THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: 30932/2016

DATE OF HEARING: 27 NOVEMBER 2017

DATE OF JUDGMENT: 28 FEBRUARY 2018

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES / ~~NO~~
(3) REVISED.

28-2-2018
DATE

SIGNATURE

28/2/18

In the matter between:

THE MOTOR INDUSTRY OMBUDSMAN	Applicant
and	
SILVERPARK MOTORS CC *t/a* SILVERTON MOTORS	First Respondent
THE MINISTER	
DEPARTMENT OF TRADE AND INDUSTRY	Second Respondent

J U D G M E N T

AVVAKOUMIDES, AJ

INTRODUCTION

[1] The applicant sought a declaratory order in terms of which the first respondent is declared to be a retailer, as defined in in the Consumer Protection Act No. 68 of 2008 and as such, liable for contributions as set out in the South African Automotive Industry Code of Conduct, per Government Gazette No. 38107 of 17 October 2014 (*"the Code"*). The applicant also sought payment of an amount of R2 052.00 comprising the monthly contributions which it says, the first respondent is liable for, presumably as at the date of issuing of the notice of motion.

[2] The Code came into effect on 17 October 2014 and in terms of Part A thereof it provides that:

"*The Code will regulate the interactions between persons conducting business in the automotive industry and their interactions with consumers.*"

[3] The Code further provides that:

"*This Code will be implemented by the Motor Industry Ombudsman of South Africa (MOISA) and its interpretation is vested in the MOISA.*"

[4] The purpose of the Code is stated to be:

"*To regulate relations between persons conducting business within the automotive industry and to provide for a scheme of alternative dispute resolution between consumers and all participants in the industry and to create an industry ombud to provide alternative dispute resolution services.*"

[5] Section 13 of the Code deals with the funding of the applicant and provides in the sub-section 2 thereof that the Applicant is "*Funded by the Automotive Industry in the manner as set out in Schedule 5.*" The current positon with regard to contributions is that each retailer is expected to make a monthly contribution of R150.00 plus vat thereon or an annual contribution of R1800.00 plus vat thereon in order to finance the activities of the applicant in giving effect to the Code.

[6] The dispute between the applicant and the first respondent arises from the refusal of the first respondent (and the refusal of other similar fuel retailers) to make such contributions to the applicant and claiming that it does not qualify as a member of the automotive industry and therefore not liable for the contributions. The first respondent operates a fuel retailer business at which it provides fuel and diesel to the public and in addition thereto, oil lubricants and Wynns accessories of an assorted nature. The first respondent also operates an ancillary shop selling general items consistent with that of a convenience store, from the same location as its fuel retailer business.

[7] The first respondent denies that the Shell fuel oil, lubricants, Wynns lubricants and accessories are accessories for a motor vehicle. The issue thus is whether or not the first respondent falls in the category of a retailer in the motor industry. The first respondent sells the various types of fuels, which contain additives, as advertised by Shell, which additives are purported to clean, repair and maintain the engine as well as oils and/or lubricants such as Helix, which is also purported to contain active cleansing agents which are designed to continuously clean and protect a motor vehicle's engine. The first respondent also sells brake fluids.

[8] The applicant's case is that the selling of brake fluids and ancillary products alone, places the first respondent within the group of persons, being retailers in terms of the Act, who supply goods and services to the end-consumer in the automotive industry and who would therefore be liable for a contribution to the funding of the applicant. The first respondent denies this contention.

[9] In terms of the Act, "Goods" are defined as follows:

"*goods*" includes—

(a) *anything marketed for human consumption;*

(b) any tangible object not otherwise contemplated in paragraph (a), including any medium on which anything is or may be written or encoded;

(c) *any literature, music, photograph, motion picture, game, information, data, software, code or other intangible product written or encoded on any medium, or a licence to use any such intangible product;*

(d) *a legal interest in land or any other immovable property, other than an interest that falls within the definition of "service" in this section; and*

(e) *gas, water and electricity;"*

[10] "Supply" is also defined in terms of the Act as:

"supply", when used as a verb—

(a) *in relation to goods, includes sell, rent, exchange and hire in the ordinary course of business for consideration; or*

(b) *in relation to services, means to sell the services, or to perform or cause them to be performed or provided, or to grant access to any premises, event, activity or facility in the ordinary course of business for consideration;*

[11] Furthermore, *"supply chain", with respect to any particular goods or services, means the collectivity of all suppliers who directly or indirectly contribute in turn to the ultimate supply of those goods or services to a consumer, whether as a producer, importer, distributor or retailer of goods, or as a service provider."*

[12] The Code further defines Automotive Industry in section 2.3 of the definition section of the Code as follows:

"Automotive Industry" means importers, distributors, manufacturers, retailers, franchisors, franchisees; suppliers ,and intermediaries who import, distribute, produce, retail or supply passenger, recreational, agricultural, industrial, or commercial vehicles, including but not limited to passenger vehicles, trucks, motor cycles, quad cycles or, whether self -propelled or not an internal combustion propelled engine for a boat, or import, distribute, manufacture, retail or supply any completed components and/or accessories to such vehicles, and/or renders a related repair or replacement service to consumers in respect of such vehicles; and trailers, and "anyone who modifies, converts or adapts vehicles."

[13] A Dealer is defined in terms of the Section 2.6 of the Code as follows:

"*A retailer who supplies goods or services to the end-consumer*", whilst a "*Motor Vehicle*" is defined as "*Any vehicle designed or adapted for propulsion or haulage on a road by means of fuel, gas or electricity or any other means, including a motorcycle, trailer, caravan, an agricultural or any other implement designed or adapted to be drawn by such motor vehicle.*"

[14] It is common cause that the first respondent sells the various types of fuels and additives. The manufacturers of these products, namely Shell and Helix advertise continuously that their fuel and their oils and/or lubricants contain

additives which would clean, repair and maintain a vehicle's engine and which furthermore contains active cleansing agents which continuously clean and protect the engines of motor vehicles. It is the applicant's case that, regard being had to the definition of Automotive Industry, the first respondent is a retailer of completed components and/or accessories to vehicles and/or who renders related repair or replacement service to consumers in respect of such vehicles and therefore falls within the definition of Automotive Industry in the Code.

THE APPLICANT'S CONTENTIONS

[15] The applicant contends that the first respondent supplies both accessories to vehicles as well as a related repair and replacement service to vehicles. The applicant relies on the fact that the products which the first respondent sells (on a daily basis), the fuel, being lubricants and oils renders services the vehicle in the form of lubricants and oils and furthermore to repair the vehicle by cleansing the internal workings of the combustion chambers. The application therefore contends that the first respondent falls squarely within the definition of the Automotive Industry. Furthermore, the replacement of fuel into the engines on a continuous basis, thereby constituting the propellant within the engine and making the motor vehicle capable of being used as a motor vehicle also constitutes a service and/or a replacement service to motor vehicles and places the first respondent squarely within the ambit of the Act.

[16] The first respondent and the body it belongs to, namely the Fuel Retailer Association are members of the Motor Industry Bargaining Council for purposes of labour issues. If they did not fall within the Motor Industry, then it is inexplicable why they are members of this particular Bargaining Council. The first respondent however denies this and alleges that, simply because it is a member of the Motor Industry Bargaining Council does not render it a member of the Automotive Industry.

[17] The first respondent contends that in order for a retailer to qualify as a member of the Automotive Industry it must have, as the primary business of its business, the activities mentioned within the definition. On this basis it contends that large retailers, such as Pick 'n Pay, Game and Builders Warehouse who stock components and accessories such as those mentioned, for instance jumper lead cables or tow ropes, would also be liable for the payment of these contributions. The applicant argued, that such retailers are in fact liable for such payments.

[18] The applicant is critical of the first respondent's contention that to qualify as a member of the Automotive Industry a business must have, s its primary business the activities mentioned in the definition. The applicants point out that should, for instance, a jumper lead cable be sold by a Game store and such jumper cable is faulty and leads to an injury or other issues relating to the use of the jumper lead cable on a motor vehicle, then such a dispute between Game and the consumer concerned could be mediated upon and dealt with by the applicant in accordance with the Code. The Act and the

Code are thus there to protect consumers. The applicant contends that to try and limit the ambit of which accessories fall within the definition by placing a cap on the retailers involved depending on whether or not it is their primary business or not, certainly does not fall within the ambit of the Act and would in fact defeat the very purpose and notion of the Act and the Code.

THE FIRST RESPONDENT'S CONTENTIONS

[19] The first respondent joined the Minister of the Department of Trade and Industry as a second respondent in its counter-application. In the counter-application the first respondent claims that the contributions levied in terms of the Act are *ultra vires* in that it is an unauthorised and illegal tax that has been raised by the second respondent. Both the applicant and the second respondent deny that the contributions are *ultra vires* for reasons that follow hereunder.

[20] The first respondent denies being liable for the contributions and says its liability would depend on whether it is a member of the "Automotive Industry" as defined in the Code. The first respondent submitted that it plainly does not qualify as a member of the "Automotive Industry" as defined and therefore it is not liable for contributions under the Code. In addition, the first respondent submitted that the applicant has not demonstrated that the contributions it seeks from the first respondent have been properly calculated in accordance with the Code.

[21] In the alternative, if it is determined that the first respondent falls within the Code's definition of "Automotive Industry", then the first respondent submits that the provisions of the Code that require those who fall within the definition of "Automotive Industry" to pay mandatory contributions to the Applicant – namely section 13.2, read with Schedule 5, in particular, Schedule 5(1) and (2) – are *ultra vires* and fall to be reviewed and set aside. The first respondent seeks such relief in its counter-application against the second respondent (the "Minister").

[22] The first respondent premises its argument with reference to the definition of "Automotive Industry" which is defined in section 2.3 of the Code as follows:

"Automotive Industry means" importers, distributors, manufacturers, retailers, franchisors, franchisees, suppliers, and intermediaries who import, distribute, produce, retail or supply passenger, recreational, agricultural, industrial, or commercial vehicles, including but not limited to passenger vehicles, trucks, motor cycles, quad cycles or, whether self-propelled or not an internal combustion propelled engine for a boat, or import, distribute, manufacture, retail or supply any completed components and/or accessories to such vehicles, and/or renders a related repair or replacement service to consumers in respect of such vehicles; and trailers, and anyone who modifies, converts or adapts vehicles."

[23] Schedule 5 of the Code, in turn, provides that "retailers" will fund 50% of the applicant's approved budget until the first anniversary of the applicant's

accreditation and, thereafter, that they will fund 80% of its budget. An individual retailer's liability is calculated by dividing 50% or 80% of the applicant's approved budget, as the case may be, by "the total number of premises from which business is being conducted in the Automotive Industry".

[24] The applicant seeks a declaratory order that the first respondent is a "retailer, as defined in accordance with the [Act]" and, "as such", is liable for the contributions as set out in the Code. The declaratory relief sought by the applicant assumes that, if the first respondent is a "retailer, as defined in accordance with the [Act]", it is liable for contributions under the Code. The first respondent denies that this assumption is correct. The fact that the first respondent (or any other person) may be a "retailer" as defined in the Act does not have the consequence that it will be liable for contributions under the Code, it argues.

[25] The first respondent submitted that it is only members of the "Automotive Industry" as defined in section 2.3 of the Code who are expressed to be liable for contributions under the Code. Section 13.2 of the Code provides that the applicant is funded by the Automotive Industry. The first respondent concludes thus that the declaratory relief sought by the applicant does not follow from the relevant statutory provisions. A declaration that the first respondent is a "retailer" as defined in accordance with the Act would not have the consequence that it will be liable for contributions under the Code. For this reason the first respondent submitted that the declaratory order sought by the applicant is not competent. The monetary relief sought by the

applicant flows from the declaratory order. To the extent that the declaratory relief is incompetent, says the first respondent, so too is the monetary relief.

[26] The first respondent is not an importer or retailer of motor vehicles. Accordingly, the first part of the definition of "Automotive Industry" set out above is not applicable. In addition, the applicant does not contend that the first respondent is an importer, manufacturer, franchisor, franchisee or intermediary. Accordingly, those parts of the definition that refer to these enterprises are also not relevant. The relevant part of the definition is accordingly the following:

"... *retailers [and] ... suppliers ... who .... distribute ... retail or supply any completed components and/or accessories to such vehicles, and/or renders a related repair or replacement service to consumers in respect of such vehicles* ..." (emphasis added)

[27] The first respondent supplies fuel and lubricants that are advertised as being able to clean, protect, repair and maintain motor engines. The first respondent also supplies brake fluid and cleaning materials.

[28] The mere selling of these products would not qualify the first respondent as a retailer of vehicle accessories or as a member of the "Automotive Industry" as defined in the Code. Because the first respondent supplies the products mentioned above, the applicant alleges that the first respondent supplies "accessories" to vehicles, and a "related repair and replacement service to vehicles".

[29] The first respondent addressed each as follows:

[29.1] Accessories

[29.1.1] the applicant contends that the first respondent supplies vehicle accessories and that the fuel and lubricants are accessories because they are "propellant[s] within the vehicle itself", "service the vehicle in the form of lubricants and oils" and "repair the vehicle in the sense of cleansing the internal workings of the combustion chambers". The applicant argues that these features mean that products sold by the first respondent "clearly fall within" the relevant definition and place the first respondent "squarely within the ambit of the Automotive Industry".

[29.1.2] the first respondent contends that the applicant provides no linguistic justification or judicial authority for its sweeping and categorical contention that, simply because the fuel and lubricants the First Respondent sells might propel vehicles or repair and clean their engines, they are vehicle accessories.

[29.1.3] the first respondent argues that the applicant's contentions are without foundation and that a vehicle

"accessory" does not include fuel, lubricants or any of the products sold by first respondent. Furthermore, the word "accessory" is defined in the Shorter Oxford English Dictionary as "*An additional or subordinate thing; and adjunct, an accompaniment; a minor fitting or attachment*".

[29.1.4] the term "accessory" received judicial attention in Rex v Silke 1947 (4) SA 297 (CPD) where the full bench of the Cape Provincial Division (as it then was) stated the following (also in connection with regulations dealing with motor vehicle "accessories and equipment") at 298-299.

"*There is no definition of "accessory" or "equipment" in these regulations, but it seems to me that the definition which is given of 'accessory' in Chambers' Twentieth Century Dictionary is the one that we should apply, namely that an accessory is a secondary, additional or non-essential item of equipment. In a case of this kind, we must, to some extent, use our knowledge of what constitutes an accessory to a motor-car and what constitutes equipment, and it seems to me that the difference between an accessory and equipment is this; that an*

accessory is an amenity in the car; it may be something more but it is at least an amenity which is not necessary for the proper use of the car, such as a wireless or a clock or a cigarette lighter, whereas equipment would be something that is necessary for the proper use of the care." (*sic*)

[29.1.5] the characteristics of an "accessory" appear from the definition of "Automotive Industry" in the Code, and the judicial authority cited above. The definition of "Automotive Industry" states that the item must be an accessory "to such vehicles". The preposition is important. The Code does not refer to items or products "in" or "within" a motor vehicle, such as fuel or lubricants. The wording of the Code suggests the attachment of an item to a vehicle.

[29.1.6] the item must be a "secondary, additional or non-essential item of equipment." The fuel and lubricants supplied by the first respondent do not satisfy this requirement for two obvious independent reasons: First, fuel and motor lubricants are not "secondary, additional or non-essential". On the contrary, they are essential for a vehicle to function. Secondly, fuel and lubricants do not constitute "item[s] of equipment". In

addition, the fuel and lubricants sold by the First Respondent do not satisfy the Oxford dictionary definition above. They are not "additional or subordinate things" nor are they "adjuncts", "accompaniments" or "minor fittings or attachments."

[29.1.7] the applicant's contention that motor vehicle fuels and oils, without which a motor vehicle cannot move or function as a motor vehicle do not constitute accessories to a vehicle, is flawed. So too the applicant's contention that items that are essential for the functioning of a vehicle are accessories. It is clear from the authorities that an accessory is something secondary or non-essential. The applicant's categorical statements concerning what qualifies as a vehicle accessory are based on a fundamental misunderstanding of what constitutes an accessory.

[29.1.8] it is inescapable thus that fuels, lubricants, brake fluid and cleaning materials sold by the first respondent are not vehicle accessories.

[29.2] Alleged supply of a related repair and replacement service to vehicles

[29.2.1] the applicant also states that the first respondent supplies a "related repair and replacement service to vehicles" and accordingly, on this further basis, that it falls within the definition of the "Automotive Industry".

[29.2.2] the applicant states that "the replacement of fuel into the engines on a continuous basis in order to constitute the propellant within the engine and thereby make the motor vehicle capable of being used as a motor vehicle, by the sale of fuels itself, also clearly constitutes a service and/or replacement service to motor vehicles" and places the first respondent "squarely within the ambit of the Act."

[29.2.3] the applicant's submissions rest on a misreading of the definition of "Automotive Industry". The definition speaks of rendering a "related repair or replacement service to consumers in respect of such vehicles ..." The Code does not speak of rendering a repair or replacement service to vehicles, but to consumers in respect of vehicles. The definition is plainly intended to cover mechanics and similar service providers who repair vehicles and replace damaged or worn out components.

[29.2.4] by supplying consumers with fuel and lubricants, the first respondent plainly does not render a repair service to consumers. Enabling a vehicle to operate by providing it with the necessary fuel and lubrication is not providing a repair service to the customer.

[29.2.5] similarly, the first respondent does not offer a replacement service to customers in respect of vehicles. It does not supply replacement vehicles, nor does it supply replacements for worn out or damaged components. In addition, the supply of fuel and lubricants does not constitute the supply of replacement products. Fuel and lubricants are not replaced in the sense of swapping damaged or worn out components for new ones. Rather fuel and oil tanks are refilled or replenished. One speaks of a "filling station", not a "fuel replacement station".

[29.2.6] the definition of "Automotive Industry" in the Code makes it clear that the Code is concerned with those importing, selling, repairing or otherwise dealing with motor vehicles or their parts and accessories. It is not concerned with those supplying the fuel and lubricants for vehicles. Those suppliers fall within a different industry altogether, namely the fuel and oil industry.

[29.2.7] had the Code intended to cover fuel and lubricant suppliers it could easily have dealt with this expressly. It did not. As a consequence, the applicant has had to resort to extremely strained (and unsustainable) interpretations of the terms "accessories", "repair services" and "replacement services" in an attempt to force the first respondent's business to fit within the definition of "Automotive Industry". The first respondent's business does not fall within any sustainable interpretation of the terms used in this definition.

[29.3] Supply of lubricants and brake fluid not primary business

[29.3.1] even if the first respondent did sell motor vehicle accessories, on the applicant's own version, the sale of these items is ancillary to the first respondent's principal business of selling fuel.

[29.3.2] in order for a retailer to qualify as a member of the "Automotive Industry" as defined in the Code, the primary business of the relevant retailer must fall within the definition. Otherwise, any retailer who happens to stock motor vehicle components or

accessories (such as, for example, jumper lead cables or tow ropes) would fall within the scope of the Code and be required to pay contributions to the applicant. All of the large retailers, including Pick n Pay, Game and Builder's Warehouse, stock components and accessories such as those mentioned. Such retailers cannot, however, sensibly be regarded as members of the Automotive Industry and liable to pay contributions to the applicant.

[29.3.3] the applicant contends that such retailers are in fact liable for contributions to the applicant because they sell such accessories. The applicant argues that if a consumer is sold a faulty vehicle accessory by one of the large retailers, the dispute between the retailer and the consumer should be mediated and dealt with by the applicant in accordance with its Code, which exists to protect consumers.

[29.3.4] the first respondent advances two related submissions in the latter regard, namely, that firstly, there is a separate ombudsman for the retail industry, namely the Consumer Goods and Services Ombud. Accredited in terms of GN R 271 in Government Gazette No. 38637 of 2015. Consequently, there is

an existing dispute resolution mechanism available for consumers who wish to bring disputes against the retail industry. There is no reason why retailers should pay contributions to the Consumer Goods and Services Ombud as well as to the Applicant, simply because they sell vehicle accessories.

[29.3.5] the applicant's contention that retailers should submit to its jurisdiction and pay contributions to it under the Code constitutes patent and abusive regulatory overreach on the part of the applicant. In the same way that the applicant has inappropriately and impermissibly sought to bring general retailers under its jurisdiction, so too it has impermissibly sought to bring the fuel and oil industry under its jurisdiction. The retail, automotive and fuel industries are separate industries.

[29.3.6] secondly, the applicant has chosen not to disclose whether it has in fact invoiced retailers such as Pick n Pay, Game and Builder's Warehouse. No doubt, should the applicant choose to invoice these retailers, it will be met with the response that they are not members of the Automotive Industry and are therefore not liable to pay contributions to the applicant.

[30] The first respondent submitted consequently that, even if the first respondent did sell motor vehicle accessories, this would not render the first respondent a member of the "Automotive Industry" for the purposes of the Code as this aspect of its business is ancillary to its primary business, which is the sale of fuel. The sale of fuel falls outside the businesses contemplated by the Code's definition of "Automotive Industry".

[31] For all the above reasons, the first respondent submitted that it is not a member of the Automotive Industry as defined in the Code and, accordingly, it is not liable to make the contributions contemplated by the Code.

[32] The first respondent made further submissions on the applicant's failure to demonstrate that it has properly calculated the contributions it seeks from the first respondent in accordance with the Code. So too did the first respondent contend that the funding mechanism is *ultra vires*. I find that it is unnecessary for me to decide on these issues for reasons that follow hereunder.

THE SECOND RESPONDENT'S CONTENTIONS

[33] The second respondent confined its argument to the opposition of allegations that the second respondent acted *ultra vires* in promulgating the Code which requires entities that fall within the definition of 'Automotive Industry' to pay mandatory contributions to the applicant. For reasons which appear hereunder I deem it unnecessary to make any finding on whether the relevant provisions of the Code are *ultra vires*.

JUDICIAL REASONING AND ORDER

[34] It would seem to me that the logical point of departure is to determine first whether the first respondent is indeed a member of the Automotive Industry. If the answer is in the negative then the application must fail. On the face of it the first respondent is not a member of the "Automotive Industry" as defined and would accordingly not be liable for contributions under the Code. On the documents before me and having considered the first respondent's submissions it is clear that the second respondent is not a member of the *"Automotive Industry"*.

[35] Section 2.3 of the Code provides a definition for "Automotive Industry" to mean importers, distributors, manufacturers, retailers, franchisors, franchisees, suppliers, and intermediaries who import, distribute, produce, retail or supply passenger, recreational, agricultural, industrial, or commercial vehicles, including but not limited to passenger vehicles, trucks, motor cycles, quad cycles or, whether self-propelled or not an internal combustion propelled engine for a boat, or import, distribute, manufacture, retail or supply any completed components and/or accessories to such vehicles, and/or renders a related repair or replacement service to consumers in respect of such vehicles; and trailers, and anyone who modifies, converts or adapts vehicles.

[36] It is thus clear that only members of the "Automotive Industry" as defined in section 2.3 of the Code are expressed to be liable for contributions under the Code. The debate is thus whether the first respondent is a member of the

"Automotive Industry". The relevant part of the definition is accordingly the following:

"... retailers [and] ... suppliers ... who .... distribute ... retail or supply any completed components and/or accessories to such vehicles, and/or renders a related repair or replacement service to consumers in respect of such vehicles ..." (emphasis added)

[37] Whether the first respondent is a member as contended by the applicant must be determined with reference to the relevant part of the definition above. The first respondent supplies fuel and lubricants that are advertised as being able to clean, protect, repair and maintain motor engines. The first respondent also supplies brake fluid and cleaning materials. The mere selling of these products do not necessarily qualify the first respondent as a retailer of vehicle accessories or as a member of the "Automotive Industry" as defined in the Code. It is because of the first respondent supplying such products that the applicant contends that the first respondent supplies "accessories" to vehicles and a "related repair and replacement service to vehicles" and for this reason, is a member.

[38] The word "accessories" does not in my view include fuel and lubricants. These products are "propellant[s] and lubricants" within the vehicle itself. The word "accessory" is defined in the Shorter Oxford English Dictionary as "*An additional or subordinate thing; and adjunct, an accompaniment; a minor fitting or attachment*". Furthermore, the term "accessory" was pronounced pon

in Rex v Silke 1947 (4) SA 297 (CPD) where the full bench of the then Cape Provincial Division, stated the following (also in connection with regulations dealing with motor vehicle "accessories and equipment") at 298-299:

"There is no definition of "accessory" or "equipment" in these regulations, but it seems to me that the definition which is given of 'accessory' in Chambers' Twentieth Century Dictionary is the one that we should apply, namely that an accessory is a secondary, additional or non-essential item of equipment. In a case of this kind, we must, to some extent, use our knowledge of what constitutes an accessory to a motor-car and what constitutes equipment, and it seems to me that the difference between an accessory and equipment is this; that an accessory is an amenity in the car; it may be something more but it is at least an amenity which is not necessary for the proper use of the car, such as a wireless or a clock or a cigarette lighter, whereas equipment would be something that is necessary for the proper use of the care."

[39] Even if the second respondent did in fact sell motor vehicle accessories the mere sale of these items would be ancillary to the first respondent's principal business of selling fuel. In order for a retailer to qualify as a member of the "Automotive Industry" as defined in the Code, the primary business of the relevant retailer must fall within the definition.

[40] I conclude thus that, for reasons set out above, the applicant has not made out a case for the primary relief sought, which is the declaratory order. This being the case, it is unnecessary to decide on the issue of the payment

method and recovery mechanism and whether the relevant provisions of the Code are *ultra vires*.

[42] In the premises the application is dismissed with costs.

G. T. AVVAKOUMIDES

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

DATE: 28 FEBRUARY 2018

Representation for parties:

For applicant:	M.M. Rip SC
Instructed by:	Arthur Channon Attorneys
For First Respondent:	G. Quixley
Instructed by:	Seton-Smith & Associates
For Second Respondent:	L. Montsho-Moloisane SC with B. T. Moeletsi
Instructed by:	State Attorney