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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Appeal Case No. **A261/2021**
NCT Case No. **NCT/171784/2020/73(2)(b)**

(REPORTABLE: YES/NO
(OF INTEREST TO OTHER JUDGES: YES/NO
(REVISED.

In the matter between:

PLATINUM WHEELS (PTY) LTD

Appellant

and

THE NATIONAL CONSUMER COMMISSION

First Respondent

THE NATIONAL CONSUMER TRIBUNAL

Second Respondent

JUDGMENT

RETIEF AJ (Ndlovane AJ concurring)

INTRODUCTION

[1] This is an appeal against the whole judgment and order of the Second Respondent (the “*Tribunal*”) dated the 3rd of August 2021 in which the Tribunal found the Appellant (“*Platinum*”), a second-hand motor dealership, in contravention of the provisions of the Consumer Protection Act 68 of 2008 (“*CPA*”).

[2] Platinum exercised its automatic right of appeal in terms of Section 75 of the CPA read together with Section 148(2) of the National Credit Act 35 of 2005 (“*NCA*”).

[3] The Tribunal’s judgment and findings emanate from proceedings brought before it by the First Respondent (the “*Commission*”) in terms of Section 73(2)(b) of the CPA. The proceedings related to a complaint lodged by Mr Hiram Clinton Links (“*Mr Links*”), a customer of Platinum after he purchased a second-hand BMW M5 2012 (“*M5*”) motor vehicle.

[4] Platinum raises six grounds of appeal, the nub of which traverse the Tribunal’s findings in respect of the applicability of the CPA, the application and contraventions of Sections 55(2), the application of the complete defence of Section 55(6), the applicability and refund remedy applied in Section 56(3) and the Tribunal’s findings in respect of Section 112 of the CPA.

[5] The Commission lodged a cross-appeal, wherein the Commission challenges the Tribunal’s formulation of the refund order in terms of Section 56(3)(b) by failing to apply Section 4(2)(b)(ii) and or applying Section 4(2)(b)(ii) at all when formulating the order and the amount of the penalty levied against Platinum in terms Section 112 of the CPA.

[6] Central to the appreciation of the issues on appeal are the sequence of the material events which took place.

FACTS

[7] Mr Links and Mr J Hayes ("*Mr Hayes*"), a director and shareholder of Platinum, were family friends. Mr Links had previously mentioned to Mr Hayes that he wished to own a M5, and that Mr Hayes should look out for a second-hand M5 motor vehicle for him. Pursuant to the aforesaid, Mr Hayes in May 2018 contacted Mr Links and informed him that a M5 2012 model was advertised by Platinum for the sum of R 499 000.00 ("*initial purchase price*").

[8] Mr Links was informed that the M5, a high-performance vehicle had an odometer reading of approximately 95 000 km and was approaching the end of its valid motor plan and extended warranty (3 months) which was underwritten by BMW South Africa. On approximately the 1st of June 2018, Mr Links inspected, tested and drove the M5. Mr Links informed Mr Hayes that he wished to purchase and in so doing, wished to trade in his current motor vehicle, a BMW 330D with registration [...]as part of the transaction. Platinum offered Mr Links a trade-in value of R 330 000.00 for the BMW 330D. The papers are silent on the actual trade-in value of the BMW 330D at the time.

[9] During the negotiations of how the transaction should be structured Mr Hayes informed Mr Links of a difficulty, namely: Mr Hayes on drawing up the settlement value for the BMW 330D became aware that the outstanding finance of the BMW 330D exceeded its value by some R 138 759.69 which meant that Mr Links would have to settle the shortfall before he could purchase the M5. This shortfall triggered the necessity to restructure the transaction, *inter partes*.

[10] The restructuring of the transaction, by agreement, was achieved by inflating the advertised initial purchase price of the M5 (this could be done as the M5's book value was approximately R 630 000.00). Consequently, it was agreed between them that the M5 would be sold to Mr Links for less than the advertised initial purchase price, for the sum of R 450 000.00, but financed for an inflated purchase price of R 586 956.52 (excluding value-added tax). The offer to purchase ("*OTP*") dated the 7th June 2018 reflects the inflated amount as the purchase price for the M5 and the trade-in details of the BMW 330D.

[11] In this way, Mr Links could settle the full outstanding amount of the BMW 330D with BMW Finance. Platinum undertook to pay BMW Financial Services directly on behalf of Mr Links.

[12] The papers are unclear whether the various financial institutions referred to by Mr Hayes who were approached to finance the purchase of the M5 were aware of the terms of the restructuring transaction between Mr Links and Platinum, but what is clear from the OTP is that the inflated purchase price of R 586 956.52 (excluding value-added tax), including additional extras (service & delivery fees, license and registration fees and power up service plan fee) was used to obtain finance for Mr Links.

[13] Mr Links obtained finance from Motor Finance Corporation t/a M.F.C, a division of Nedbank ("*MFC*") and concluded a credit variable rate instalment sale agreement with them. Clauses 1.3.5 and 1.3.6 of the terms and conditions thereof, clearly indicate that the term "goods" meant the described M5 and that the purchase price for such goods was reflected as R 586 956.52 (excluding value-added tax).

[14] The amount inclusive of value added tax advanced by MFC to Mr Links amounted to R705 797.87 which amount, included the purchase price of R 586 956.52 (excluding value-added tax) and other additional charges for value added products in respect of the M5, all of which were included in the monthly instalment. The principal debt owed by Mr Links for the advanced finance was R989 708.99 which amount included the total advanced aforementioned and interest. Mr Links was charged interest for the deferred monthly repayments payable over a 72-month period.

[15] The relationship between Platinum and MFC is not apparent from the papers nor was there an indication whether the M5 was subject to a floor plan agreement. Save that the terms and conditions applicable to the credit variable rate instalment sale agreement refer to the term "supplier" as the person (dealership in this case) who supplied the goods to Mr Links and from whom the goods were to be collected by him (clauses 1.3.6 and 3) and further that MFC would purchase the goods from the supplier and retain ownership until date of last payment.

[16] Mr Link's finance was approved on the 8th June 2018. This is the same date Mr Links took transfer of the M5 by collecting it from Platinum. Platinum received payment from MFC as per the OTP on the 11th of June 2018. The remittance advice indicated that a sum of R 694 915.84 was paid from MFC to Platinum. The advice itself indicated that the sum paid to Platinum was for the total sum as per the OTP including payment for an amount for difference in condition cover ("*DIC*").

[17] Platinum on the 11th June 2018, having received full consideration as a result of the restructured transaction indicated in its papers "*that the proceeds of the sale were allocated*" as follows:

17.1 Platinum settled the full outstanding balance for the BMW 330D by paying R 468 759.69 directly to BMW Financial Services;

17.2 Platinum paid McCarthy Finance, a Division of Wesbank, a Division of FirstRand Bank Limited, the settlement figure of an amount of R 74 552.34 being the settlement value of a Chevrolet Utility 1.5 Club vehicle, owned on behalf Mr Links as a second vehicle;

17.3 Platinum as the motor dealer settled a mechanical protection plan and Innovation Group Power Hub service plan underwritten by Insure Africa, a Division of Constantia Insurance Company to the value of R 17 918.42 in respect of the M5;

17.4 Platinum received the purchase price. The purchase price received as indicated by Mr Hayes in his affidavit in annexure "**JH2**". Annexure "**JH2**" is tax invoice number 2020, dated the 8 June 2018 raised in favour of MFC in which the M5 purchase price is indicated as the sum of R 586 956.52 (excluding value-added tax).

[18] After Mr Links took transfer of the M5, the M5 was booked in for assessment and repairs at JSN Motors (Pty) Ltd t/a BMW Bryanston ("*JSN*") on four occasions namely: 21st June 2018, 11th July 2018, 16th July 2018 and on 23rd July 2018. The

reasons for each such assessment and the necessity to repair the M5 is common cause.

[19] On 14 September 2018, the M5 finally broke down whilst Mr Links was driving it. The incident of the 14th of September 2018 occurred 3 months and 1 week after Mr Links took delivery of the M5 and 6 weeks after the last repair. At the time, the M5 had a final odometer reading of 98 504 km travelled.

[20] According to JSN the M5 was booked in on the 15th of September 2018 for the assessment of an oil leak and loss of power. The final assessment of the M5's oil leak and loss of power was as a result of engine failure necessitating the replacement of the engine. The cost estimate of the engine replacement amounted to R 509 078.46.

[21] Prior to Mr Links lodging a consumer complaint against Platinum in terms of the CPA, the complaint had been referred to the Motor Industry Ombudsman of SA ("MIOSA"). MIOSA's attempted to mediate and resolve the complaint/dispute between Mr Links and Platinum but it failed.

[22] The nature of Mr Links' complaint lodged in terms of the CPA against Platinum as the supplier, is apparent from the papers as recorded in the prescribed SA Consumer Complaint intake which states: "*Engine failure after 4 months after vehicle being purchased. I have experienced several problems with the vehicle since taking ownership*" ("complaint").

[23] Mr Ntsako Khoza ("*Mr Khoza*"), a duly appointed inspector for the Commission investigated the veracity of Mr Links' complaint against Platinum and compiled a report in which he set out his findings. His report dated the 29th of October 2020 found that Platinum as a supplier contravened Sections 55(2)(a)-(d) and Sections 56(3)(a)-(b) of the CPA. He consequently recommended that the matter be referred to the Commissioner for the consideration of enforcement against Platinum.

[24] The Commission proceeded with enforcement against Platinum and referred the contraventions to the Tribunal.

[25] The Commission succeed with its application against Platinum before the Tribunal. The Tribunal made an order in the following terms:

25.1 Platinum contravened Sections 55(2)(c) and 56(3) of the CPA which it declared as prohibited conduct;

25.2 Platinum was interdicted from engaging in such prohibited conduct (i.e., the contravention of Section 55(2)(c) and Section 56(3));

25.3 Platinum was directed to refund Mr Links the purchase price paid by Mr Links for the M5 with registration [....]. The amount to be refunded was to be the capital sum that MFC financed under the credit agreement which was entered into between Mr Links and MFC minus the amounts included in the capital sum to settle the outstanding balances on the two vehicles Mr Links traded in, the purchase price of the mechanical warranty and any other amounts that are unrelated to the actual purchase price of the M5, within sixty days of date of the judgment;

25.4 Platinum was directed to pay an administrative fine of R 50 000.00 into the National Revenue Fund referred to in Section 213 of the Constitution of the Republic of South Africa, 1996 within sixty days of date of the judgment;

25.5 There was no order for costs.

[26] The evidence however demonstrates that Mr Links only traded-in one motor vehicle as part of the transaction, the BMW 330D.

[27] The Court now deals with issues raised on appeal.

ISSUES

[28] Platinum's Counsel in argument advanced that the crisp issue to be determined was a jurisdictional enquiry into the applicability of the CPA. He contended that the transaction was a credit agreement in terms of the NCA and that the "goods" which

are subject to that credit agreement were, as referred to in terms of Section 5(2)(d), excluded from the applicability of Section 56 in this case. He contended that if the Court found in favour of these contentions the appeal should be upheld. If not, he stood by his heads of argument in respect of the remaining grounds.

[29] To succeed with the argument that the CPA was not applicable, and that Mr Links' redress was competent in terms of the NCA, Platinum's Counsel advanced that the transaction between Mr Links and Platinum was not a purchase agreement in terms of which Mr Links purchased the M5 from Platinum. But rather, that the papers demonstrated the conclusion of a tripartite credit agreement entered into between Mr Links, Platinum and MFC in which, MFC purchased the M5 from Platinum and Platinum in turn delivered the M5 to Mr Links. In support of the contention the Court was referred to the wording of the OTP which, contended Platinum's Counsel, was merely an offer by Mr Links and not an offer to purchase the M5 from Platinum. Furthermore that factually, MFC purchased the M5 from Platinum and Platinum delivered the M5 to Mr Links. In support thereof, the Court was referred to the preamble of the wording of the pre-agreement statement and quote prepared by MFC in which, MFC records that it as the credit provider sells to Mr Links, the credit receiver, the goods, subject to the terms and conditions. The Court was not referred to the applicable terms and conditions.

[30] Counsel relying on this argument then advanced that the "goods" which are subject to a credit agreement as referred to in Section 5(2)(d) which accordingly are not exempt from the applicability of the CPA, in context, refer to the applicability of Sections 60 and 61 of the CPA only. This is so, the argument was advanced, if one has regard to the wording and interpretation of Section 5(1)(d) and 5(5). In consequence the remedy in terms of Section 56 was not competent *vis-à-vis* the tripartite agreement.

[31] The proposition that the transaction was not a 'purchase agreement' but rather a tripartite credit agreement, was not advanced before the Tribunal nor addressed in Platinum's heads of argument as support of the jurisdictional issue raised by them on appeal nor before the Tribunal.

[32] Platinum's heads of argument merely contended that the Tribunal misdirected itself in finding that the relief in Section 55(2)(d) and Section 56(3) was competent. The reference to Section 55(2)(d) was confusing as the Court did not find a reference to Section 55(2)(d), in context, in Platinum's notice of appeal.

[33] Platinum did however raise the jurisdictional issue in its Notice of appeal but failed to do so with reference to or with any particularity to such tripartite credit agreement, as advanced in argument on appeal.

[34] Platinum's Counsel, as dictated by sound litigation practice did not inform Mr Biyana, who represented the Commission, beforehand that he wished to advance the proposition of a tripartite transaction on appeal, affording him an opportunity to prepare on this point alternatively, to formulate a formal objection, if applicable, thereto.

[35] Mr Biyana correctly raised the lack of informed notice, *supra*. In amplification, he requested the Court to take cognisance of the evidence before the Tribunal and the record. He did not raise a formal objection to the "new issue", but rather in bringing it to the Court's attention, requested the Court to attach the necessary weight thereto, if any, having regard to the facts, the evidence and the arguments advanced by Platinum before the Tribunal.

[36] In addressing the issue, the Court notes that Platinum did not raise issue with paragraph 13 of the Tribunal's judgment as a misdirection of fact when, the Tribunal accepted the facts *vis-à-vis* at paragraph 13 of its judgment which recorded:

"13. Mr Links bought a BMW M5 2012 motor vehicle ("BMW M5 or 'the motor vehicle') for R 586,952.52 from the Respondent (Platinum) (own emphasis)".

[37] It is noteworthy that the facts as stated in paragraph 13 of the Tribunal's judgment are echoed in the Platinum's own evidence, in particular by the deponent Mr Hayes in his answering affidavit when he stated that:

“10.14 it was agreed that the motor vehicle would be purchased by Links from the respondent (Platinum - own emphasis)”

read with,

“10.16 Ultimately a credit agreement was concluded between Links and MFC....”.

[38] Furthermore, Counsel for Platinum before the Tribunal advanced common cause facts namely: *“So we know, it is common cause, that Mr Links, the consumer, purchased the BMW M5 motor vehicle from Platinum Wheels. We know that Platinum Wheels, that must be common cause, is a second-hand car dealership and that they purchase and sell motor vehicles.”*

[39] The common cause facts were further echoed by Platinum’s own Counsel before the Tribunal when he confirmed that: *“Now insofar as we are concerning the supplier, we submit categorically, that means the supplier in terms of the Act (the CPA) [own emphasis] insofar as we sold the vehicle. Insofar as the repair services is concerned that, we submit would fall into category B of the definition of supply and would relate to JSN who actually conducted those services.”*

[40] The proposition of the tripartite credit agreement, as advanced on appeal, was not advanced in the evidence nor argued before the Tribunal.

[41] None of Platinum’s list of authorities advanced in this appeal deal with the core proposition of the tripartite credit agreement as advanced by Counsel. Conversely the SCA in **Motus Corporation (Pty) Ltd t/a Zambezi Multi Franchise (Renault) South Africa v Abigail Wentzel**¹ (*“Motus matter”*) applied the CPA, in particular Section 55 and 56 of the CPA to a vehicle purchased from Renault and financed by MFC on a credit variable sale agreement concluded on terms and conditions which appear similar to those in the papers.

¹ [2021] ZASCA 40.

[42] The proposition appears to be an afterthought by Platinum and one which is not well founded, certainly not on appeal. This however does not bring the jurisdictional enquiry nor the remaining grounds of appeal to finality.

[43] The question which then arises is what is the nature of the transaction between Mr Links and Platinum and, is Section 5(2)(d) applicable triggering an enquiry into the applicability of Section 56 to “the goods,” the subject of that transaction having regard to interpretation of Section 5(1)(d) and 5(5)?

[44] Answering this question will deal with the bulk of Platinum’s grounds raised on appeal including the jurisdictional enquiry.

[45] In so doing, the Court turns to determine the nature of the transaction between Mr Links and Platinum and MFC arising from the complaint in terms of the CPA by applying the facts and evidence to the applicable law.

THE TRANSACTION

[46] In terms of the CPA:

*“**retailer**’, with respect to any particular goods, means a person who, in the ordinary course of business, supplies those goods to a consumer;*

*‘**supplier**’ means a person who markets any goods or services;*

*‘**supply**’, when used as verb –*

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

(b) ...

*‘**transaction**’ means -*

(a) in respect of a person acting in the ordinary course of business –

(i) an agreement between or among that person and one or more other persons for the supply or potential supply of any goods or service in exchange for consideration; or

(ii) the supply by the person or any goods to or at the direction of a consumer for consideration; or

(iii) ...

(b) ... “

[47] Applying the facts, Platinum in the ordinary course of its business as a second-hand car dealership sourced and supplied Mr Links with a second-hand M5. Platinum received full consideration for supplying the M5. The payment and how the proceeds were to be dealt with, were agreed to between Mr Links and Mr Hayes on behalf of Platinum. The consideration paid for the supply of the M5 was not deferred nor was any interest agreed, levied or charged.

[48] Applying the CPA, the word “supply” in terms used as a verb is an inclusive definition and not a limiting definition. Furthermore, if read in conjunction with the words “supplier” and “transaction”, common sense dictates that the interpretation thereof is not only confined to the selling, renting, exchange and hire of such goods in the ordinary course of business for consideration, but would include the marketing, sourcing and/or supply of such goods for consideration in the normal course of business for consideration.

[49] Applying the terms of the CPA mentioned above, in context with MFC’s variation credit instalment sale agreement, Platinum as the supplier/dealer supplied the M5. MFC paid Platinum the full consideration agreed to between Mr Links and Platinum for the supply of the M5. MFC’s ordinary course of business is a credit provider. Ownership of the M5 vests in MFC as security for the total debt advanced, including interest, until date of final payment by Links. Platinum is not a party to the variation credit instalment sale agreement.

[50] The transaction under the looking glass of the CPA complained about remains the transaction of the supply of goods between the consumer and supplier for consideration in the ordinary course of business.

[51] Applying the definitions of the CPA together with the interpretation guidelines afforded by Section 4(4) of the CPA, there remains little doubt that Platinum is the supplier envisaged in terms of the CPA who, in the ordinary course of its business marketed, contacted and supplied an M5 to Mr Links for consideration. This transaction, as relied upon and catered for in the CPA occurred without the necessity of considering the terms of the purchase agreement relating to the M5 nor the relevance thereof.

[52] The transaction between Mr Links and Platinum is not a credit agreement as envisaged in terms of Section 8 of the NCA and as a consequence, Section 5(2)(d) finds no application nor is it relevant to the facts.

[53] Although the Court is in agreement with Platinum that the Section 5(2)(d) is not applicable the reasons as discussed above differ.

[54] It flows that the grounds raised by Platinum in respect of the jurisdictional enquiry, the interpretation of the exclusion of “goods” referred to in Section 5(2)(d) and the inapplicability of Section 56 must fail.

[55] Applying the Motus matter, the provisions of the CPA is applicable, and as a consequence Sections 55 and 56 apply to the transaction in terms of the CPA as it relates to the complaint by Mr Links.

[56] The Court now turns to deal with the provisions of Sections 55 and 56 as dealt with in Platinum’s remaining grounds of appeal.

DISCUSSION OF SECTIONS 55 AND 56 OF THE CPA

Section 55

[57] Section 55 of the CPA guarantees a consumer like Mr Links a right to safe and good quality goods. In Section 55(2)(a) to (c) on which reliance was made by the Commission for the contravention, states the following:

“55(2) Except to the extent contemplated in subsection (6) (own emphasis), every consumer has a right to receive goods that –

(a) are reasonably suitable for the purpose 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.

55(3) In addition to the right set out in subsection (2)(a), if a consumer has specifically informed the supplier of the particular purpose for which the consumer wishes to acquire any goods, or the use to which the consumer intends to supply those goods, the supplier –

(a) ordinarily offers to supply such goods; or

(b) acts in a manner consistent with being knowledgeable about the use of those goods, the consumer has a right to expect that the goods are reasonably suitable for the specific purpose that the consumer has indicated.

55(4) ...

55(5) ...

55(6) Subsection (2)(a) and (b) do not apply (own emphasis) to a transaction if the consumer –

(a) has been expressly informed that particular goods were offered in a specific condition; and

(b) has expressly agreed to accept the goods in that condition, or knowingly acted in a manner consistent with accepting the goods in that condition.”

[58] The thrust of Platinum’s argument on appeal in support of the grounds raised in respect of Section 55 is that the defence envisaged in subsection (6) apply to the common cause facts and undisputed evidence.² The consequence of which affords Platinum a complete defence for the applicability of Section 55. In the alternative, Platinum contends that in the absence of the Tribunal finding that it contravened Sections 55(2)(a-b), Section 55(2)(c) should not be applied.

[59] The common cause facts relied on by Platinum: Mr Links was aware that the M5 was a high-performance vehicle, it was second-hand and had approximately 95 000 km on the odometer and was approaching the end of its motor plan and extended warranty (3 months remaining) underwritten by BMW South Africa. Mr Links was aware that any repairs after the expiry of the motor plan and warranty would be for his own account. Acting on this knowledge Mr Links took out an insurance policy for used cars, insuring the engine.

[60] Before dealing with whether the defence in subsection (6) is applicable, the Court has regard to the nature of Section 55(2). In the *Motus* matter,³ the Supreme Court of Appeal affirmed that a right afforded to a consumer in terms of Section 55(2) exists, irrespective of whether it is contractually warranted, it exists by operation of law and is protected by Section 56. A consumer may enforce it in terms of the CPA or in terms of an agreement in the event of its breach by the supplier. Mr Links has

² **Plascon-Evans Paint Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A) at 635C.

³ [2021] ZASCA 40.

enforced his right in terms of Section 55 against Platinum as the supplier of the M5 irrespective of the mechanical warranty and maintenance plan.

[61] The complaint levied by Mr Links is against Platinum in terms of the CPA as the supplier of goods. The complaint levied by Mr Links is not centred around Platinum as the supplier of the service repairs nor against JSN who repaired the M5 in terms of a contractual warranty at the time. Any reliance thereon by Platinum must fail.

[62] The application of subsection (6) qualifies a consumer's rights envisaged in Section 55(2). This is to be found in the preamble of Section 55(2) which states that every consumer has the right to receive goods, except to the extent contemplated in subsection (6).

[63] The extent of the qualification in subsection (6) appears to confine its application to the consumer rights afforded in subsections (2)(a) and (b) only. Subsection (6) is silent on qualifying 55(2)(c). Subsection 55(2)(c) has its own built-in limitation of "*reasonable time....*".⁴

[64] The Tribunal found that Mr Links possessed a right to goods supplied to him in terms of Section 55(2)(c). The right in terms of subsection (c), by its limitation operates as a 'type and shadow' of a qualified continuing warranty for the limited period only. Its operation is not confined to the date of purchase/transfer of goods but continues after delivery. This explains why subsection (6) does not qualify Links' right in terms of Section 55(2)(c). It flows that applying the common cause and undisputed facts are irrelevant to the outcome *vis-à-vis* Section 55(2)(c).

[65] In the alternative Platinum contends that by the Tribunal not applying the rights afforded to Mr Links in terms of Section 55(2)(a-c), Section 55(2)(c) is inapplicable. To succeed with this argument Platinum would have to succeed with an argument that the rights afforded to a consumer in terms of Section 55 are, in all circumstances, to be read and applied together. This is an untenable proposition having regard to reading of Section 55 as a whole and in context.

⁴ Section 55(2)(c) requires that the goods must be "*useable and durable for a reasonable period of time, having regard to the use which they would normally be put and to all the surrounding circumstances of their supply*". This is a new right not recognised under the common law.

[66] Section 55, *inter alia*, qualifies each right separately. This is apparent in Sections 55(3)-(6) and subsection (4) which refer to such rights, in the alternative by using the conjunction “or”. Platinum did not expand on this alternate ground in its heads of argument. The alternate argument must fail.

[67] Once the application of Section 55 is established to apply to the transaction between Mr Links and Platinum, Mr Links possessed the right to receive the M5 according to the provisions of Section 55(2)(c).

[68] The Court therefore finds no misdirection with the Tribunal’s application of subsection (6) nor with the manner in which the Tribunal applied Section 55(2)(c) to the common cause and undisputed facts in determining that Platinum was in contravention thereof.

[69] Lastly, the Tribunal did not make a finding in respect of Platinum’s contraventions in respect of Section 55(2)(a-b). The Commission in cross-appeal sought to incorporate the contravention of (a-b) but failed to deal with it in its Notice. No amendment was sought nor granted. The incorporated relief must fail. The Court will deal with the cross-appeal in detail hereunder.

Section 56

[70] Section 56 reads as follows:

“56. IMPLIED WARRANTY OF QUALITY

(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 retailers each warrant that the goods comply with the requirements and standards contemplated in section 55, except to the extent that they goods have been altered contrary to the instructions, or after leaving the control, of the producer, 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.

(3) If a supplier repairs any particular goods or any component of any such goods, and within three months after that repair, the failure, defect or unsafe feature has not been remedied, or a further failure, defect or unsafe feature is discovered, the supplier must –

(a) replace the goods; or

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

[71] According to Mr Hayes, the M5 underwent a “M-check” to ensure, *inter alia*, that it was in good working order and had not been modified. It is common cause that the M5 was returned by Mr Links for repairs on four occasions subsequent to Mr Links taking possession of the M5 on the 8th of June 2018. JSN repaired the M5. Such repairs occurred within the prescribed time limits of Section 56(2).

[72] Platinum contends that because the repairs were affected by JSN in the execution of a motor plan, Platinum is not the supplier as envisaged in Section 56(3).

[73] The answer lies in Section 56(1) in that the implied warranty of quality referred to in Section 56 is an implied provision in any transaction or agreement pertaining to the supply of goods to a consumer and furthermore, that implied provision places an obligation on the producer or importer, the distributor and the retailer of the goods.

The implied warranty of quality is that the goods themselves will comply with the requirements and standards contemplated in Section 55, with certain exceptions.

[74] It flows then that the supplier envisaged in terms of a transaction pertaining to the supply of the goods whether as a producer, importer, distributor or retailer is the supplier intended in Section 56(2) and (3). Applying the definitions of the CPA of “retailer” being the person who supplies the goods, Platinum is a retailer.

[75] Sections 56(2) and (3) both have safeguard time limits within which a consumer may seek a remedy. Platinum’s concerns that an incorrect interpretation of Section 56(3) could create a situation where a consumer could return goods after several years which would have far-reaching consequences, is misplaced as a result of the built-in time limitations.

[76] Platinum in its heads failed to deal with Section 56(1), the preamble to Section 56(2) and (3), and on that basis, missed the point entirely. The obligation imposed by Section 56 is on Platinum as the supplier and retailer of the M5. Furthermore, the implied warranty operates as of law, irrespective of any other contractual agreements (i.e., a warranty and maintenance plan).

[77] After the repairs to the M5 were done as referred to in terms of Section 56(2) by the request of Mr Links, it was common cause that the prescribed time limit after the last repair occurred as prescribed in Section 56(3), the M5’s engine failed (an oil leak was discovered as a result of a hole in the cylinder block) occurred and the quote for the engine repair amounted to R509 078.00. Compliance of the provisions of Section 56(3) triggers an obligation on the supplier to act in accordance with Section 56(3)(a) or (b). Platinum failed to act in accordance with the CPA.

[78] The Tribunal found that Platinum had contravened Section 56(3) by failing to comply with its obligations implementing the replace or refund remedy in favour of Mr Links. No misdirection can be found.

[79] There is no misdirection in respect of the application of Sections 55(3)(c) nor Section 56(3) by the Tribunal. In consequence the grounds raised by Platinum

dealing with this Section and sub-sections, including all the permutations thereof must fail.

[80] In consequence of its findings, the Tribunal ordered and applied the refund remedy of Section 56(3) as follows: Platinum was ordered to refund Mr Links the purchase price of the M5 which it described as “...*the capital sum entered into with the MFC minus the amounts included in the capital sum to settle the outstanding balances of the two vehicles traded in*”.

[81] The formulation of the refund order in terms of Section 56(3) aforesaid, is the nub of the Commission’s cross-appeal. Platinum did not challenge the formulation of the refund order on appeal nor did Platinum challenge the Commission’s cross-appeal dealing with the formulation of the refund order and the applicability of Section 4(2)(b)(ii), at all.

[82] The Court now deals with the refund order in terms of Section 56(3) and Section 4(2)(b)(ii).

SECTIONS 56(3) REMEDY AND 4(2)(b)(ii)(bb)

[83] The Commission in its cross-appeal raised that the Tribunal is empowered to apply statutorily Section 4(2)(b)(ii)(bb) to the Section 56(3) refund remedy which it failed to do.

[84] In exercising its statutory power, the Commission contends that the Tribunal was competent to award the refund remedy in terms of Section 56(3) by ordering Platinum to refund Mr Links the full outstanding balance and instalments already paid to Motor Finance Corporation t/a M.F.C, a division of Nedbank (“MFC”) under finance account [...]

[85] This the Commission contends is notwithstanding the provisions of the 56(3)(b) which refer only to a refund of “...*price paid for the goods*”.

[86] The Commission advanced this argument by relying on Section 4(2)(b)(ii)(bb) which statutorily mandates a Tribunal and Court (“...*The Court or Tribunal, as the*

case may be, must make appropriate orders to give effect to the Consumer's rights 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").

[87] Section 4 of the CPA is headed "Realisation of Consumer Rights". Subsection (2) mandates a Tribunal or Court to, in addition to any order provided for in the CPA make appropriate including, innovative orders which give practical effect to a consumer's access to redress in terms of the Act.

[88] The question which arises is whether the Tribunal is empowered, in terms of Section 4(2)(b)(ii)(bb), to formulate an order in terms of Section 56(3)(b) which, effectively expands the statutory remedy which already exists, namely in Section 56(3)(b)? The Court now turn to deal with the answer to this question.

[89] The wording of Section 56(3)(b) already provides a remedy in terms of the CPA thereby providing access to redress of a consumer's right in terms of Section 56. It appears from the wording of the CPA that not all right infringements possess a built-in remedy.

[90] The Supreme Court in the Motus matter⁵ stated that the refund remedy in Section 56(3) is confined to the refund of the purchase price only and as a consequence not the amounts payable to MFC, the financier. This appears to be what the Tribunal attempted to achieve with the wording of its order.

[91] The Supreme Court in the Motus matter was not asked to deal with, nor did it deal with the mandatory obligation envisaged in terms of Section 4(2)(b)(ii)(bb) on appeal. The reason simply lies in the factual matrix before the Court at the time in that, the facts did not trigger the refund remedy of Section 56.

[92] Against this backdrop, the Commission in cross-appeal relies on a misdirection of the Tribunal in its failure to apply Section 4(2)(b)(ii)(bb) to the refund remedy in terms of Section 56(3).

⁵ See footnote 3.

[93] The Tribunal in its cross-appeal expanded the Tribunal's misdirection by stating that the Tribunal did not applying Section 4(2)(b)(ii)(bb) at all.

[94] The wording of Section 4(2)(b)(ii)(bb) in context empowers a Court to ensure that orders which are given in favour of consumers are practical and, where necessary, to provide innovative orders to ensure that the consumer is afforded effective redress of his/her rights provided for in terms of the CPA (*"the Act"*).

[95] It appears that the empowerment to make innovate orders does not attach itself to the expansion and/or alteration of a consumer right in circumstances where a remedy has already been statutorily catered for but, rather to ensure that such remedy rights provided for in the CPA, so stated, is practical and ensures the realisation of the consumer's right. This too, is echoed in the wording of the heading of Section 4.

[96] In terms of the CPA the consumer's right to a refund remedy is confined to the purchase price of the goods. This too has been confirmed by the Supreme Court. The task of the Tribunal or Court under Section 56(3)(b) is to ensure that the order is as practical as possible to give effective to a consumer's rights to such refund in terms of Section 56. In this case to ensure that the order gives practical effect to the refund remedy of the price paid for the goods as provided for in Section 56(3)(b).

[97] Section 4(2)(b)(ii)(bb) does not appear to empower and mandate a Court to grant an order which goes beyond the rights (to the price paid for) already afforded to Mr Links in terms of the CPA as advanced by the Commission. However, the Commission's reliance that the Tribunal misdirected itself by not applying or considering Section 4(2)(b)(ii)(bb) to the facts *per se*, to give practical effect to such right and in general to the order is not misplaced and is an important issue to deal with having regard to the object of the CPA.

[98] Applying the mandate in Section 4(2)(b)(ii)(bb) the Court can readily apply a more broad inclusive rather than a distractive interpretation of the CPA as a whole. In so doing, the Court applying "...*price paid for the goods*" through the looking glass of Section 4(2)(b)(ii)(bb) turns to the definition of "*price*" used in the CPA and to the

general principles applicable to the mechanisms for a consumer's right to a refund in Section 20 as a guide when applying the remedy in Section 56(3)(b).

[99] The definition of 'price' in Section 1 provides, when used in relation to the consideration of any transaction, means the total amount paid or payable by a consumer to a supplier in terms of the transaction or agreement, including any amount that the supplier is required to impose, charge or collect in terms of any public regulation.

[100] Applying the definition, the total amount paid to Platinum by Links to supply the M5 was the sum of R 586 956.52 (excluding value-added tax). This amount is echoed in the OTP, repeated in the credit variable rate agreement with MFC, confirmed in "**JH2**" relied on by Mr Hayes of Platinum and paid to Platinum from MFC as per the remittance advice. This amount, although inflated on the facts, is the amount demonstrated on the papers, including represented to third parties as the total amount payable for the supply of the goods, the M5.

[101] Expanding further and applying the definition of "price" to include regulatory charges (license and registration costs) the amount including value added tax would amount to R679 500.00.

[102] Applying the wording of Section 56(3)(b) through the looking glass of Section 4(2)(b)(ii)(bb), practically: If Platinum is ordered to repay R 679 500.00 for the supply of the M5, Links would be in a financial position to settle the outstanding principal debt with MFC. In so doing, ownership of the M5 would vest with Links. Links, having received a refund is legally able to tender, as he should applying the principles of refunds in Section 20, the return of the M5 to Platinum. Platinum to receive the tendered return of the M5 at its own risk as envisaged in terms of Section 56.

[103] Further practical considerations are that according to the evidence the principal debt as at 31 August 2020 was R621 393.51. Mr Links is still paying the monthly instalments to MFC, R12 911.79 per month and has not had use of the M5 since September 2018. The quotation to replace the M5's engine in 2018 amounted to R 509 078.00.

[104] Having regard to the above, the formulation of the Tribunal's refund order stands to be set-aside. Although not as formulated by the Commission on cross appeal but having regard to the provisions of 56(3) and applying Section 4(2)(b)(ii) were practically applicable. It flows that in this regard, the cross appeal must be upheld.

[105] The remaining issue to address is the administrative fine which was levied in terms of Section 112 of the CPA against Platinum.

SECTION 112 PENALTY

[106] The Tribunal ordered Platinum to pay a Section 112 penalty in the amount of R 50 000.00.

[107] Platinum contended that as it was not in contravention of the CPA and as such, no administrative fine should be levied. It confined its attack to the inapplicability of the fine and not the amount levied.

[108] The thrust of Platinum's challenge related to the Tribunal's findings as against Platinum when applying the factors in terms of Section 112(3).

[109] Considering Platinum's heads of argument regarding this challenge and in the light of the Tribunal applying each factor in terms of Section 112(3) including the factors considered in favour of Platinum, this Court finds no misdirection in the application of the factors as against the evidence presented to the Tribunal. The amount of R 50 000.00 levied echoes the weight of such findings as against Platinum in circumstances where an amount, at the discretion of the Tribunal could have been substantially higher. The subject matter of the Commission's cross-appeal.

[110] The Commission on cross-appeal confined its attack on the amount levied stating that the imposed fine was shockingly disproportionate and stands to be set aside. The Commission requested an administrative fine of R 1 000 000.00 to be levied.

[111] The determination of the administrative fine before the Tribunal is based on a statutory imposed discretion. Such discretion common cause. For this Court to interfere with the exercise of that statutory discretion, this Court would have to determine that the Tribunal failed to consider all the factors as set out Section 112(3) and/or failed to apply sufficient weight each of them when considering the fine to be levied.

[112] The Commission nor Platinum challenged that the Tribunal's failure to apply the factors of Section 112(3). The Commission however, failed to expand on the weight of each factor to sustain the ground in its heads of argument, but wished to rely on submissions in argument.

[113] No compelling submissions were made in argument to sustain the contention that the fine was shockingly inappropriate. This Court is actually aware of the common cause fact that a number of parties, including Platinum made an offer to Mr Links as redress, which he rejected and that Mr Links together with Platinum agreed to inflate the purchase price.

[114] Having regard to all the above facts and circumstances, there is no reason why this Court should interfere with the discretion of the Commission. The cross-appeal on this ground must fail.

It flows that the following order should be made:

1. The appeal is dismissed with costs;
2. The cross-appeal is upheld;
3. The order of the Tribunal dated the 3rd August 2021 is set aside, replaced and substituted as follows:

3.1. Platinum Wheels (Pty) Ltd ("*Platinum*") has contravened Sections 55(2)(c) and 56(3) of the Consumer Protection Act 68 of 2008;

3.2. Platinum is interdicted from engaging in the prohibited conduct set out in paragraph 3.1 hereof;

3.3. Platinum is ordered to pay Mr Hiram Clinton Links an amount of R679 500,00 (inclusive of value-added tax);

3.4. Platinum is directed to pay an administrative fine of R 50 000.00 (Fifty thousand rand only) into the National Revenue Fund referred to in section 213 of the Constitution of South Africa, 1996;

3.5. Payment of the amounts referred to in paragraphs 3.3 and 3.4 are to be paid by Platinum within 15 (fifteen) days from date of this order;

3.6. No order as to costs.

4. Platinum is ordered to pay the costs of the appeal.

Retief, AJ
Acting Judge of the High Court,
Pretoria

Ndlovane AJ
Acting Judge of the High Court,
Pretoria

Appearances:

Counsel for Appellant:	Adv E.C. Labuschagne SC with Adv J. Herschensohn
Attorney for Appellant:	Savage Jooste & Adams Attorneys
Appellant's Ref:	M. Van Staden/Tustin/P330
Appearance for First Respondent:	Mr. L. Biyana
The First Respondent:	The National Consumer Commission
First Respondent's Ref:	NCT/171784/2020/73(2)(b)
Date of argument:	1 st September 2022
Judgment reserved:	1 st September 2022
Date of judgment:	2 nd November 2022