THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1272/2019

In the matter between:

MOTUS CORPORATION (PTY) LTD t/a ZAMBEZI MULTI FRANCHISE **First Appellant**

RENAULT SOUTH AFRICA (PTY) LTD **Second Appellant**

and

ABIGAIL WENTZEL **Respondent**

Neutral citation: *Motus Corporation (Pty) Ltd and Another v Wentzel* (Case no 1272/2019) [2021] ZASCA 40 (13 April 2021)

Coram: WALLIS, SALDULKER and ZONDI JJA and CARELSE and KGOELE AJJA

Heard: 26 February 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. It has been published on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 13 April 2021.

Summary: Consumer Protection Act 68 of 2008 – consumer approaching the high court to enforce their rights under the Act against the supplier of the motor vehicle before exhausting internal remedies set out in s 69 – whether s 69 precludes consumer from approaching the court to seek remedy –Refund remedy: consumer not entitled to a refund of the purchase price unless they satisfy the court that all requirements stipulated in s 56(3) have been met – determination of amount of the purchase price to be refunded regulated by s 20. Court a quo materially misdirected itself in awarding refund remedy – appeal succeeds.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Mavundla J sitting as court of first instance):

1 The appeal succeeds with no order as to costs.

2 The order of the high court is set aside and is replaced with the following order: 'The application is dismissed, with no order as to costs.'

JUDGMENT

Zondi JA (Wallis and Saldulker JJA and Carelse and Kgoele AJJA concurring)

Introduction

[1] On 16 May 2018 the respondent, Ms Abigail Wentzel (Ms Wentzel), brought an application in the Gauteng Division of the High Court, Pretoria, against the first appellant, Motus Corporation (Pty) Limited t/a Zambezi Multi Franchise (Renault) and the second appellant, its parent company, Renault South Africa (Pty) Ltd (Renault SA). She claimed to be entitled to cancel a credit agreement between herself and Renault in respect of a Renault Kwid motor vehicle (the vehicle) and to the refund of the purchase price in the amount of R256 965.84. She tendered the return of the vehicle against the refund of the purchase price. The essential basis for her claim was that Renault had, in breach of ss 49(1)(*b*), 55(2)(*b*) and (*c*), 56(2)(*a*) an (*b*) and 56(3) of the Consumer Protection Act 68 of 2008 (the Act), sold her a brand new vehicle that was woefully defective. Renault denied the alleged breaches of the Act and that Ms Wentzel was entitled to the relief that she sought.

[2] The matter served before Mavundla J. The learned Judge upheld Ms Wentzel's claims and granted an order in the following terms:

'1. That the respondents are jointly and severally, the one paying the other to be absolved, ordered to repay the applicant the total purchase [price] and finance charges for the Renault Kwid in an amount of R256 965.84 within fifteen (15) days of this order;
2. That the aforesaid amount shall be paid to the trust account of the applicant's attorneys of record, within fifteen (15) days of service of this order;
3. That the respondents, are jointly and severally, the one paying the other to be absolved, ordered to pay taxed or agreed costs on attorney and client scale.
4. That the applicant returns the relevant vehicle to the premises of the first respondent, on the date of payment of the amount mentioned in order 1 above.'

[3] The appeal is before this Court with leave granted by the court a quo. Renault attacks the court a quo's conclusions and the factual findings on which they are based.

[4] The issue is whether Ms Wentzel made out a case in terms of ss 56(2) and (3) of the Act for the refund of the purchase consideration paid to Renault in respect of the vehicle. The related issues are whether the vehicle had defects; whether such defects were resolved by Renault; and whether there were any further complaints received by Renault from Ms Wentzel, subsequent to the repairs undertaken by Renault.

The sale agreement

[5] Central to an appreciation of the issues on appeal is the sequence of material events. On 7 December 2017 Ms Wentzel purchased the vehicle from Renault in terms of a written offer to purchase. The total purchase consideration payable to Renault was R176 400.41 made up as follows:

• Selling price	:	R131 491.23
• Metallic paint	:	3 000.00
• Smash and grab	:	4 000.00
• Motor Plan	:	10 745.97
• On the road charge	:	5 000.00
• VAT	:	21 663.21

[6] Ms Wentzel obtained finance for the vehicle from the Motor Finance Corporation (Pty) Ltd t/a M.F.C. (MFC), a division of Nedbank, and the latter settled

her indebtedness to Renault. The MFC provided finance to Ms Wentzel in terms of a Variable Rate Instalment Sale Agreement (instalment sale agreement). The total purchase price payable to MFC under the instalment sale agreement, after addition of finance charges and other related charges, was R261 924.84 payable in monthly instalments of R3 637.37 over a period of 72 months. The relationship between Renault and MFC is not apparent from the papers. Counsel for Renault informed the court from the Bar that there was no relationship between the two and further that the vehicle was not subject to a floor plan agreement. But what is clear, is that in terms of clause 3.2 of the instalment sale agreement MFC is the owner of the vehicle and is entitled to retain ownership of the vehicle until all obligations and repayments to MFC have been fulfilled by Ms Wentzel. In terms of the instalment sale agreement Ms Wentzel was obliged to collect the vehicle from Renault and to confirm acknowledgement of delivery on MFC's behalf. Additionally, she was required to inspect the vehicle for any defects before collecting it, and, if any defect was found, to decline delivery of the vehicle and inform MFC immediately of that fact.

Alleged defects and breach of warranty

[7] In her founding affidavit Ms Wentzel alleged that Renault guaranteed that the vehicle was suitable for the purpose for which it was generally intended to be used, that it was in good working order and free of any defects, and fit for use on a public road. She alleged further that Renault guaranteed that the vehicle was safe, roadworthy and would be useable and durable for a reasonable period of time.

[8] Ms Wentzel contended that in breach of the warranty, Renault sold her a vehicle beset with numerous defects, some which manifested themselves even before it left their premises on 7 December 2017. She said that when she started the vehicle, while on Renault's showroom floor, she heard a ticking and/or rattling sound emanating from 'the front part of the vehicle'. She asked a sales representative, a certain Mr Nicolas Andrade about the cause of the noise. Mr Andrade informed her that such noise was something not uncommon to find in Renault Kwid models and it normally occurs when the navigation system starts running.

[9] Ms Wentzel said that despite the assurance given to her by Mr Andrade, the

noise did not stop. Instead, it increased in its intensity. On Monday, 11 December 2017 she reported it to Mr Andrade, who in turn, reported it to Renault service department. There was then an exchange of emails between her and Mr Andrade. On 14 December 2017 he wrote that he had not forgotten her and would sort things out for her. On 17 December 2017, a Sunday, she wrote asking him to phone her in relation to the mats and a noise that made the lights flicker. She also mentioned that her air-conditioning sometimes did not cool the car. He responded on Tuesday in an email receipt of which was delayed for some reason until 15 January 2018. In the meantime, the service department arranged for the vehicle to be booked in for inspection on 27 December 2017.

[10] It is common cause that on 27 December 2017, Ms Wentzel took the vehicle to Renault for repairs. According to the job card which was prepared in respect of the vehicle, the vehicle had a 'tick noise in the dash and the hazards flashing'. The vehicle had done 270 kilometres. The invoice that was generated for the work that was done on the vehicle recorded that an immobiliser module was replaced. Mr Gerben van der Merwe, the senior technician at Renault, oversaw the repairs which were carried out on the vehicle on 28 December 2017. Ms Wentzel collected the vehicle from Renault on 29 December 2017. There was no charge for attending to these matters.

[11] Ms Wentzel claimed that she had also on this occasion complained that the Bluetooth system for using her mobile phone was faulty, although, like the air-conditioning, this was not recorded on the job card. She said that when she collected the vehicle, the Bluetooth was still faulty and stopped audible functioning once the vehicle exceeded 70 kilometres per hour. She claimed in her founding affidavit that over the next few days further 'troubles and/or faults and defects' manifested themselves, but did not specify the nature of these. When this was pointed out in the answering affidavit her reply was that it was not for her to report defects. She said that as a result of these she contacted Renault SA and was advised to approach the Motor Vehicle Ombudsman of South Africa (MIOSA) for assistance. Nothing was done pursuant to this advice until 21 February 2018.

[12] The delayed email from Mr Andrade was received by Ms Wentzel on

15 January 2018. In another email addressed to various people at Renault on 23 January 2018, she said that she tried to contact Mr Andrade about her number plates and foot mats and also advised him that her brakes were making a screeching noise, the driver's side front window was rattling and the people could not hear her when she phoned using the Bluetooth system. She took the vehicle back to Renault service department on 23 January 2018. At that stage the odometer reading of the vehicle recorded 2863 kilometres. The work that was carried out on the vehicle, included 'brakes modification' and securing the window of the door on the driver's side. This was reflected on the job card and confirmed by Mr van der Merwe who oversaw the repairs.

[13] According to Ms Wentzel, on 25 January 2018 she sent a photograph to Renault showing that the roof rails were defective and pulling away from the vehicle. The photograph is unclear, but seems to show that the roof rail has at the foremost point become unclipped. Ms Wentzel said that by 22 February 2018, the noise in the vehicle had reached an unbearable level. An immobiliser warning light came on when she was driving home that evening. She telephoned Mr Andrade to ask him if it was safe to continue driving the vehicle, given these problems. On his advice, she took the vehicle back to Renault for service on 23 February 2018.

[14] The job card prepared in respect of the vehicle, records that the complaints which were raised, were 'warning light is on, wind noise when travelling over 70km per hour, roof racks loose, Bluetooth sounds bad, rattle noise at 70 km, brakes noisy'. By this time, the vehicle had done 6211 kilometres. The invoices issued by Renault on 28 February 2018 record that the brake pads were deglazed and roof rails replaced. Renault explained that it was necessary to deglaze the brake pads in order to stop and/or soften the noise that occurred with the application of brakes as the vehicle did not have an anti-locking braking system (ABS). A vehicle health check was carried out and Mr van der Merwe, who attended to the repairs himself, tested the car by driving some 8 kilometres. In his affidavit he stated that every problem raised by Ms Wentzel had been properly attended to and the car was not defective. Renault kept the car for five days and returned it to Ms Wentzel on 28 February 2018.

[15] On 21 February 2018 Ms Wentzel referred the dispute to MIOSA for possible assistance in terms of s 69*(c)*(i) of the Act. In her referral to MIOSA, Ms Wentzel quoted what appears to be an email addressed to Renault in which she repeated the complaints referred to above. She said that she did not want the car anymore and asserted that she would not pay for this vehicle for the next five years. She sought a full refund or 'a vehicle that [Renault] have the means to fix every single component . . .'. Two days later the repairs referred to in the previous paragraph were undertaken.

[16] It is not apparent from the record what steps MIOSA took to attempt to resolve the dispute, but what we know, is that about six months later, and on 10 September 2018, MIOSA declined to take her referral, stating that it did not have jurisdiction in respect of the dispute. In doing so, it relied on s 17.2.6 of the South African Automotive Industry Code of Conduct (the Code), which states that MIOSA does not have jurisdiction in respect of any dispute 'where legal action has been instituted by either party, unless such complaint was received by MIOSA before such legal action was instituted'. It further stated that it has 'no mandate to solicit refunds or financial compensation'. I find MIOSA's reliance on s 17.2.6 of the Code, as a basis to decline jurisdiction, very disturbing, having regard to the fact that no legal action had been instituted by Ms Wentzel, when she referred the dispute to MIOSA.

[17] In her founding affidavit Ms Wentzel averred that, despite the numerous attempts by Renault to repair the vehicle, the defects remain unresolved. She listed ten items, but only three of these did not relate to items that had been attended to when the vehicle had been with Renault on the three occasions when she had taken it back for problems to be attended to. Her new and current complaints were about loose back panels of the vehicle,[1] a 'ticking' sound when the engine was hot or after the car had been driven[2] and a complaint that the air-conditioning was not blowing cool air.[3] She alleged that, due to these persisting problems in the vehicle, she, on 14 March 2018, escalated the matter to Renault's dealer principal, Mr Werner Petzer, who she said acknowledged the defects and offered to take Ms Wentzel's vehicle back as a trade-in for a Renault Clio. She said that the proposed deal was not favourable, as its

[1] As the vehicle is a hatchback it is difficult to identify to what this referred.
[2] It is unclear whether this was anything more than the sound of the engine cooling down.
[3] This had not been reflected as a concern on any job card.

terms would have been to her detriment. For instance, her vehicle would have been taken at a book value, which she considered was too low for a brand new vehicle. Renault's response was that Mr Petzer had not acknowledged that the car was defective, but sought to resolve the problems by assisting her to purchase a Renault Clio to replace the Kwid as the latter was an entry level vehicle. However, she did not qualify financially for such an arrangement.

[18] Ms Wentzel contended that Renault's conduct, in offering to sell her another vehicle on terms, which were to her detriment, was in contravention of s 68(1)*(c)* of the Act. This section provides that 'if a consumer has exercised, asserted or sought to uphold any right set out in the Act or in the agreement or transaction with a supplier, the supplier must not, in response . . . alter, or propose to alter, the terms or conditions of a transaction or agreement with the consumer, to the detriment of the consumer'. The section protects consumers from victimisation by the suppliers for enforcing their rights under the Act against the suppliers.

The issues

[19] In addition to opposing the application on the facts, Renault raised four special pleas. First, it argued that Ms Wentzel failed to exhaust the internal remedies provided for by s 69 of the Act. It alleged that, in terms of the section, she had to, inter alia, refer the matter directly to the Tribunal, or the applicable industry Ombud with jurisdiction, accredited in terms of s 82(*b*), to the consumer court; alternative dispute resolution and filing a complaint with the Commission, before approaching a civil court.

[20] Secondly, Renault raised a *lis alibi pendens* defence. In this regard, it was alleged by Renault that Ms Wentzel had, prior to the institution of the proceedings in the high court, referred the matter to MIOSA for resolution and that the matter before MIOSA was still pending. Renault accordingly contended that Ms Wentzel was precluded from seeking the exact same relief from it in two separate proceedings. Thirdly, Renault contended further that Ms Wentzel failed to comply with rule 18(6) of the Uniform Rules of Court, which requires that when a party relies on a contract, that contract must be annexed to the pleadings. Finally, Renault averred that in light of the irresoluble and material disputes of fact on the papers, which Ms Wentzel should have

foreseen, she should not have proceeded by way of motion proceedings. The alleged disputes related to whether the vehicle had defects and whether such defects were rectified by Renault.

[21] As regards the facts, Renault denied that the Bluetooth system stopped functioning once the vehicle exceeded the speed of 70 kilometres per hour. It alleged that Ms Wentzel only complained about the Bluetooth on 23 February 2018 and the complaint was resolved, when it was explained that the system was working, but noise from the car being driven at higher speeds, was the problem. It maintained that all of Ms Wentzel's other complaints relating to the vehicle, were attended to. It denied that it breached the warranty by selling Ms Wentzel a vehicle that had defects. Renault alleged that Ms Wentzel failed to return the vehicle or inform it of any of the alleged unresolved issues relating to the vehicle. It averred that Ms Wentzel only brought the vehicle for repairs on 27 December 2017, 23 January 2018 and 23 February 2018 and, to its knowledge, all of her complaints were resolved.

[22] Renault argued that Ms Wentzel, after electing to have the vehicle repaired by Renault, could not claim a refund of the purchase price. It contended that she was bound by her election and it was not open to her to change it. Renault's contention that Ms Wentzel could not claim a refund of the purchase price because she had elected to have the vehicle repaired, is not correct. Ms Wentzel's case for the refund of the purchase price was based on the allegation that the defects which were previously repaired by Renault resurfaced within three months after the repair. Her claim for the refund of the purchase price was not precluded by s 56(3) provided all of the requirements of that section are met.

[23] As a result of MIOSA's delay in investigating her complaints against Renault, Ms Wentzel, on 16 May 2018 approached the court a quo. It dismissed all of Renault's defences. After setting out the purposes of the Act as set out in s 3*(d)* – to protect the economic interests of consumers – and the obligation imposed on the courts by s 4(2) – to develop common law as necessary to improve the realisation and enjoyment of the consumer's rights in general and to promote the spirit and purposes of the Act - the court a quo concluded that:

'the courts must take a robust approach towards the economic giants, such as [Renault], who can flex their financial muscle to bully unsuspecting consumers to accept flawed goods, and raise all sort of spurious defences and denials. In this case, there were too many flaws or defects for a new vehicle. I am inclined to lean towards protecting the rights and interests of the applicant'.

The court a quo accordingly ordered Renault and Renault SA jointly and severally to make a refund of the full purchase price of R256 965.84, as set out in the instalment sale agreement on the basis of its finding that the vehicle was simply not of good quality. It did not explain on what basis Renault SA was held liable, notwithstanding the fact that it had no contractual relationship with Ms Wentzel.

Discussion

Section 69(d)

[24] Renault submitted that Ms Wentzel's application to the high court was premature, because she had not exhausted her remedies in terms of the other provisions of s 69*(d)* of the Act, more particularly because MIOSA, to which she had referred her complaints on 21 February 2018, had not yet rendered a decision, when she commenced these proceedings. Section 69 reads as follows:

'**Enforcement of rights by consumer.**—A person contemplated in section 4 (1) may seek to enforce any right in terms of this Act or in terms of a transaction or agreement, or otherwise resolve any dispute with a supplier, by—

(*a*) referring the matter directly to the Tribunal, if such a direct referral is permitted by this Act in the case of the particular dispute;

(*b*) referring the matter to the applicable ombud with jurisdiction, if the supplier is subject to the jurisdiction of any such ombud;

(*c*) if the matter does not concern a supplier contemplated in paragraph (*b*)—

(i) referring the matter to the applicable industry ombud, accredited in terms of section 82 (6), if the supplier is subject to any such ombud; or

(ii) applying to the consumer court of the province with jurisdiction over the matter, if there is such a consumer court, subject to the law establishing or governing that consumer court;

(iii) referring the matter to another alternative dispute resolution agent contemplated in section 70; or

(iv) filing a complaint with the Commission in accordance with section 71; or

(*d*) approaching a court with jurisdiction over the matter, if all other remedies available to that person in terms of national legislation have been exhausted.'

[25] The section has caused considerable difficulty and is the source of conflicting judgments in the high court. The authors of *Commentary on the Consumer Protection Act*[4] say that 'the various entities that can be approached for purposes of redress are not indicated in s 69 in an order that presents a clear picture of the exact route that a person has to follow in this quest for redress'. Nonetheless they suggest that the section contemplates a hierarchy of remedies and they make a valiant effort to describe such hierarchy. [5] The difficulty posed by the notion that the section creates a hierarchy of remedies is illustrated by cases where the route taken by the dissatisfied consumer has avoided the applicable ombudsman with jurisdiction in terms of s 69*(b)*.[6] Requiring dissatisfied consumers to pursue other remedies under s 69 before approaching the high court under s 69*(d)* has resulted in the consumer being non-suited.[7] In the present case MIOSA did not deal with Ms Wentzel's complaints until 10 September 2018, when it wrote to her saying that it had no jurisdiction, because the complaint needed to be received by it before the institution of legal action. The reference to it preceded the present litigation so it was incorrect to reject jurisdiction.

[26] The need for us to address the scope of s 69*(d)* fell away in argument, because Mr Botes SC, who appeared for Renault and Renault SA, indicated that he would not pursue the point as his clients preferred to address the issues of substance. Therefore, we did not hear full argument on the matter. The issues arising from the section will need to be resolved on another occasion. It suffices to say that the primary guide in interpreting the section will be s 34 of the Constitution and the guarantee of the right

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[4] Naudé and Eiselen *Commentary on the Consumer Protection Act* (Original Service, Juta) 69-1. The relevant chapter was written by Professor Corlia van Heerden.
[5] Ibid 69-20 para 33.
[6] *Imperial Group (Pty) Ltd t/a Cargo Motors Klerksdorp v Dipico and Others* [2016] ZANCHC 1 and *Imperial Group (Pty) Ltd t/a Auto Niche Bloemfontein v MEC: Economic Development, Environmental Affairs and Tourism, Free State Government and Others* [2016] 3 All SA 794 (FB). In para 43 of the latter judgment Daffue J questioned whether the Act does in fact create an implicit hierarchy of remedies.
[7] *Joroy 4440 CC v Potgieter and Another NNO* 2016 (3) SA 465 (FB) paras 8-10 and *Nzwana v Dukes Motors t/a Dampier Nissan* [2019] ZAECGHC 81 para 34.

of access to courts. Section 69(*d*) should not lightly be read as excluding the right of consumers to approach the court in order to obtain redress. A claim for cancellation of the contract and the refund of the price of goods on the grounds that they were defective falls under the *actio redhibitoria* and dates to Roman times. Our courts have always had jurisdiction to resolve such claims and there is no apparent reason why the section should preclude a consumer, at their election, from pursuing that avenue of relief until they have approached other entities.

[27] The section is couched in permissive language consistent with the consumer having a right to choose which remedy to pursue. Those in *(a)*, *(b)* and *(c)* appear to be couched as alternatives and, as already noted, there is no clear hierarchy. Had that been the aim it would have been relatively simple to set the hierarchy out in a sequence that would have been apparent, not 'implied', and clear for the consumer to follow. Furthermore, subsec *(d)* does not refer to the consumer pursuing all other remedies 'in terms of this Act', but of pursuing all other remedies available in terms of national legislation. That could be a reference to legislation other than the Act, or to the remedies under both the Act and other applicable consumer legislation, such as the National Credit Act 34 of 2005. Given the purpose of the Act to protect the interests of the consumer, who will always be the person seeking redress under it, there is no apparent reason why they should be precluded from pursuing immediately what may be their most effective remedy. Nor is there any apparent reason why the dissatisfied consumer who turns to a court having jurisdiction should find themselves enmeshed in procedural niceties having no bearing on the problems that caused them to approach the court.

[28] One further matter deserves mention. The contract between Ms Wentzel and the first appellant dealt specifically with this question. It provided in clause 6.1 that if she had a complaint, or a dispute arose, the parties would endeavour to resolve it within seven days, failing which it could be referred to MIOSA. However, clause 6.2 said:

'Notwithstanding the contents of clause 6.1, either party has the right to approach a competent court for urgent redress.'

Is such a contractual provision binding? It is easy to think of instances where one or other of the parties to a dispute would want urgent relief, but the stringent construction that some courts have put on s 69*(d)* would, if correct, appear to preclude it. That in turn, takes us back to s 34 of the Constitution and a possible issue over the constitutional validity of the section. In view of the approach by Renault and Renault SA, we do not have to consider these problems in this case, but any court seized of a similar contention will need to consider the issues we have mentioned and, no doubt, others that have not occurred to us.

The other issues

[29] In relation to the issues identified by Renault for resolution, I prefer to leave aside the defences of *lis alibi pendens* and non-compliance with Rule 18(6). Both are technical and do not address the substance of the issues between the parties. *Lis alibi pendens* is a purely dilatory defence and by the time the case was argued all the relevant contractual documents were before the court. I turn then to the issue of alleged defects and Ms Wentzel's rights in terms of the Act.

[30] It is apparent that the parties offered mutually destructive factual versions. On Ms Wentzel's version, the defects were never resolved by Renault. Renault's version is that all of the complaints raised by Ms Wentzel on 27 December 2017, 23 January 2018 and 28 February 2018 were resolved and no further complaints regarding the vehicle were thereafter brought to its attention. It relied in this regard on direct evidence from the technician who either supervised or personally attended to her car. There is no basis upon which that evidence can be rejected on the papers. The basis of Ms Wentzel's claim depended on the determination of issues, as to which there were serious disputes of fact and those factual disputes ought to have resolved by applying the test enunciated in *Plascon-Evans*[8] and subsequently explained by this Court in *National Director of Public Prosecutions*.[9]

[31] This Court in *National Director of Public Prosecutions* held at para 26:

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[8] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) 634-635.
[9] *National Director of Public Prosecutions v Zuma* [2009] 2 All SA 243 (SCA); 2009 (2) SA 279 (SCA).

'Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers. The court below did not have regard to these propositions and instead decided the case on probabilities without rejecting the NDPP's version.'

I will return to this aspect later in the judgment. The court a quo rejected Renault's contention that disputes of fact existed on papers. It decided the matter on the facts, which it held to be common cause. In order to assess whether this was permissible it is necessary to examine the relevant provisions of the Act.

[32] The objectives of the Act, are to develop and employ innovative means to ─

'(a) fulfil the rights of historically disadvantaged persons and to promote their full participation as consumers;

(b) protect the interests of all consumers, ensure accessible, transparent and efficient readiness for consumers who are subjected to abuse or exploitation in the marketplace; and

(c) to give effect to internationally recognised customer rights.'

The Act was enacted to, inter alia, promote and protect the economic interests of consumers.

[33] Section 3 of the Act deals with the purpose and policy of the Act. It reads:

'(1) The purposes of this Act are to promote and advance the social and economic welfare of consumers in South Africa by—

(*a*) establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally;

. . .

(*c*) promoting fair business practices;

(*d*) protecting consumers from—

(i) unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices;

and

(ii) deceptive, misleading, unfair or fraudulent conduct;

. . .

(*g*) providing for a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions; and

(*h*) providing for an accessible, consistent, harmonised, effective and efficient system of redress for consumers.'

[34] Ms Wentzel's claim for the refund of the purchase consideration was grounded on ss 49(1)*(b)*; 55(2)*(b)* and *(c)*; 56(2)*(a)* and *(b)*; and 56(3) of the Act. The reliance on s 49(1)*(b)* was misplaced. The subsection provides that any notice to consumers or provision of a consumer agreement that purports to constitute an assumption of risk or liability by the consumer, must be drawn to the attention of the consumer in a manner and form that satisfies the formal requirements of subsecs (3) to (5). It finds no application in a matter where the relief sought is a claim for the refund of the purchase consideration. In any event, there was no factual support for the case based on the provision of s 49(1)*(b)*. Nothing further needs to be said about it.

[35] Section 55 of the Act guarantees a consumer, such as Ms Wentzel, a right to safe and good quality goods. Section 55(2)(*b*) and (*c*) on which Ms Wentzel relied, provide:

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

(*a*) . . .

(*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.

. . .'.

[36] The provisions of subsection (6) to which reference is made in s 55(2) do not find application in this case, as there is no evidence that Ms Wentzel was expressly informed that the vehicle was offered in a specific condition and that she expressly agreed to accept it in that condition, or knowingly acted in a manner consistent with accepting the vehicle in that condition. Ms Wentzel bought a brand new vehicle and that being the case, she was entitled to the protection afforded by s 55(2). A right

afforded to a consumer in terms of s 55(2) exists, irrespective of whether it is contractually warranted. It exists by operation of law and is protected by s 56. A consumer may enforce it in terms of the Act or in terms of an agreement in the event of its breach by the supplier.

[37] Section 56 reads as follows:

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

[38] Consideration of the question of whether Ms Wentzel established a case based on these provisions of the Act on which she relied, must start with s 53(1)*(a)*, in which the concept of 'defect' is defined, together with the concepts of 'failure', hazard' and 'unsafe'. It is clear that her claim was based on the goods having defects. 'Defect' when used with respect to any goods, component of any goods, or services means –

'(i) any material imperfection in the manufacture of goods or component, or in performance of the services, that renders the goods or results of the service less acceptable than persons generally would be reasonably entitled to expect in the circumstances; or

(ii) any characteristic 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.'

[39] The parties disagreed as to whether the alleged 'defects' relied upon by Ms Wentzel constituted defects as contemplated by s 53(1)*(a)*(i) or s 53(1)*(a)*(ii). Counsel for Renault submitted that, properly construed, Ms Wentzel's complaint related to defects falling within the ambit of s 53(1)*(a)*(ii). In other words, the complaint of Ms Wentzel was about alleged defects relating to characteristics of the vehicle that would render the vehicle less useful than persons generally would be reasonably entitled to expect in a brand new vehicle.

[40] Counsel for Ms Wentzel submitted that Ms Wentzel's complaint encompassed both classes of 'defects'. In particular he argued that the failure of the Bluetooth to perform optimally when the vehicle travelled beyond a speed of 70 kilometres per hour was a fact that constituted a material imperfection in the manufacture of the vehicle rendering the vehicle less acceptable than persons generally would be reasonably entitled to expect in a brand new vehicle. I do not think there is merit in this argument. A Bluetooth system is accessory to the primary function of a motor car, which is to be driven and to enable travel from place to place. A functioning Bluetooth system is no doubt a convenience for making and receiving phone calls or other purposes related to the use of modern technology. But a deficiency in it cannot render the goods less acceptable than people generally would be reasonably entitled to expect from a motor vehicle of this type, or render it less useful, practicable or safe for the purpose for which it was purchased, namely, as a motor vehicle.

[41] On a broader basis, counsel emphasised that Ms Wentzel bought a brand new vehicle, but because of the issues she encountered, it was like a second-hand vehicle. It is not necessary to reach a firm conclusion as to whether the defects complained of by Ms Wentzel fall either under s 53(1)*(a)*(i) or s 53(1)*(a)*(ii). It must be accepted on the facts that are common cause that her vehicle did have certain issues, which she brought to the attention of Renault. It is more difficult to determine whether they amounted to defects as defined in the statute. 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. No evidence was led by either side to inform the court of what purchasers of entry level motor vehicles are reasonably entitled to expect. Is every rattle or unfamiliar noise a defect in terms of the statute? 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.

[42] It is common cause that the issues with the vehicle started to manifest themselves within six months after its delivery to Ms Wentzel on 7 December 2017. The vehicle was taken in for repairs by Renault on 27 December 2017, 23 January 2018 and 23 February 2018. Renault at its risk and expense, repaired the defective components in the vehicle. Assuming that these issues were defects, this is what Ms Wentzel was entitled to in terms of s 56(2).

[43] Ms Wentzel was not satisfied with the repair remedy afforded to her by s 56(2). Instead, she sought payment of the full purchase price she had to pay, pursuant to the instalment sale agreement she concluded with the MFC. But she was not entitled to claim a refund of the purchase price before all events stipulated in s 56(3) had taken place. To obtain the refund remedy Ms Wentzel had to show, first, that Renault repaired the defective parts; secondly, that within three months after the repairs, the defects had not been remedied or that a further failure was discovered.

[44] The evidence revealed that the last time that the vehicle was repaired by Renault, was on 28 February 2018 and on Renault’s version, which must be accepted, Ms Wentzel did not report further defects to them after 28 February 2018. Apart from twice raising the noise from the brakes, which had been explained as due to the fact that the car was not fitted with ABS brakes, she never complained that a repair was not properly carried out. Renault's evidence was that all repairs were properly carried out. It is correct that Ms Wentzel saw Mr Petzer of Renault on 14 March 2018 and said she informed him of the defects, which according to her, he acknowledged. But that discussion occurred in a different context and for a different purpose. She had gone to Renault to discuss the possibility of replacing Renault Kwid with another vehicle.

There is no record that she reported to Renault service department any defect relating to the vehicle on 14 March 2018. It is correct that s 56(3) requires a further defect to be discovered, not reported, for the consumer to be entitled to the replacement of the goods or refund. In my view, it is required of a consumer to report further defects to the supplier that manifest themselves within three months after the repair of the vehicle as such reporting is necessary for the purposes of enforcing the warranty provisions.

[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 ordered Renault to refund to Ms Wentzel the total purchase price and finance charges in an amount of R256 965.84. The court a quo misdirected itself in ordering the refund of the purchase price. In the first place, as I have found above, Ms Wentzel did not make out a case for a refund remedy. She failed to bring her claim within the ambit of s 56(3) of the Act. Secondly, even if she had brought herself within the provisions of s 56(3), she was not entitled to a refund of the amount stipulated in the court a quo's order. This was not the amount she paid to Renault. It was the amount she agreed to pay to MFC in terms of the agreement with them. Her claim for the refund was not against the financier but against the supplier of the vehicle.

[46] The definition of 'price' in s 1 of the Act is relevant here. It provides that 'price', when used in relation to ─

'(*a*) . . .

(*b*) the consideration for any transaction, means the total amount paid or payable by the consumer to the supplier in terms of that transaction or agreement, including any amount that the supplier is required to impose, charge or collect in terms of any public regulation.'

In this matter the amount charged by Renault for the vehicle was R176 400.41. The amount of the refund ordered by the court a quo included the finance charges and other related charges which were imposed by and payable to, MFC by Ms Wentzel. Assuming in her favour that the amount paid by MFC to Renault was a payment on her behalf, if Ms Wentzel had made out a case for the refund she was not entitled to a refund of an amount greater than R176 400.41.

[47] Section 20 of the Act provides a mechanism for the determination of a refund. In terms of s 20(5) upon the return of the goods, the supplier must refund to the

consumer the price paid for the goods, less any amount that may be charged in terms of subsection (6). Subsection (6) provides:

'In determining the right of a supplier to impose a charge contemplated in s 20(5), if any goods referred to the supplier are:

(a) . . .

(b) in their original condition and repackaged in their original packaging, the supplier may charge the consumer a reasonable amount for ─

(i) use of the goods during the time they were in the consumer's possession, unless they are goods that are ordinarily consumed or depleted by use, and no such consumption or depletion has occurred; or

(ii) any consumption or depletion of the goods, unless that consumption or depletion is limited to a reasonable amount necessary to determine whether the goods were acceptable to the consumer; . . .'.

[48] The court a quo in determining the amount to be refunded to Ms Wentzel failed to consider that Ms Wentzel had used the vehicle for over a period of 18 months and that Renault, in terms of s 20 would have been entitled to deduct a reasonable amount for the use of the vehicle during the time it was in her possession. This was a relevant fact which the court a quo should have considered, but failed to consider. This failure constituted a material misdirection which, even if a proper case had been out for such remedy, would have entitled this Court to interfere with the court a quo's award.[10]

[49] In conclusion, I am not satisfied that a proper case had been made out by Ms Wentzel for a remedy under s 56(3)*(b)* of the Act, having regard to the serious disputes of fact which arose on the pleadings. Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts and they cannot be used to resolve factual issues.[11] To the extent there was a dispute regarding the nature of the defects in the vehicle and whether they were resolved by Renault, such dispute ought to have been resolved in favour of Renault. For these reasons the appeal must succeed.

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[10] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Limited and Another* [2015] ZACC 22; 2015 (5) SA 245 (CC) para 88.

[11] Op cit, note 6 para 26.

[50] Turning to the issue of costs, the court a quo ordered Renault to pay taxed or agreed costs on an attorney and client scale. This was a punitive costs order which is not ordinarily made unless there are special facts giving rise to the litigation, or arising out of the conduct of the losing party, which would render it just and equitable, and necessary to ensure that the successful party is not out of pocket. The court a quo purportedly in the exercise of its discretion to award costs on a punitive scale, took into account the fact that Ms Wentzel 'does not have a deep pocket as compared to the respondents' and that she 'must have been highly prejudiced and inconvenienced in having to seek redress from the respondents'. It imposed the punitive cost order to 'compel the respondents to ensure that they sell to the public good quality commodities'. These considerations viewed cumulatively did not, in my view, justify an award of costs on a punitive scale. This much was conceded by counsel for Ms Wentzel. The opposition by Renault to the proceedings was not unreasonable. It was entitled to enter the fray in order to show that it took steps to address the problems raised by Ms Wentzel in relation to the vehicle.

[51] As regards the costs of appeal, it was submitted by counsel for Renault that in the event of the Court upholding the appeal, Renault would not seek a costs order against Ms Wentzel. In the circumstances no order will be made as to costs.

The Order

[52] In the result the following order is made:

1 The appeal succeeds with no order as to costs.

2 The order of the high court is set aside and is replaced with the following order: 'The application is dismissed, with no order as to costs.'

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D H Zondi
Judge of Appeal

Appearances:

For appellants:	F W Botes SC (with him S McTurk)
Instructed by:	Rémon Gerber Attorneys Incorporated, Johannesburg
	McIntyre van der Post, Bloemfontein
For respondent:	M Coetsee
Instructed by:	Elliot Attorneys, Pretoria
	Willie J Botha Incorporated, Bloemfontein