

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

Case number: NCT/171784/2020/73(2) (b)

In the matter between:

NATIONAL CONSUMER COMMISSION

APPLICANT

AND

PLATINUM WHEELS (PTY) LTD

RESPONDENT

Panel:

Ms. D Terblanche – Presiding Tribunal member

Adv F Manamela - Tribunal member

Prof B Dumisa - Tribunal member

Date of hearing:

24 June 2021

JUDGEMENT AND REASONS

THE PARTIES

1. The Applicant is the National Consumer Commission (the “NCC”, the “Applicant” or the “Commission”), a regulatory entity created by section 85 of the Consumer Protection Act 68 of 2008 (“the CPA”).
2. The Respondent is Platinum Wheels (Pty) Ltd (the “Respondent” or “Platinum Wheels”), a private company incorporated under the company laws of South Africa

with company registration number: 2013/083293/07. The Respondent carries on business at 28 White Hills, Sandton, Johannesburg, Gauteng.

THE APPLICATION

3. This is an application in terms of section 73(2)(b) of the CPA. Section 73(2) (b) of the CPA provides that – *“(2) In the circumstances contemplated in subsection (1)(c)(iii), the Commission may refer the matter— (b) to the Tribunal.”*
4. Subsection (1)(c)(iii) of section 73 of the CPA provides that *“(1) After concluding an investigation into a complaint, the Commission may— (c) if the Commission believes that a person has engaged in prohibited conduct—(iii) make a referral in accordance with subsection (2);...”*
5. The Applicant alleges that the Respondent contravened sections 55(2)(a) to (c) and 56(3) of the CPA.
6. The National Consumer Tribunal (the “Tribunal”) has jurisdiction to hear the matter in terms of section 27(a)(i) of the National Credit Act 34 of 2005 (the “NCA”). Section 27(a)(i) of the NCA provides that - *“The Tribunal or a member of the Tribunal acting alone in accordance with this Act or the Consumer Protection Act, 2008 may adjudicate in relation to any application that may be made to it in terms of this Act in respect of such an application.”*

THE HEARING

7. Due to the coronavirus pandemic and the resultant physical distancing protocols, all the parties appeared *via* the Microsoft Teams audio and video technology links on 24 June 2021.

8. Mr. L M Biyana, Senior Legal Advisor, National Consumer Commission, appeared for the Applicant.
9. The Complainant, Mr. Links (“Mr. Links” or the “Complainant” or the “Consumer”), attended the hearing through video and audio links.
10. Adv J Hershensohn instructed by Savage Jooste & Adams Incorporated. represented the Respondent.

BACKGROUND / INTRODUCTION

11. The pertinent facts in this matter are largely common cause between the parties.
12. The application originates from a complaint a consumer, Mr. Links, made to the Applicant.
13. Mr. Links bought a BMW M5 2012 motor vehicle (“BMW M5” or “the motor vehicle”) for R 586 956, 52 from the Respondent. He took delivery of the vehicle on or about 8 June 2018. After the addition of the initiation fee, additional charges, value-added products, and Value Added Tax (“VAT”), the Motor Finance Corporation (the “MFC”), the financier, advanced an amount of R 705 9791, 87, to the Complainant. With interest, Mr. Links became liable to the MFC for the sum of R 969 708, 99, payable in monthly installments of R 12 911,79. The amount the MFC financed for Mr. Links included amounts towards settling two other credit agreements in the sums of R 74 552,32 and R 138 759,69 respectively Mr. Links had to settle before he could enter into a credit agreement for the purchase price of the BMW M5.
14. At the time Mr. Links bought the BMW M5 from the Respondent on 8 June 2018, the motor vehicle was still under the BMW SA Motor plan. In addition, Mr. Links bought an Extended Mechanical Protection Plan and Service Plan (the “extended warranty”)

for R 17 918,42.

15. Mr. Links complained to the Applicant that he experienced several problems with the vehicle after he took ownership and that the engine of the vehicle failed within four (4) months.
16. Between 21 June 2018 and 23 July 2018, Mr. Links returned the vehicle to the supplier on at least four (4) occasions. On each of these occasions, the supplier took the vehicle to JSN Motors (Pty) Ltd (“JSN Motors”), a BMW-approved dealer, for diagnosis and repairs.
17. The repairs failed to remedy the defects or new defects were discovered soon after the repairs were effected.
18. On 14 September 2018, the vehicle broke down as Mr. Links was driving it. The vehicle was booked in on 15 September 2018, due to oil leaks. The odometer reading was 98 504 km, having travelled 2 968 kilometres since the consumer took delivery of the vehicle, and having travelled 1 489 kilometres after JSN Motors did the last repairs. The breakdown on 14 September 2018, took place 3 months and 1 week after Mr. Links purchased and took delivery of the vehicle, and 6 weeks after the last repairs.
19. On 4 October 2018, JSN Motors issued a service estimate indicating that the costs of repairing the vehicle would amount to R 509 078,46.
20. By that date Mr. Links lodged his complaint with the Applicant, he had already complained to the Motor Industry Ombudsman of South Africa (the “MIOSA”). The MIOSA attempted to resolve the dispute between Mr. Links and the Respondent. The MIOSA’s attempts to settle the dispute between the parties were unsuccessful.
21. BMW SA indicated that they were willing to contribute R 253 295,00 towards the

repairs of the vehicle, in terms of the BMW Motor Plan.

22. The company Mr. Links bought the extended warranty from confirmed it will pay R55 000 towards the repairs of the motor vehicle.
23. The Respondent initially offered Mr. Links R 50 000, 00 towards the repairs, without acknowledging liability. The Respondent subsequently increased their contribution to the repairs to R 100 000,00 as a gesture of goodwill.
24. Mr. Links was left with the remaining amount of R 100 782, 00 to pay towards the repairs of the motor vehicle.
25. The attempts to resolve the complaint failed because Mr. Links refused to pay the balance of R 100 782,00 required to settle the remainder of the quotation for the repairs of the motor vehicle. This led to a deadlock which culminated in a complaint being lodged with the NCC and the matter being referred to the NCT for adjudication.
26. The motor vehicle has been with JSN Motors ever since it was towed there on 14 September 2018. No repairs have been done to the motor vehicle.
27. The Applicant investigated the consumer's complaint and brought this application to the Tribunal in terms of section 73(2)(b) of the CPA.

POINTS *IN LIMINE*

28. The Respondent raised various points *in limine* in the answering affidavit.
29. The points *in limine* the Respondent pursued at the hearing; the Applicant's responses; and the Tribunal's assessments and findings are set out immediately below.

THE PARTIES' SUBMISSIONS

Wrong party and material misjoinder

30. According to the Respondent the Applicant brought the wrong party before the Tribunal and effected a material misjoinder and the application stands to be dismissed; in that:
- 30.1. At the heart of the dispute is the motor plan the consumer bought from BMW SA to be implemented by JSN Motors;
 - 30.2. The motor plan, JSN Motors and the consumer agreed; that JSN Motors would attend to all the defects; following delivery of the vehicle in the remaining three months of the motor plan;
 - 30.3. BMW SA and its authorized suppliers are “suppliers” and they should supply the repairs of the vehicle under the motor plan, yet the Applicant did not join them to the application before the Tribunal;
 - 30.4. Section 56(3) specifically relates to the supplier of repairs;
 - 30.5. All the repairs were undertaken by JSN Motors; and
 - 30.6. The Respondent has not undertaken any repairs.
31. The Applicant submitted that the fact that the BMW M5 still had time left on the motor plan and the consumer bought an additional extended warranty, does not absolve the Respondent from his obligations to supply the consumer with goods that comply with the requirements of sections 55, 56(2) and 56(3) of the CPA.

32. The Applicant denies that BMW SA and JSN Motors are suppliers for sections 56(2) and 56(3) of the CPA in this matter; and that the motor plan and the extended warranty are relevant.
33. The Tribunal considered the parties' submissions and finds that the Applicant did not bring the incorrect party before the Tribunal; or effected a material misjoinder.
34. This consumer's complaint is about the quality of the goods he bought from the Respondent namely the BMW M5, not the repairs JSN Motors effected under the BMW SA motor plan.
35. The Respondent in its understanding that the words the "... *supplier repairs...*" in section 56(3) of the CPA where section 56(3) provides that "... *if a supplier repairs any particular goods or any component of any such goods...*" do not refer to a supplier of the goods but rather to the supplier of the repairs, is misguided. The wording is clear – it refers to the supplier of the goods being obligated to refund the consumer at the consumer's election if the repairs had not been affected or new defects come to the fore. It is irrelevant, and the CPA does not prescribe, that the supplier of the goods has to effect the repairs itself or through a third party.
36. If repairs failed, whether the supplier of the goods or a third party affected the repairs, the consumer may at his or her option return the goods to the supplier and the supplier is obliged to refund the consumer the price the consumer paid for the goods. Section 56(3) of the CPA specifically provides that "...*the supplier must (a) replace the goods; or refund the consumer the price paid by the consumer for the goods.*"

The consumer forfeited relief in terms of section 56(2) of the CPA

37. The Respondent submitted that Mr. Links had six months to request the return of the goods in terms of section 56(2) of the CPA. Mr. Links elected not to do so and forfeited

the relief in terms of section 56(2) of the CPA.

38. The Applicant submitted that the consumer did not forfeit his right to claim a refund under the CPA because he initially opted for the motor vehicle to be repaired.
39. The Tribunal considered the parties' submissions and dismisses the Respondent's point *in limine* above for the reasons that follow below.
40. Section 56(2) of the CPA gives a consumer an implied warranty of quality. It allows a consumer a choice whether the supplier should repair or replace the defective goods or refund the consumer the price the consumer paid for the defective goods. Section 56(2) of the CPA provides that –

"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."

41. Section 56(3) of the CPA gives a consumer the right to resile from a sale agreement of defective goods once the goods have been repaired but the repairs failed or became defective or unsafe or *"... a further failure, defect or unsafe feature is discovered"*. Section 56 (3) of the CPA provides that –

"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.*

(Emphasis added)

42. Sections 56(2) and 56(3) of the CPA must be read together. Section 56(3) of the CPA applies as a consequence of Section 56(2)(a) of the CPA not being able to address or offer effective redress to the consumer in a particular case.
43. In this instance the consumer cannot forfeit his rights under section 56(3) of the CPA as a further failure, defect, or unsafe feature was discovered within 3 months of the latest repairs. No doubt the legislator had a situation in mind where goods are perpetually in a state of being repaired, with consumers not being able to enjoy the use of the goods they paid for.

The consumer cannot approbate and reprobate

44. The Respondent's submitted that the consumer, in his referral to the MIOSA requests that his vehicle be fixed. The consumer cannot, once he elected that the Respondent repairs his vehicle, change his mind and demand that the Respondent refunds him the purchase price he paid for the motor vehicle.
45. The Applicant submitted that the Consumer's request to the MIOSA that his vehicle is fixed does not amount to a waiver of his rights under the CPA.
46. The Tribunal refers to the discussions in paragraphs 40 to 44 above and dismisses the Respondent's point *in limine*. The consumer is entitled to the protection prescribed in section 56(3) of the CPA if he meets the section's requirements.

MFC as an interested party had not been joined

47. As part of the relief the Applicant seeks is that the Respondent settles the outstanding balance of the credit agreement between the MFC and the consumer, according to the Respondent the Applicant should have joined the MFC as a party to the application before the Tribunal. The Applicant's failure to join the MFC, being an interested party, as a party to the application, amounts to a material non-joinder. Moreover, the Applicant has not provided the details of the outstanding balances on the credit agreement the Applicant demands the Respondent settles.
48. The Applicant denies that MFC had to be joined to the action. The consumer is claiming the repayment of the purchase price he paid to the Respondent for the BMW M5, not a refund from the MFC of the payments the consumer made under the credit agreement.
49. Having considered the submissions by the parties, the Tribunal finds that there was no need for the Applicant to join the MFC as a party to the application before the Tribunal. The Applicant is not alleging any facts that constitute a cause of action against the MFC for MFC to answer.
50. The MFC financed the purchase price of the vehicle. The credit agreement the consumer entered into with the MFC is subject to and regulated under the NCA, not the CPA. The current application before the Tribunal had not been brought under the NCA.
51. If any of the parties wished to place evidence before the Tribunal regarding the payments the consumer made to the MFC and the outstanding amounts on the credit agreement, the parties could have, in terms of the rules of procedure of matters before the Tribunal, called the relevant persons from the MFC to give evidence to that effect before the Tribunal at the hearing of the application.
52. The Tribunal accordingly dismisses the Respondent's points *in limine*.

THE MAIN MATTER

53. The Tribunal now proceeds to the main matter and the submissions by the parties.

THE APPLICANT'S SUBMISSIONS

54. The Applicant argued that the Respondent's interpretation of sections 5(1)(d), 5(2)(d), and 5(5), that the CPA does not apply to the transaction between the Respondent and the consumer is without merit and ill-founded. From the text of section 5(2)(d) of the CPA, it is clear that "*the CPA does not apply to any transaction that constitutes a credit agreement under the National Credit Act, but the goods or services that are the subject of the credit agreement are not excluded*" (Emphasis added). The CPA applies to goods or services subject to credit agreements.

55. Had there been a transaction between the consumer and BMW SA or JSN Motors for the goods and services they supplied to the consumer, sections 55 and 56 of the CPA would have applied to BMW SA or JSN Motors as well. In this matter, there is no evidence before the Tribunal that the consumer's complaint relates to goods and services BMW SA or JSN Motors supplied to the consumer. The consumer's complaint relates exclusively to the quality of the goods, the BMW M5, the Respondent sold and supplied to the consumer. The Respondent is the supplier to the consumer for both section 56(2) and 56(3) of the CPA.

56. Regarding the submission by the Respondent that section 55 only applies if the consumer had established the condition of the goods at the time of receipt of the goods and not *ex post facto*, the Applicant submitted that this submission of the Respondent disregards the fact that Section 55 and 56 of the CPA apply and protect consumers against both latent and patent defects. It is irrelevant whether a product

failure or defect could have been detected by a consumer before taking delivery of the goods.

57. The Applicant submitted that the consumer complied with sections 56(2) and 56(3) of the CPA. The consumer returned the motor vehicle to the supplier, the Respondent, for repairs. The supplier, in turn, commissioned JSN Motors to repair the motor vehicle. At all material times, JSN Motors rendered services to the Respondent and not to the consumer. The consumer was not a party to the relationship between the Respondent and JSN Motors.
59. Although the consumer initially requested the Respondent to repair the vehicle, it was when the motor vehicle broke down after the initial sets of repairs that the consumer elected under section 56(2) of the CPA to assert his rights under section 56(3) of the CPA and claimed the refund of the purchase price he paid for the motor vehicle.
58. If the Respondent wishes to rely on the consumer having accepted the risks in the goods, the Respondent had to bring the risks to the notice of the consumer in writing in terms of section 49 and plain language in terms of section 22 of the CPA.

THE RESPONDENT'S SUBMISSIONS

59. Section 55 and 56 of the CPA are inapplicable to goods that are the subject of a credit agreement. The exemption in section 5(2)(d), read with section 5(1)(d) of the CPA, renders sections 55 and 56 of the CPA inapplicable to goods under a credit agreement.
60. The CPA is also applicable to second-hand goods and as such, the provisions of section 55 apply to BMW SA and JSN Motors.
61. The condition of the goods for section 55 must be established at the time of receipt of the goods and not *ex post facto*.

62. The supplier for section 56(3) of the CPA has to be JSN Motors as an agent of BMW SA.
63. The consumer benefitted from an increased purchase price which militates against restitution.
64. Section 55(6) of the CPA provides that section (2)(a) and (b) of the CPA do not apply to a transaction if the consumer has been expressly informed that particular goods were offered in a specific condition, and has expressly agreed to accept the goods in that condition, or knowingly acted in a manner consistent with accepting the goods in that condition, applies to the transaction the Respondent entered into with the consumer. When Mr. Links bought the vehicle the Respondent made him fully aware, albeit not in writing, of the risks associated with the motor vehicle. The Respondent submitted that it informed Mr. Links that the vehicle is a second-hand vehicle with a relatively high mileage; the vehicle had an extended motor plan that was due to expire in a relatively short time; if something goes wrong with the vehicle after the expiry of the motor plan, Mr. Links would have to repair the vehicle at his costs; that the repairs of a high-performance vehicle such as the BMW M5 are very costly; and that the price was discounted because the vehicle was reaching the end of the extended motor plan. According to the Respondent, Mr. Links understood and accepted the risk and requested the Respondent to assist him with acquiring an additional repair warranty, which the Respondent did.
65. The Respondent argued that section 55(6) of the CPA does not require that the Respondent informs the consumer in writing of the risks in terms of section 49 of the CPA and plain language in terms of section 22 of the CPA.
66. The Respondent maintained that there was no duty on it to repair the motor vehicle, particularly where the Respondent's business did not include motor vehicle repairs;

the motor vehicle was subject to a motor plan issued by BMW SA;
and the consumer bought an extended warranty.

67. All the repairs were undertaken by JSN Motors on behalf of BMW SA, and any liability in terms of section 57 of the CPA, should lie against them being the service providers.

DISCUSSION AND ANALYSIS OF THE MAIN MATTER

68. From the evidence before the Tribunal it is clear that the consumer, Mr. Links, entered into a purchase and sale agreement for the BMW M5 with the Respondent, and a credit agreement to finance the purchase price of the BMW M5 with MFC.
69. The actual price the consumer paid for the motor vehicle is confounded by the various other items added onto and financed by the MFC, including, for example, the outstanding balances owing on two other vehicles the consumer traded in and settled to enter into the financing agreement for the BMW M5; and the price the consumer paid for the extended mechanical protection plan.
70. On the Respondent's version in its answering affidavit, which the Applicant did not dispute in reply, it appears the MFC financed a capital sum of R 705 979,87. This amount included the purchase price of the BMW M5; the outstanding balances (after trade-ins) for two vehicles, namely an amount of R 74 552,32 to settle the consumer's obligations in respect of a Chevrolet Utility motor vehicle and an amount of R 138 759,69 to settle the consumer's obligations in respect of a BMW 330D motor vehicle; and a mechanical protection plan the consumer purchased from the Innovation Group Power Hub in the amount of R17 918, 42.
71. Section 5(2)(d) of the provides that *"the CPA does not apply to any transaction that constitutes a credit agreement under the National Credit Act, but the goods or services that are the subject of the credit agreement are not excluded."* (Emphasis added) From

the plain reading of the text of the provisions of section 5(2)(d) of the CPA it is clear to the Tribunal that the CPA does not exclude goods or services subject to credit agreement from its application.

72. The Respondent had to ensure the consumer receives safe goods, of good quality, and free of defects. Similarly, the obligation to effect repairs at the election of the consumer rests on the supplier of the goods, i.e. the Respondent.
73. The purchase and sale of the goods, namely the BMW M5 vehicle, is subject to the provisions of section 55(2) of the CPA. These provisions impose an obligation on the supplier, the Respondent in this matter, to supply to the consumer, Mr. Links in this matter, with safe goods and of good quality.
74. The Respondent raised before the Tribunal that the suppliers liable to the consumer should be BMW SA under the motor plan and/or JSN Motors as the entity that affected the repairs to the vehicle.
75. The Tribunal disagrees with the Respondent's contentions in this regard.
- 75.1. It is undisputed that Mr. Links bought and received the vehicle from the Respondent. Section 55(2)(a) to (c) of the CPA gives a consumer the right to *"... receive goods that— (a) are reasonably suitable for the purposes for which they are generally intended; (b) are of good quality, in good working order and free of any defects; (c) will be useable and durable for a reasonable period of time, having regard to the use to which they would normally be put and to all the surrounding circumstances of their supply; "* (Emphasis added)
- 75.2. The obligations under section 55(2)(a) to (c) attach to the supplier, the Respondent, which the supplier cannot transfer to any other entity, be it a repairer, such as JSN Motors, or BMW SA as the underwriter of the BMW SA

motor plan. The obligation is on the supplier to provide consumers with goods that meet the prescripts of the CPA.

76. The Tribunal noted the Respondent's reliance on section 55(6) of the CPA as a defense (the "section 55(6) defense") to the Applicant's allegation that the Respondent contravened sections 55(2)(a) and (b) of the CPA. Section 55(6) of the CPA provides that –

"Subsection (2)(a) and (b) do not apply 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."

(Emphasis added)

77. The Tribunal noted the Respondent's submissions regarding notifying the consumer of the risks as required in section 55(6) of the CPA; and the consumer's evidence that Mr. Jacques Hayes of the Respondent assured him that the vehicle was in a good condition and that he (Mr. Hayes) would not sell him a defective vehicle.
78. The parties disagree whether the Respondent should have made the consumer aware of the risks in writing and plain language as sections 49 and 22 of the CPA respectively prescribes.
79. Before the Tribunal delves into the submissions regarding what form and style the notification of the risks to the consumer should take, and if indeed it is necessary at all to delve into that issue, the Tribunal considered the parameters of section 55(6) defense, and whether it would be a complete defense to all the contraventions the Applicant alleged the Respondent committed.

80. From the text of section 55(6) of the CPA it appears the defense applies to contraventions of section 55(2)(a) and (b)¹ of the CPA, and not section 55(2)(c) of the CPA. This obligation on the Respondent remains intact to supply a consumer with goods under section 55(2)(c) that *“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”*.
81. Therefore, even if the Tribunal accepts the Respondent’s section 55(6) statutory defense and finds that Mr. Links *“...has been expressly informed that particular goods were offered in a specific condition; and has expressly agreed to accept the goods in that condition, or knowingly acted in a manner consistent with accepting the goods in that condition”*, the Respondent is still left with an obligation to provide the consumer with goods that comply with section 55(2)(c) of the CPA. If the Respondent failed to meet the section 55(2)(c) obligation, the Tribunal can make a finding that the Respondent contravened section 55(2)(c) of the CPA.
82. Section 55(2)(c) prescribes that the goods the supplier provides to the consumer *“(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 ...”*
83. It is common cause between the parties that the consumer had very little use of the vehicle over the four months before it broke down on 12 September 2018. The motor vehicle had to undergo numerous repairs shortly after the consumer bought the motor vehicle. On 12 September 2018, the motor vehicle broke down and had to be towed in, requiring repairs of over half a million rand. To date, the vehicle had not been repaired. From these facts, it is clear to the Tribunal that the vehicle was not usable

¹ Section 55(2)(a) and (b) of the CPA provides that *“subsection (2)(a) and (b) do not apply to a transaction if the consumer - (a) has been expressly informed that particular goods were offered in a specific a 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.”*

and durable for a reasonable period.

84. The Tribunal agrees with the Applicant's submission that the availability of the BMW SA motor plan and extended mechanical warranty is not a substitute for the Respondent's obligation to supply a vehicle to the consumer that is safe, of good quality, and free of defects (latent and/or patent).
85. The Tribunal considered the use to which the consumer would have wanted to put the goods to and all the surrounding circumstances of its supply. In this regard the Tribunal considered that the consumer had been on the lookout for a high-performance vehicle. The consumer purchasing the vehicle from the Respondent did not come about by chance. The consumer spoke to the Respondent's Mr. Hayes about wanting that specific type of vehicle. The consumer and Mr. Hayes were friends and quite conceivably they discussed and made common cause about the use to which Mr. Links wished to put the car, alternatively the use to which such a car would normally be put. It is inconceivable to the Tribunal that Mr. Links would have bought a high-performance vehicle for close to half a million rand and incurred finance charges for the financing of the purchase price over multiple years, which would last him for approximately four months only.
86. The Tribunal finds that the Respondent contravened section 55(2)(c) of the CPA.
87. The Tribunal noted the parties' arguments and submissions regarding the interpretation and application of sections 49 and 22 to section 55(6) of the CPA. In the light of the Tribunal's finding that the Respondent contravened section 55(2)(c) of the CPA, the Tribunal will not delve into the section 55(6) defense the Respondent raised, and the interpretation and applicability or not of sections 49 and 22 to section 55(6) of the CPA to the current matter before the Tribunal.

THE APPROPRIATE ORDER

88. Having made the finding that the Respondent breached its obligations in terms of sections 55(2)(c) and section 56(3) of the CPA, the Tribunal now turns to the relief the consumer could be entitled to under the CPA.

The relief the Applicant seeks

89. The Applicant requested the Tribunal –
- 89.1. to order that the Respondent contravened sections 55(2)(a) to (c) and Section 56(3) of the CPA;
 - 89.2. to declare that the Respondent's contravention of sections 55(2) (a) to (c) and section 56(3) of the CPA is prohibited conduct;
 - 89.3. to interdict the Respondent from engaging in conduct contravening the sections of the CPA detailed in paragraph 89.2 above;
 - 89.4. to order that the Respondent refunds the Consumer the Purchase Price he paid for the BMW M5 Motor Vehicle;
 - 89.5. to order that the Respondent settles the outstanding balance on the credit agreement between Mr. Links and the MFC vehicle finance account number 18986300001;
 - 89.6. to order that the Respondent refunds to the Consumer, all installments paid by the Consumer towards servicing the credit agreement between Mr. Links and MFC: vehicle finance account number 18986300001;
 - 89.7. to order that the Respondent pays the amounts mentioned in paragraph 89.4

above within 15 days of the date of Judgment;

89.8. to order that the Respondent pays an administrative penalty of R 1 000 000,00 (One Million Rands); and

89.9. to order that the Respondent adheres to any other appropriate order the Tribunal imposes as contemplated in section 4(2) (b) (ii) of the CPA.

90. The evidence before the Tribunal is that the consumer elected for the Respondent to repair the motor vehicle on several occasions, and that further defects were discovered. In terms of section 56(3) of the CPA that entitles the consumer to a refund of the purchase price, the consumer paid for the BMW M5.

91. The purchase price for the BMW M5 is the amount the consumer financed through the MFC, excluding the amounts the consumer included in the capital amount to settle the outstanding balances of the two other vehicles the consumer traded in and the purchase price for purchasing the extended mechanical warranty.

92. The Tribunal is not empowered to agree to the orders the Applicant requested that the Tribunal –

92.1. *“Orders that the Respondent settles the outstanding balance on the credit agreement between Mr. Links and the MFC vehicle finance account number 18986300001.”*

and

92.2. *“Orders that the Respondent refunds to the Consumer, all installments paid by the Consumer towards servicing the credit agreement between Mr. Links and MFC: vehicle finance account number 18986300001.”*

93. The redress section 56(3) of the CPA prescribes is a refund of the purchase price the consumer paid for the goods to the Respondent. The outstanding balance on the credit agreement between Mr. Links and the MFC and the installments Mr. Links paid towards servicing the credit agreement between him and the MFC, goes beyond what this section allows, particularly since the credit agreement Mr. Links entered into with the MFC included amounts unrelated to the purchase price of the defective goods, the BMW M5.

Administrative Fine

94. Section 112 empowers the Tribunal to impose administrative fines in respect of prohibited or required conduct not exceeding the greater of 10 percent of the respondent's annual turnover during the preceding financial year or R1 000 000.
95. When determining an appropriate administrative fine, in terms of section 112(3) of the CPA, the Tribunal must consider the following factors:
- 95.1. the nature, duration, gravity, and extent of the contravention;
 - 95.2. any loss or damage suffered as a result of the contravention;
 - 95.3. the behaviour of the Respondent;
 - 95.4. the market circumstances in which the contravention took place;
 - 95.5. the level of profit derived from the contravention;
 - 95.6. the degree to which the Respondent has co-operated with the Commission and the Tribunal; and
 - 95.7. whether the Respondent has previously been found in contravention of the CPA.
96. A fine payable in terms of this section must be paid into the National Revenue Fund referred to in section 213 of the Constitution in terms of section 112(5) of the CPA.

97. The Tribunal now considers the above factors to determine an appropriate amount for an administrative fine if any.

The nature, duration, gravity, and extent of the contraventions

98. The Respondent's contraventions are serious. The Respondent deprived the consumer of his rights under the CPA. The Respondent's view of its obligations is concerning to the Tribunal in that the Respondent seems to hold the view that it is not obliged to make good to the consumer where the Respondent had supplied goods in contravention of the CPA. There is no evidence before the Tribunal to the extent of the contraventions. i.e., whether the Respondent contravened the CPA in respect of other consumers.

Losses suffered by the Consumer

99. The Consumer had been without the vehicle he paid almost half a million rand for, since the date the vehicle broke down, though the Respondent remains liable to the financier for the payments under the credit agreement. The Tribunal also considers the fact that that the consumer traded in two other vehicles to be able to afford the vehicle that he has not had the use of for several years.

The behaviour of the Respondent

100. It is clear to the Tribunal that the Respondent does not acknowledge its responsibilities under Section 56 of the CPA. The Tribunal agrees with the Applicant's submissions that it appears the Respondent is intent on relying on the BMW motor plan and Extended Mechanical Protection Plan the consumer purchased to avoid its responsibilities in terms of the CPA.

101. The Tribunal shares the Applicant's concerns about the Respondent's insistence that it is not bound by the provisions of the CPA. The Tribunal views the Respondent's behaviour in not accepting its duty to repair the motor vehicle it supplied to the consumer in contravention of section 55(2)(c) of the CPA and boldly renegeing on its obligations under the CPA, as extremely concerning.

102. The Respondent's conduct constitutes a wanton disregard for the CPA, and the plight of the consumer.

Market circumstances

103. The contraventions occurred and continue to occur at a time when the CPA has been in operation for more than a decade, seeking to promote and advance the social and economic welfare of consumers in South Africa by promoting the fair business practice and protecting consumers from unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices, deceptive, misleading, unfair or fraudulent conduct.

Level of profit the Respondent derived

104. The Respondent profits in a form of saved costs of repair or replacement which it passes on to consumers.

Cooperation by the Respondent with the Applicant

105. It is common cause that the Respondent co-operated with the Applicant during the investigation.

Previous findings against the Respondent

106. The Respondent has not been found in contravention of the CPA and Regulation before this matter, nor has the Applicant issued a compliance notice to the Respondent.

The amount of the fine

107. The factors above render it appropriate for the Tribunal to impose an administrative fine of R50 000,00 (fifty thousand rands).

ORDER

108. The Tribunal makes the following order:

109. The Respondent's contravention of the following sections of the CPA is declared prohibited conduct:

109.1. Section 55(2)(c); and

109.2. Section 56(3).

110. The Respondent is interdicted from engaging in the prohibited conduct set out in paragraph 109 above.

111. The Respondent is directed to refund to the consumer the purchase price paid by the consumer for the BMW M5 motor vehicle, with Registration Numbers FG 18 YK GP. The amount to be refunded is the capital sum the MFC financed under the credit agreement the consumer entered into with the MFC minus the amounts included in the capital sum to settle the outstanding balances on the two vehicles the consumer traded in; the purchase price of the mechanical warranty; and any other amounts that are unrelated to the actual purchase price of the BMW M5), within 60 days of the date of this judgment.

112. The Respondent is directed to pay an administrative fine of R 50 000,00 (fifty thousand rands) into the National Revenue Fund referred to in section 213 of the Constitution of the Republic of South Africa, 1996, within 60 days of the date of this judgment

The National Revenue fund account details are as follows:

Bank:	Standard Bank of South Africa
Account name:	Department of Trade and Industry
Account number:	370650026
Account type:	Business current account
Branch code:	010645 (Sunnyside)
Branch code	
for electronic payments:	051001
Reference:	NCT/171784/2020/73(2) (b)
	(Name of depositor); and

113. There is no order for costs.

Thus done in Centurion on this 3rd day of August 2021.

[signed]

Ms. D Terblanche
Presiding Tribunal Member

Adv. F Manamela and Prof. B Dumisa concurring.

Authorised for issue by The National Consumer Tribunal

National Consumer Tribunal

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