the consumer also paid;
- 9.8 When the consumer checked the motor vehicle, he found the engine had been dismantled. There was a disagreement, but eventually, they agreed that the consumer would collect his motor vehicle;
- 9.9 When the consumer sent people to fetch the motor vehicle, the Respondent refused to release the motor vehicle and demanded payment for labour; and
- 9.10 Consequently, the Applicant formed a reasonable suspicion that the Respondent had contravened the CPA and initiated an investigation into the matter.

SUBMISSIONS BY THE APPLICANT

10. During the investigation, the Respondent is alleged to have breached various provisions of the Act:
 - 10.1 The Respondent breached Section 65(2)(a) to (c) of the CPA in that it failed/refused to return the consumer's motor vehicle. The Respondent alleges that the motor vehicle was handed to someone known to the consumer. However, the Respondent is unable to furnish the identity of the alleged person;

10.2 The Respondent contravened Section 15(2) (a) and (b)(ii) of the CPA in that it did not give the consumer an estimate that satisfies the prescribed requirements of Section 15(2)(a). In addition, the Respondent charged the consumer an amount exceeding the pre-authorized charges of R3 600.00.

11. The Applicant made submissions that considering the above contraventions of the Act, an administrative fine in the amount of R1 000 000 (One Million Rand Only) is appropriate in this matter:

APPLICABLE SECTIONS OF THE CPA

12. **Section 65(2)(a) to (c)**

Supplier to hold and account for consumer's property

"(1) ..."

(2) When a supplier has possession of any prepayment, deposit, membership fee, or other money, or any other property belonging to or ordinarily under the control of the 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; and

(c) is liable to the owner of the property for any loss resulting from failure to comply with paragraph (a) or (b).

15. **Section 15(1) and (2)**

Pre-authorisation of repair or maintenance services

(1) This section applies only to a transaction or consumer agreement –

(a) with a price value above the threshold prescribed in subsection (5); and

(b) if, in terms of that transaction or agreement, a service provider supplies a repair or maintenance service to, or supplies or installs any replacement parts or components in, any property belonging to or in the control of the consumer, and –

(i) the service consumer has, or takes, possession of that property for the purpose contemplated in this paragraph; or

(ii) in any other case, the consumer requests an estimate before any services or goods are supplied.

(2) A service provider to whom this section applies, must not charge a consumer for the supply of any goods or services contemplated in subsection (1), unless –

- (a) *the supplier or service provider has given the consumer an estimate that satisfies the prescribed requirements, and the consumer has subsequently authorised the work; or*
- (b) *the consumer, in writing, or by another recorded manner or form, has -*
 - (i) *declined the offer of an estimate, and authorised the work; or*
 - (ii) *pre-authorised any charges up to a specified maximum, and the amount charged does not exceed that maximum.*

CONSIDERATION OF THE EVIDENCE ON A DEFAULT BASIS

16. The application was served on the Respondent by personal courier delivery on 10 March 2022. The address used was 55 Schoeman Street, Mokopane¹. There is no indication on the file where this address originates from. The address appearing on the Respondent's letterhead and invoice² is 100 Nelson Mandela Drive, Mokopane. The address appearing on the investigation directive³ is 67 Sussex Street, Mokopane. The address appearing in the Applicant's founding affidavit⁴ is 2 Brahman Street, Mokopane. The Respondent did not file any papers, including an answering affidavit, in response to the Applicant's founding papers. This appears unsurprising, as it appears the application was not served on any known address of the Respondent.
21. The Tribunal heard the matter on a default basis, but it appears that the Respondent was not properly served with the application. Nevertheless, in the interests of justice and completeness, the Tribunal will consider the evidence presented.

CONSIDERATION OF THE EVIDENCE BEFORE THE TRIBUNAL

22. Based on the evidence submitted to the Tribunal, the motor vehicle broke down on 2 April 2017. It appears the interaction between the consumer and the Respondent continued until 26 April 2018, when a quote for R10 849.89 was presented to the consumer⁵. The consumer reported the complaint to the Motor Industry Ombud at some stage in 2018 and then to the NCC in 2019. The application was lodged with the Tribunal on 3 May 2022.

¹ Page 64 of the file.

² Pages 35 and 36 of the file.

³ Page 29 of the file.

⁴ Page 7 of the file.

⁵ Page 35 of the file.

23. Section 116⁶ of the CPA states that a complaint may not be referred or made to the Tribunal more than three years after the act or omission took place. The vehicle broke down in April 2017. Based on the evidence the cause of action arose at some point between April 2017 and April 2018 when the Respondent presented a quote for repairs that the consumer appears to have been unwilling to pay. Using the latest possible date of April 2018, the consumer had until April 2021 to file an application with the Tribunal. The NCC only filed the application in May 2022, more than a year after the complaint had lapsed.
24. The High court issued an unreported judgment stating that the Tribunal had no power to interrupt or extend the time bar provision⁷. Although the High court judgment referred to section 166 of the National Credit Act, 34 of 2005 (“NCA”), section 116 of the CPA and section 166 of the NCA have the same wording. The Tribunal is bound by the High court judgment and must strictly apply the provisions of section 116 of the CPA. The Tribunal cannot hear the application as it has lapsed.
25. Even if the service of the application and the time bar provision were disregarded, the Tribunal can note that the evidence does not provide a reasonable basis for a finding of prohibited conduct. There is no direct evidence that the Respondent contravened section 12 of the CPA. There is no direct evidence that the vehicle was in fact disposed of. The only evidence in this regard appears to be the email apparently sent by the Respondent’s representative and the allegation by the consumer. The dispute between the parties regarding the quote for repairs and the actual costs appears to be based on verbal agreements alleged by the consumer. The only clear evidence appears to be the quote provided in April 2018. The Tribunal would have some difficulty in making a finding based on the evidence presented.

ORDER

Accordingly, the Tribunal makes the following order:

26. The application is dismissed; and
27. No order is made as to costs.

⁶ Limitations of bringing action

116. (1) A complaint in terms of this Act may not be referred or made to the Tribunal or to a consumer court more than three years after—

- (a) the act or omission that is the cause of the complaint; or
- (b) in the case of a course of conduct or continuing practice, the date that the conduct or practice ceased.

⁷ *FirstRand Bank Ltd v A Ludick* A277/2019 High Court of South Africa, Gauteng, Pretoria Division, 18 June 2020 (unreported).

DATED ON THIS 16th DAY OF AUGUST 2022

Prof B Dumisa
Presiding Member

Ms D Terblanche (Member) and Mr. T Bailey (Member) concurring

Authorised for issue by The National Consumer Tribunal

National Consumer Tribunal

Ground Floor, Building B

Lakefield Office Park

272 West Avenue, Centurion, 0157

www.thenct.org.za

