

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Number: A72/2024

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

DATE: 25/10/24

SIGNATURE

In the matter between:

AUTO EXTREME CC

Appellant

and

LOUIS JAKOB LOURENS

Respondent

***Delivered:** This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 25 October 2024.*

Summary: Statutory Appeal in terms of section 148(2)(b) of the National Credit Act (NCA). The appellant is seeking an appeal against the decision of the Tribunal. The Tribunal found that the appellant was in breach of section 56(2)(b) of the Consumer Protection Act (CPA) and ordered the appellant to refund the respondent and also to settle the amount owing to the MFC.

The jurisdictional requirements that must exist before section 56(2)(b) of the CPA could be contravened are (a) the goods must fail to satisfy the requirements and standard contemplated in section 55 and (b) the defect must be one that is material. The onus is on the consumer to prove that there is a defect and that the defect is material. In the absence of the jurisdictional requirements, the provisions of section 56(2)(b) are incapable of being contravened. The Tribunal failed in its duties to establish whether the defect is material. On the issue of what directions were given by the consumer, the Tribunal being faced with a dispute of fact was obliged to apply the *Plascon Evans* test having been faced with motion proceedings.

The version of the appellant ought to have been accepted – instructed to repair whatever defect. In which event, section 56(3) of the CPA would find application. A refund would only be available within 3 months of the repair. A defect that would entitle a consumer to a repair and or refund is one defined in section 53(1) of the CPA. The Tribunal nevertheless failed to take into account the provisions of section 20(5) and (6) of the CPA. The Tribunal exceeded its powers by ordering the appellant to settle the MFC debt. Held: (1) The appeal is upheld. Held: (2) The order of the Tribunal is set aside. Held: (3) The respondent is to pay the costs of the appeal.

JUDGMENT

CORAM: MOSHOANA, J (LESUFI AJ CONCURRING)

Introduction

[1] Before us serves an appeal within the contemplation of section 148(2)(b) of the National Credit Act¹ (NCA). The appellant, Auto Extreme CC (Extreme), seeks to set aside an order made by the Tribunal that was constituted by Advocate C Sassman (Presiding Tribunal Member); Mr C Ntsoane (Tribunal Member) and Dr Potwana (Tribunal Member). The three members constituted a full panel of the

¹ Act 34 of 2005.

Tribunal contemplated in section 148(2) of the NCA. The appeal is duly opposed by the respondent, Mr Louis Jakob Lourens.

[2] It suffices to mention at this early stage that the respondent's legal representatives, Mr Van Den Heever, wisely conceded that the Tribunal had exceeded its powers by ordering the Extreme to settle and reimburse the outstanding amount owing to the MFC. This was a concession well-made, and this judgment shall not deal with that aspect in any meticulous detail hereinafter. Accordingly, this judgment shall pay a particular attention to two aspects; namely; (a) whether the defect alleged by Mr Lourens was proven and if so, whether it was a material defect contemplated in the relevant section; (b) whether Mr Lourens had proven that his direction was for the Extreme to repair the alleged defect or to be refunded the price he paid.

[3] It must be stated upfront that a conclusion by this Court that the defect established is not one contemplated in the section, would spell the end of the matter for Mr Lourens, in which event, the decision of the Tribunal in its entirety ought to be set aside. When this Court sets the ruling of the Tribunal aside, this Court is not empowered to substitute the ruling of the Tribunal with its own order.

Pertinent background facts to the present appeal

[4] On 10 October 2022, Mr Laurens purchased a Toyota Hilux motor vehicle from the Extreme. The purchase price for the motor vehicle was R 485 169. Mr Lourens paid to the Extreme an amount of R 80 000 as a deposit towards the purchase price, and the balance thereof was financed through the MFC. On 15 October 2022, Mr Lourens took delivery of the motor vehicle. According to Mr Lourens, after he took delivery of the motor vehicle, as he was driving away from the premises of the Extreme, he reported to one Mr Jan – the salesperson, that the motor vehicle had a problem with steering and the air-conditioning. It must be stated that in his founding papers before the Tribunal, he simply alleged that he immediately noticed and experienced concerns with the steering of the vehicle.

[5] I pause to mention that the founding affidavit did not unpack the “concerns with steering of the vehicle”. It was not made clear by Mr Lourens that the motor

vehicle could not steer at all or it steered with some considerable difficulty. Nonetheless, in his statement made to the Motor Industry Ombudsman of South Africa (MIOSA), he again repeated the vague statement of concerns with the steering of the vehicle. In the form he completed giving the summary of the complaint to MIOSA, he stated the following: “bought the vehicle on Saturday, Complain immediately about steering. *Steering pump* is malfunctioning after they reassured me their workshop and the service history is 100%”.

[6] The salesperson informed Mr Lourens to return the vehicle on 24 October 2022 so that the reported problem can be assessed and repaired. Indeed, on 24 October 2022, Mr Lourens drove to the premises of the Extreme. Whilst driving there for the purposes of assessment and promised repairs, the motor vehicle overheated. After having pulled over for the engine to cool down, he proceeded to the premises. Upon arrival, on Mr Lourens’ version, he handed the key and the vehicle to the salesperson. He informed the salesperson that he wanted to terminate the transaction. He demanded a refund of his R 80 000 deposit that he paid over to the Extreme. I again pause and state that Mr Lourens’ pleaded version at the Tribunal emerges as follows:

“4.3 I took delivery of the vehicle on 15 October 2022. Upon leaving the dealership, I immediately noticed and *experienced concerns with the steering of the vehicle*. In addition to the problems and concerns with the steering, I also noticed that the air-conditioning was not functioning.

4.4 On 15 October 2022 I informed Jan (from Auto Xtreme) of *these problems* and was informed that Auto Xtreme would tend (sic) to these problems and *instructed to return the vehicle* on 24 October 2022, so that Auto Xtreme could undertake the assessment and *repairs*.”

[7] It suffices to mention that this pleaded version set out in 4.4 above was admitted by the Extreme. With regard to the version set out in 4.3, the Extreme alleged the following:

“5.3 Other than admitting that the Applicant took delivery of the vehicle on 15 October 2022, *the remainder of the paragraph is denied, and the Applicant is put to the proof thereof.* The respondent specifically pleads that *the vehicle was put through and passed a roadworthy test on 13 October 2022...* The Applicant furthermore signed a General Offer to Purchase ... confirming inter alia, the condition of the vehicle, the wear and tear as well as that the vehicle is fit for the purpose for which he is purchasing it.”

[8] In reply to the above allegations, Mr Lourens testified as follows:

“4.4 The Applicant *admits the contents of the this (sic) paragraph*, but sets out, that it was never provided with the service history of the vehicle and that the Respondent never identified the specific problems set out in the Applicant’s Founding Affidavit...

4.5 Further independent analysis of the vehicle reveal the patent defects after collection of same by MFC. Same was answered in the positive and is attached to the Applicant’s Founding Affidavit...”

[9] On the same day, 24 October 2022, Mr Lourens lodged a complaint with the MFC regarding the motor vehicle. The Extreme conducted a diagnostic test which revealed a single fault of the power steering pump which was malfunctioning. The steering pump was replaced at no cost to Mr Lourens. On or about 25 October 2022, Mr Lourens was informed that he must come and collect the motor vehicle since it was repaired as undertaken. Mr Lourens did not collect the motor vehicle, instead on 31 October 2022, he lodged a complaint with MIOSA. MIOSA ruled that the complaint must be referred to the National Consumer Commission (NCC).

[10] Owing to the failure on the part of Mr Lourens to service his debt with the MFC, on 18 January 2023, the motor vehicle was repossessed by the MFC. On 15 February 2023, Mr Lourens referred a dispute to the NCC, some three months after the motor vehicle was repossessed. In April 2023, the motor vehicle was allegedly assessed by the MFC, and it was discovered that the motor vehicle had a steering rack problem.

[11] Mr Lourens referred the complaint directly to the Tribunal within the contemplation of section 75(1)(b) of the Consumer Protection Act² (CPA). On 11 December 2023, Mr Hockey, in a written judgment, granted Mr Lourens leave to refer the complaint to the Tribunal. On 23 February 2024, the full panel entertained the application and heard no *viva voce* evidence but listened to oral submissions only. On 26 February 2024, the full panel delivered the impugned judgment and reasons. The full panel made an order in the following terms:

- The respondent [Extreme] has contravened section 56(2)(b) of the CPA;
- The contravention is declared prohibited conduct in terms of section 150(a) of the NCA;
- The respondent is ordered to pay the applicant [Mr Lourens] R80 000.00 being the cash deposit paid for the vehicle, within 30 business days after issuing this judgment;
- The respondent is ordered to settle the outstanding shortfall balance on the applicant's credit account held with MFC for the financing of the Toyota Hilux with registration number H[...] 5[...] [...] within 30 business days after issuing this judgment; and
- There is no cost order.

[12] Chagrined by the judgment and order of the full panel, on or about 15 March 2024, the present appeal was lodged.

Grounds for the appeal

[13] The present appeal is chiefly predicated on four grounds; namely:

² Act 68 of 2008.

- The full panel erred in their finding that the vehicle did not satisfy the requirements of section 55(2) of the CPA;
- The full panel erred in finding that the appellant is liable to refund the respondent the price paid for the vehicle (and that the appellant contravened section 56(2)(b) of the CPA);
- The full panel was incorrect in finding that the appellant is liable to settle and reimburse the outstanding shortfall balance on the respondent's credit account held at MFC;
- Ultimately, the full panel erred in granting the relief sought by the respondent.

Analysis

[14] Ultimately, what serves before us is what is often referred to as a statutory appeal. In such instances, a Court may go wider and in the exercise of its discretion, admit further evidence in considering such an appeal. The learned author Lawrence Baxter³ observes the following:

“At one end of the spectrum is the so-called ‘wide appeal’, in terms of which the *court is empowered to rehear the matter completely, receiving fresh evidence if necessary, and to decide the issue anew on the merits*. Such jurisdiction is most likely to be conferred where judges are as well qualified and in as good a position as the public authority itself *to adjudicate upon the matter*. If the legislation has not specifically stated that the court may receive fresh evidence and decide the matter afresh, this jurisdiction might be inferred from the fact that: - the legislation expressly requires the appeal court to reach a decision on the merits yet makes no provision for the keeping of a record by the administrative authority.⁴” [Own Emphasis]

³ Baxter *Administrative Law* (Juta & Co Ltd, Kenwyn 1984) at 707.

⁴ *Johannesburg Consolidated Investment Co. v Johannesburg Town Council* 1903 TS 111 at 119.

There is always difficulty in determining the exact nature of the process where the legislature prescribed an appeal. This difficulty was observed by Trollip J in *Tikly & Others v Johannes, N.O., & others*,⁵ where he stated that the word “appeal” can have different connotations. Relevant to the matter that was before him, it may have meant (a) wider sense appeal; (b) stricter sense appeal or (c) a review guided by honesty and properness. At the end, he concluded thus:

“In view, however, of the fact that after the amplified ruling of the revision court was handed in, the proceedings were then *directed solely towards determining the correctness or otherwise of that ruling, I think that the best course would be to give an order declaring that that ruling is correct.*”⁶ [Own Emphasis]

[15] Since this appeal involves, in the main, application of statutory provisions by the full panel of the Tribunal, in order to determine the correctness of the order under attack, this Court must engage in an exercise of statutory interpretation.

Does section 55(2) of the CPA find application?

[16] In order to contextually interpret this section, it is appropriate to first consider section 53(1) of the CPA. In terms thereof, a *defect* is defined to mean:-

- (i) Any *material imperfection in the manufacture of the goods or components, or in performance of the services, that renders the goods or results of the services less acceptable than persons generally would reasonably entitled to expect in the circumstances; or*
- (ii) Any *characteristics of the goods or components that renders the goods or components less useful, practicable or safe than persons generally would be reasonably entitled to expect in the circumstances.*

[17] The section defines *failure* to mean:-

⁵ 1963 (2) SA 588 (T) at 590F.

⁶ Id at 594H-595A.

The inability of the goods to perform in the intended manner or to the intended effect.

[18] *Unsafe* is defined to mean:-

That due to a characteristic, failure, defect or hazard, particular goods present an extreme risk of personal injury or property damage to the consumer or to other persons.

[19] Regard being had to the above section, it must follow that a *qualifying defect* is one that is material and renders the goods to be less acceptable than persons generally would be reasonably entitled to expect. It must be so that the test involved in determining the quality of the defect is one that is objective as opposed to a subjective one. In *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co. Ltd (Holmdene)*,⁷ the Appellate Division, as it then was, had the following to say:-

“Broadly speaking in this context a defect may be described as an abnormal quality or attribute *which destroys or substantially impairs the utility or effectiveness of the res vendita*, for the purpose for which it has been sold or for which it is commonly used.”

[20] On Mr Lourens’ vacillating version, the motor vehicle presented with three defects; namely, (a) unidentified problems with the steering;⁸ (b) air-conditioning; (c) overheating.⁹ The veritable question is whether the unidentified steering problems, air-conditioning issues, and the overheating problems destroyed or substantially impaired the utility or effectiveness of the motor vehicle? Although there was no evidence as to how far Mr Lourens drove after taking delivery, it appears to be

⁷ 1977 (3) SA 670 (A) at 683H.

⁸ There was no evidence led as to the nature of the problem with the steering. In the form delivered to MIOSA, a steering pump problem was mentioned by Mr Lourens. The diagnosis conducted by the appellant shortly after the sale revealed a defective steering pump. The diagnosis conducted by the MFC three months after the motor vehicle was repossessed revealed a hole in the steering rack.

⁹ Overheating may be caused by various factors; namely (i) insufficient coolant; (ii) malfunctioning thermostat; (iii) cooling system leaks; (iv) radiator issues; (v) cooling fan problems; or (vi) clogged or faulty water pump.

uncontested that even after immediately reporting the defects to the salesperson, Mr Lourens managed to drive with the motor vehicle. The Extreme is situated in Pretoria (Silverton) and Mr Lourens alleged in his founding affidavit that he resided at 2[...] S[...] V[...]. This Court, after using the distance calculator, must take judicial notice that the distance between the two places is about 190 kilometres single trip.

[21] A motor vehicle that drives over 300 kilometres cannot be said to be, on any reasonable basis, substantially impaired. It is not rendered less acceptable than persons would be reasonably entitled to expect. There is no evidence as to whether for the period 15 - 23 October 2022, Mr Lourens did not drive the motor vehicle, nor was the motor vehicle rendered ineffective.

[22] Section 55(2) of the CPA provides as follows:-

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

(b) Are of good quality, in good working order and *free of any defects;*”

[23] The question is whether the motor vehicle was free of any defects. Before Mr Lourens took delivery, the motor vehicle was inspected and no defects were noticed. This allegation was not challenged by Mr Lourens. Based on such uncontested evidence, *prima facie*, Mr Lourens received the motor vehicle free of any defects. Accepting that there were latent defects as discovered by Mr Lourens and the Extreme itself afterwards, it must be shown that those defects were material imperfections that render the motor vehicle less acceptable.

[24] He who alleges must prove¹⁰ – *onus probandi*. Mr Lourens was obligated to prove on the preponderance of probabilities that a defect as defined in section 53 was present. On the contrary, the defect discovered by the Extreme was more of an immaterial imperfection, hence it was repaired. The report by the MFC, although

¹⁰ *Kunz v Swart and Others* 1924 AD 618 and *Pillay v Krishna and another* 1946 AD 946.

produced some three months later, did not reveal any material defect in the air-conditioning and the alleged overheating. The full panel of the Tribunal simply accepted that there was a defect and failed to assess the materiality of any of the defects alleged by Mr Lourens. What this Court observes is an unsupported, unsubstantiated and speculative finding to the following effect:

“12 ... On the evidence before the Tribunal, we are persuaded that the problems the applicant experienced with steering the vehicle were not confined to the steering pump and *would have persisted after the replacement* thereof. A defective steering mechanism is not a minor fault. The defect rendered the vehicle less acceptable than people generally would be reasonably entitled to expect and *unsafe*. It further rendered the vehicle *less useful or practical for the purpose for which the applicant purchased it*.”

[25] Other than being speculative in nature, this finding is fraught with numerous difficulties. Firstly, contrary to the version of Mr Lourens, it inexplicably confined the defects to the steering and chose to label it “defective steering mechanism”. The version of Mr Lourens at best was confined to “steering concerns” and “malfunctioning steering pump”. Nowhere did Mr Lourens testify about a steering mechanism. A steering mechanism involves the entire steering system, ranging from the steering box, drop arm, idler arm, rack, pinion, recirculating ball, worm and sector. Secondly, it speculates a situation contemplated in section 56(3) that even after the replacement of the steering pump, the steering problems would have persisted. Thirdly, it alleges unsafeness in the circumstances of absence of evidence of extreme risk. Fourthly, with no evidence, it concluded that the vehicle was less useful or practical for the purpose for which Mr Lourens purchased it. Impermissibly, it was only in a replying affidavit that Mr Lourens alleged that he informed the Extreme of the specific task of transporting building supplies to and from Mozambique. This case was not made in the founding affidavit. There was no way in which the Extreme could deal with it.

[26] This belated attempt was seeking to make a case contemplated in section 55(2)(a) read with section 55(3)(a) and (b) of the CPA. There was simply no case made in that regard and accepting such a case belatedly offends the principles of

natural justice – *audi alteram partem*. A conclusion reached by the full panel that the vehicle is found to be unsuitable for its intended purpose, is simply baseless and bereft of evidentiary support. It is accepted that grammatically, a defect means an imperfect or faulty something. However, where the legislature has provided a technical meaning of any word, such a word may not be given a grammatical meaning. It must be given the technical meaning afforded by the legislature.¹¹

[27] Accordingly, this Court reaches a conclusion that the defect alleged by Mr Lourens does not meet the definitional requirements set out in section 53 of the CPA. Resultantly, the provisions of section 55(2) have not been contravened. Any finding that section 55(2) was contravened is a finding incorrect in law.

Was section 56(2) of the CPA contravened?

[28] Section 56(2) provides as follows:-

(2) Within six months after 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.

[29] The above section contemplates two forms of remedies (repair or refund) in the event the jurisdictional requirements are met. The legislature employed the phrase "*if the goods fail to satisfy the requirements and standards*". Where the word "if" is employed in a statute, it introduces a condition. In other words, the goods must be infested with a defect as defined in section 53. If the defect contemplated in section 53 is absent, it cannot be said that the goods fail to satisfy the requirements

¹¹ *University of the North and Others v Ralebipi and Others* [2003] 11 BLLR 1120 (LAC) at para 12.

or standards set out in section 55. In terms of the law, Mr Lourens acquires a right to receive goods that are free from defect. Such does not mean that consumers like Mr Lourens would acquire a right even if the defect is immaterial or the imperfection is immaterial.¹² Such a benign and liberal interpretation would defeat the provisions of section 2 read with section 3 of the CPA. The purpose of the CPA is not to punish suppliers or unfairly stifle their businesses, but it is to promote and advance the social and economic welfare of consumers in South Africa by, amongst others, promoting fair business practices. It is a statute to be interpreted in a manner that gives effect to its purpose.

[30] It must axiomatically follow that the jurisdictional requirements for the two remedies to be available are (a) delivery of goods; (b) that fail to meet the requirements or standard. Should these jurisdictional requirements not be met, the remedy of a repair and or refund does not avail. It remains the onus of the consumer to allege and prove that the goods fail to satisfy the requirements and standards. Counsel for the respondents placed reliance on the judgment of *Toyota Randburg (A division of Motus Group Ltd) v Ndlovu and another (Ndlovu)*¹³ in advancing an argument that Mr Lourens does not attract an onus of proof in the present circumstances. The learned Kumalo J sitting with Mbongwe J relying on *Ross v South Peninsula Municipality (Ross)*¹⁴ reached the following conclusion:

“[40] This is to say that some circumstances permit in the name of fairness and experience for the burden of proof to be placed not necessarily on the ‘plaintiff’ but on the ‘defendant’ who may be in a better position with the necessary information required in the circumstances. *I am of the view that consumer dispute resolution procedures can fall under these circumstances.*”

¹² See *Motus Corporation (Pty) Ltd and Another v Wentzel (Wentzel)* [2021] ZASCA 40 at para 41, where the Court found that not every small fault is a defect as defined. It must either render the goods less acceptable than people generally would be reasonably entitled to expect from goods of that type, or it must render the goods less useful, practicable or safe for the purpose for which they were purchased... ***A defective module may be readily replaced, as occurred with the immobiliser. Does that render the vehicle defective so as to entitle the purchaser to return it and demand repayment of the purchase price? Clearly not.***

¹³ [2024] ZAGPPHC 591.

¹⁴ [2000] 4 All SA 85 (C).

[41] The question of burden of proof is central to the object or purpose of the CPA ... This means ensuring effective consumer redress and access to justice.

[42] Section 117 is somewhat vague as to whom the burden lies, which leaves it to the discretion of the Courts which must be exercised judiciously. *Laying the burden of proof on the consumer in these circumstances will in my view not only be burdensome but it would also be unfair on the consumer and would go against the object and purpose of the CPA especially where there is a need for in-depth knowledge that a consumer would ordinarily not have.*”

[31] This Court respectfully begs to differ with a view that the incidence of onus does not occur in matters involving consumers. It is apparent that in reaching that conclusion, the Court in *Ndlovu* did not take into account the provisions of section 75(4) of the CPA, which provides as follows:-

“(4) The Tribunal –

(a) *Must conduct a hearing into any matter referred to it under this Chapter, in accordance with the requirements of this Act, and the applicable provisions of the National Credit Act pertaining to the proceedings of the Tribunal;*”

[32] The above provisions obligate a Tribunal to conduct a hearing in the prescribed manner. In law, *onus probandi* means the duty of proving a disputed assertion. A standard of proof is different from the *onus probandi*. As an indication that the onus of proof is contemplated, section 4(1) of the CPA provides that a person may approach a Commission or Tribunal and allege that a consumer right has been infringed or impaired or that a prohibited conduct occurred. The old adage of he who alleges must prove is bound to apply. A standard of proof describes the amount of evidence necessary to prove an assertion or claim. As a clear indication that the incidence of onus finds application, section 117 of the CPA specifically provides that in any proceedings before the Tribunal, the standard of proof is on a balance of probabilities. Clearly, if onus was not anticipated, then the provisions of

section 117 would be superfluous. In *Wentzel*, the SCA reached the following apt conclusion:

“[45] In my view, Ms Wentzel has *failed to show* that the requirements of s 56(3) were satisfied and that she was entitled to a refund of the purchase price in respect of the vehicle... The court a quo misdirected itself in ordering the refund of the purchase price...”

[33] The failure to show can only mean failure to discharge the onus or burden of proof. Section 142(1) of the NCA dictates that the hearing must be conducted in (a) an inquisitorial manner; (b) expeditiously; (c) informally as possible; and (d) in accordance with the principles of natural justice. Nowhere in the Rules for the conduct of matters before the National Consumer Tribunal (Rules) is it apparent that the incident of onus does not apply. Rule 21(1) provides that a hearing must be informal and rule 21(2) affords the Tribunal the power to judge the admissibility of any evidence adduced and its probative value.

[34] For reasons canvassed above, this Court crosses path with *Ndlovu* to the extent that it concludes that the incidence of onus is replaced with the fairness principle. There are instances where the legislature finds it appropriate to move the proverbial onus from the alleging party to the defending party (section 11 of the Employment Equity Act). A provision similar to section 11 is not to be found in the CPA. As a parting shot, the principle suggested in *Ross* found application in cases involving section 26(3) of the Constitution. In substantiation of this parting shot, the Court in *Ross* concluded thus:

“Grosskopf JA in the *Eskom* case (*supra*) made it clear that this is no reason for removing the burden of the onus of proof from the plaintiff, in such a case, *although less evidence* will be required from a plaintiff in relation to knowledge which is peculiarly within the domains of the defendant.

It is the conclusion of this Court therefore that Section 26(3) of the Constitution has indeed modified the common law as laid down in *Graham v Ridley* to the extent that a plaintiff seeking to evict a person from his or her

home is now required to allege relevant circumstances which entitle the court to issue such an order. The respondent did allege that Mrs Ross was occupying the property illegally but this is not sufficient to satisfy the above requirement.”¹⁵

[35] Accordingly, for all the above reasons, this Court must conclude that Mr Lourens had failed before the full panel to show that the provisions of section 56(2) have been contravened. A finding that the section has been contravened was made in error and it is incorrect in law owing to the fact that the jurisdictional requirements have not been established. Thus, in my fervently held view, the first and second grounds of appeal must be upheld.

Entitlement to a refund

[36] A refund entitlement only arises if the jurisdictional requirements outlined in section 55(2) have been met. Absent those jurisdictional requirements, Mr Lourens was not entitled to a refund. Related to this issue is the question whether Mr Lourens directed a repair or not. Since the proceedings were by way of motion, the *Plascon Evans* rule must apply. On application of the rule, the Tribunal ought to have accepted the version of the Extreme that the direction was to repair. On Mr Lourens’ own version, he was directed by the salesperson to return the vehicle to the premises for assessment and repairs. Even though the letter to Mr Lourens suggested that a refund would not be possible, such does not make the version of the Extreme to be far-fetched. In his founding affidavit, Mr Lourens referred to an assessment and repairs. Therefore, the version of the Extreme that it was directed to repair and did repair is incapable of being rejected.

[37] Acceptance of the version of the Extreme would have driven the full panel to the provisions of section 56(3) of the CPA. In that regard, the right to a refund would only arise three months after the repair, and a demonstration of a defect not being remedied. As held in *Wentzel*, that would have compelled Mr Lourens to show through evidence that the defect was not remedied. The fact that the power steering

¹⁵ Ross above n 14 at 92.

pump was remedied is confirmed by the MFC report because a new defect is identified three months later. A power steering pump is a different motor vehicle part from a steering rack. Accordingly, since the steering pump was remedied, the right to a refund within the contemplation of section 56(3) had since evaporated.

[38] With regard to the settlement of the MFC account, a concession that the full panel acted *ultra vires* was wisely made. However, for the sake of posterity, section 4(2)(b)(ii)(bb) of the CPA does not suggest that an innovative order is tantamount to excess of power. An order in excess of power does not ensure the realisation by consumers of their rights in terms of the CPA. Where a qualifying defect is not shown to exist, a consumer cannot realise the rights contemplated in section 55 of the CPA. An innovative order must first be an appropriate order. An appropriate order is one that follows a declaration that a conduct is prohibited in terms of the CPA. Section 150(a) of the NCA specifically provides that the Tribunal may make an appropriate order in relation to prohibited conduct or required conduct in terms of the Act, including declaration of established conduct to be prohibited in terms of the Act.

[39] The purpose of an innovative order is to better advance, protect, promote, and assure the realisation by consumers of their rights, not in general but in terms of the Act. A right to a refund is limited to the price paid by the consumer. In terms of section 1(b) of the CPA, a price in consideration for any transaction means the total amount paid or payable by the consumer to the supplier in terms of that transaction or agreement. Money paid to a supplier by the credit grantor is not contemplated in the price as defined. Therefore, such money exchanged between the supplier and a credit grantor is incapable of being refunded. In *Wentzel*, the Court dealt with the issue of the price on an assumption that the purchase price was paid by the MFC on behalf of Mrs Wentzel. This assumption does not constitute the *ratio decidendi* of the Court. Therefore, it is not an authority for the proposition that money owed to a credit grantor ought to be refunded to the credit grantor under the provisions of section 56 of the CPA. However, even with that assumption made, the Court stated that the provisions of section 20 of the CPA find application.

[40] Therefore, it would have been required that the money paid by the MFC on behalf of Mr Lourens be subjected to the deductions contemplated in section 20. To

the extent that the full panel failed to consider this relevant factor, it reached an incorrect ruling with regard to the refund by settling the credit amount.

[41] In summary, it is the conclusion of this Court that a defect within the contemplation of section 53 read with section 55 had not been established. The existence of such a defect is a jurisdictional requirement for the remedy contemplated in section 56(2)(b) of the CPA. Since the jurisdictional requirements have not been established, a finding that the Extreme contravened section 56(2)(b) of the CPA is an incorrect one susceptible to be set aside on appeal. Since there is no prohibited conduct established, Mr Lourens was not entitled to an appropriate order of refund of any form. Accordingly, the appeal must succeed.

[42] For all the above reasons, I make the following order:

Order

1. The appeal is upheld.
2. The order made by the full panel Tribunal is set aside in its entirety.
3. The respondent is to pay the costs of this appeal on a party and party scale taxable or to be settled at scale B.

GN MOSHOANA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

B LESUFI
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA
(I agree and it is so ordered)

APPEARANCES:

For the Appellant:

Mr B C Bester

Instructed by:

Van Der Merwe Attorneys Inc, Pretoria

For the Respondent:

Instructed by:

Mr J A J Van Den Heever
Henstock Van Den Heever,
Polokwane

Date of the hearing:

08 October 2024

Date of judgment:

24 October 2024