



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**  
**JUDGMENT**

**Reportable**

Case no: 612/2023

In the matter between:

**PLATINUM WHEELS (PTY) LTD**

**APPELLANT**

and

**THE NATIONAL CONSUMER COMMISSION**

**FIRST RESPONDENT**

**THE NATIONAL CONSUMER TRIBUNAL**

**SECOND RESPONDENT**

**Neutral citation:** *Platinum Wheels (Pty) Ltd v The National Consumer Commission & Another* (612/2023) [2024] ZASCA 163 (29 November 2024)

**Coram:** ZONDI DP and NICHOLLS and MOTHLE JJA and BAARTMAN and NAIDOO AJJA

**Heard:** 22 August 2024

**Delivered:** 29 November 2024

**Summary:** National Consumer Commission represented in the high court by attorney who had no right of appearance after his name was struck from roll of legal practitioners – fraud caused prejudice to the administration of justice – proceedings vitiated by the fraud.

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## ORDER

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**On appeal from:** Gauteng Division of the High Court, Pretoria (Retief AJ and Ndlovane AJ sitting as court of first instance):

- (a) The appeal is upheld with costs, such costs to include the costs of two counsel where so employed.
- (b) The order of the high court is set aside and replaced with the following order:

‘The matter is remitted to the high court for hearing by a differently constituted bench. Costs of the aborted high court application are awarded against the first and second respondents, jointly and severally.’

- (c) The Registrar of this Court is directed to forward a copy of this judgment to the South African Legal Practice Council.
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## JUDGMENT

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### Nicholls JA

[1] This appeal has its origins in an adverse finding by the National Consumer Tribunal (the Tribunal) against Platinum Wheels (Pty) Ltd (Platinum Wheels), a second-hand car dealership, pursuant to a complaint lodged with the National Consumer Commission (the Commission) by a dissatisfied customer. Platinum Wheels exercised its automatic right of appeal in terms of s 75 of the Consumer Protection Act 68 of 2008 (the CPA), read with s 148(2) of the National Credit Act 34 of 2005 (NCA) and approached the Gauteng Division of the High Court, Pretoria (the high court). It was unsuccessful in overturning the finding of the Tribunal. Leave to appeal was granted to this Court by the high court. Platinum Wheels is the appellant, the Commission is the first respondent and the Tribunal the second respondent.

## Background

[2] In brief, the history of the matter is as follows. Mr Hiram Clinton Links (Mr Links) was a friend and acquaintance of a director and shareholder of Platinum Wheels, a certain Mr Jacques Hayes (Mr Hayes). He asked Mr Hayes to look out for a suitable second-hand BMW M5 (M5) for him. In May 2018, Mr Hayes informed him of a 2012 model which was being advertised by Platinum Wheels for R499 000. Mr Hayes informed him that it had 95 000 kilometres on the clock and was approaching the end of its motor plan and its extended three-month warranty.

[3] After inspecting the M5, Mr Links decided to purchase the motor vehicle and trade in his BMW 330D. On drawing up the settlement value on the BMW 330D, it became apparent that there was an outstanding balance of R138 759.69 which Mr Links had to settle with the financiers. To accommodate this difficulty, it was agreed between Mr Links and Mr Hayes that the transaction would be structured so that the M5 would be sold for R450 000, but the finance obtained would be for an inflated sum of R586 956.52, excluding VAT. The agreement of sale was concluded on this basis and signed on 7 June 2018. This sum is also reflected in the finance agreement that Mr Links entered into with Motor Finance Corporation t/a MFC. The principal debt owed to MFC for the advanced finance, including interest, was R989 708.99. The finance agreement was concluded on 8 June 2018 and Mr Links took delivery of the M5 on the same day. Platinum Wheels undertook to pay BMW financial services the outstanding amount for the BMW 330D directly.

[4] Before the motor vehicle was handed over to Mr Links, it was taken to JSN Motors (Pty) Ltd t/a BMW Bryanston (JSN), a BMW dealership, for the transfer of the motor plan, the remaining duration of which was two months or 4 464 kilometres, whichever came first. The vehicle was also checked for 'a sticky cupholder'. According to JSN, a motor plan is normally transferred to the individual customer or the car dealer who brings the vehicle in. In this instance, it was Platinum Wheels who booked in the vehicle at JSN, and the motor plan was therefore in their name. The normal practice is that once a motor vehicle is sold the dealer would then furnish the BMW dealership with the customer's details who would transfer it into the name of the customer within three months or 10 000 kilometres (whichever comes first). In this instance, the relevant documents to transfer the motor plan into Mr Link's name were not provided.

[5] Almost immediately after Mr Links took possession, the M5 started causing trouble. On 21 June 2018, the vehicle was booked in to JSN due to heavy fuel consumption and the fact that an engine light on the dashboard came on. On 11 July 2018, the vehicle was booked in to JSN because the drive train warning light was on, the steering wheel was off centre, and vibrations were felt when driving at 140 kilometres per hour. On 16 July 2018, the steering was still off centre, and the warning light came on again. On 23 July 2018, the vehicle was again booked in for the same steering wheel problem, vibrations being felt when driving around 140 kilometres per hour and that the vehicle was not saving settings.

[6] On 14 September 2018, three months and one week after taking delivery of the vehicle, the M5 broke down on the highway and was booked in for repairs the following day. JSN diagnosed the vehicle as having engine failure. The mileage at that point was 98 504 kilometres. Mr Links was informed that it was necessary to replace the engine at the cost of R509 078.48.

[7] Initially, Mr Links lodged a complaint with the Motor Industry Ombudsman of South Africa for mediation, however, nothing came of the attempted mediation. Only afterwards did he lodge a complaint with the Commission, against Platinum Wheels as the supplier. The said complaint recorded that:

'Engine failure after 4 months after vehicle being purchased. I have experienced several problems with the vehicle since taking ownership.'

The Commission appointed one of their inspectors to investigate. A report was duly compiled in which the inspector found that Platinum Wheels, as the supplier, had contravened s 55(2)(a)-(d) and s 56(3)(a)-(b) of the CPA. The contraventions were referred to the Tribunal.

### **The Tribunal and high court**

[8] The Tribunal made the following findings:

- (a) Platinum Wheels had contravened ss 55(2)(c) and 56(3) of the CPA which it declared as prohibited conduct;
- (b) Platinum Wheels was interdicted from engaging in such prohibited conduct;
- (c) Platinum Wheels was ordered to refund Mr Links the purchase price paid for the M5, that is the capital sum that MFC financed under the credit agreement minus

several deductions. These included the amounts required to settle the outstanding balances on the two vehicles (although the evidence shows that Mr Links only traded in one vehicle); the mechanical warranty and any other amounts unrelated to the actual purchase price;

(d) Platinum Wheels was ordered to pay a R50 000.00 administrative fine within 60 days;

(e) No order as to costs.

[9] Platinum Wheels exercised its automatic right of appeal and appealed to the high court. The Commission, in turn, lodged a cross-appeal challenging the Tribunal's formulation of the refund order in terms of s 56(3)(b) by failing to apply s 4(2)(b)(ii) when formulating the amount of the penalty to be awarded against Platinum Wheels in terms of s 112 of the CPA. The appeal was dismissed with costs. The cross appeal was upheld.

[10] The high court made the following order:

'1. The Appeal is dismissed with costs.

2. The cross-appeal is upheld.

3. The order of the Tribunal dated the 3<sup>rd</sup> August 2021 is set aside, replaced and substituted as follows:

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

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

3.3 Platinum is ordered to pay Mr Hiram Clinton Links an amount of R679,500.00 (inclusive of value-added tax).

3.4 Platinum is directed to pay an administrative fine of R50 000.00 (fifty thousand rand only) into the National [Revenue] Fund referred to in section 213 of the Constitution of South Africa, 1996.

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

3.6 No order as to costs.

3.7 Platinum is ordered to pay the costs of the appeal.'

## In this Court

[11] There are two preliminary issues to be disposed of. The first is whether this Court has jurisdiction. The Commission initially argued that, because the matter served before two judges in the high court as an appeal against the judgment and order of the Tribunal, special leave should have been granted. Once it was pointed out that this Court, in *National Credit Regulator v Lewis Stores*,<sup>1</sup> distinguished between appeals from within the judicial system and appeals which emanated from bodies outside the court system, such as administrative tribunals and regulatory bodies, this point was abandoned. There, this Court held that the high court, in an appeal from a regulatory body, was sitting as court of first instance, not as an appeal from another judicial body. That such appeals are not judicial appeals was recently confirmed in *Hanekom NO and Others v Nuwekloof Private Game Reserve Farm Owners' Association*<sup>2</sup>.

[12] The next, and more important point, relates to the status of Mr Ludwe Mbsa Biyana (Mr Biyana), an erstwhile employee of the Commission, and the attorney who represented the Commission in the high court in his capacity as the in-house legal counsel. Unbeknown to the court, or either of the parties, Mr Biyana had been struck from the roll of attorneys shortly after he commenced employment as a legal advisor of the Commission. This was the prevailing situation when he appeared on behalf of the Commission before the Tribunal in 2021,<sup>3</sup> and in the high court, on 1 September 2022.<sup>4</sup>

[13] It came to the attention of the legal representatives of Platinum Wheels quite fortuitously when they became suspicious of what they referred to as 'sharp' practices of Mr Biyana in the conduct of the appeal. They made the necessary enquiries and found out that Mr Biyana had been struck off the roll on 23 August 2019. They informed the Commission, in writing on 27 October 2023, attaching a copy of the judgment against Mr Biyana. It is common cause that this was the first time that the Commission became aware of this fact.

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<sup>1</sup> *National Credit Regulator v Lewis Stores (Pty) Ltd and Another* [2019] ZASCA 190; 2020 (2) SA 390 (SCA); [2020] 2 All SA 31 (SCA) para 43.

<sup>2</sup> (502/2023) [2024] ZACA 154 (12 November 2024)

<sup>3</sup> The judgment and reasons of the National Consumer Tribunal were delivered on 3 August 2021.

<sup>4</sup> The judgment of the high court was handed down on 2 November 2022.

[14] The Commission immediately placed Mr Biyana on suspension on 31 August 2023 on the grounds that on 2 August 2019, and with intent to defraud, he accepted employment as a legal advisor with the right to appear in court, knowing that at the time he had been suspended from the roll of legal practitioners. He was also alleged to have misrepresented to the Commission that he was an attorney, knowing this to be false. Finally, it was alleged that, after 23 August 2019, he withheld that he had been struck from the roll. Mr Biyana's contract of employment was terminated on 31 December 2023, four months after he had been suspended.

[15] That the Commission as a public body should have been more careful in whom they employed cannot be disputed. Their negligence in their due diligence reflects very badly on public bodies like the Commission who should ensure their employment procedures are unassailable, and that the persons they employ are beyond reproach. That Mr Biyana's conduct places the entire legal profession into disrepute is undeniable. Courts decry such conduct. Had this been known by the court and the litigants, he would not have been permitted to participate in the high court proceedings. His conduct demonstrates gross dishonesty, deceit and fraud. He has committed an offence which should be reported to the relevant authorities.<sup>5</sup>

[16] But does this vitiate the entire judgment? I think not. The Commission was not involved in the fraud. There is no suggestion of any irregularity either in the make-up or conduct of the bench which would have far reaching effects and be grounds for setting aside the judgment.<sup>6</sup> In fact, in its heads of argument Platinum Wheel's initial stance was that, had Mr Biyana's status been disclosed to the high court, the appeal would have been struck from the roll for non-appearance. However, this was not considered to be grounds to set aside the judgment. Platinum Wheels acknowledged that it had 'made submissions and a reasoned judgment was delivered. As remittal would be inappropriate, due to a reasoned judgment having been delivered by the full bench a quo, the costs of the hearing a quo may remain relevant in this appeal. It is submitted that, notwithstanding the improper representation of the Tribunal a quo, this appeal should succeed for other reasons'.

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<sup>5</sup> Section 33(3) of the Legal Practice Act 28 of 2014, read with s 93(2).

<sup>6</sup> *S v Malindi and Others* [1989] ZASCA 175; [1990] 4 All SA 433 AD.

Whether the judgment was, in the view of Platinum Wheels, a reasoned one, is irrelevant. What is important is that Platinum Wheels acknowledged that it was afforded a proper hearing, and the court delivered a judgment after hearing both parties and considering the merits of the matter.

[17] Platinum Wheel's stance altered once this Court requested the parties to file further affidavits and heads of argument on this particular aspect. Thereafter, Platinum Wheels took the approach that the appeal should be upheld with costs and the matter be remitted back to the court a quo for a fresh hearing on the merits. For this they placed reliance on *S v Mkhise (Mkhise)*,<sup>7</sup> where, in four separate criminal trials, the accused were represented by an advocate who had assumed someone else's identity and was not admitted to practise as an advocate. The Court held that it is a well-established practice that an irregularity in the conduct of a criminal trial may be of such a magnitude that it vitiates the trial. This is where the irregularity is so gross in nature that the appeal court sets aside the conviction without reference to the merits. On the other hand, there are irregularities which are of a lesser nature where the appeal court can separate the bad from the good and consider the merits.<sup>8</sup> In *Mkhise*, this Court went on to observe that the administration of justice requires that advocates be persons of unquestionable honesty and integrity. The authority to practise as an advocate in terms of the relevant legislation is essential to the proper administration of justice.<sup>9</sup> It was the integrity of the process that had been impugned which was considered in *Mkhise* to be sufficient to vitiate the various trials.

[18] It is significant that *Mkhise* was a criminal trial where the rights of the accused to a fair trial are paramount and constitutionally mandated.<sup>10</sup> Mr Mkhise had been sentenced to death (although he was later reprieved) while represented by the advocate in question. The prejudice to an accused person who is represented by someone who is not properly admitted, is manifest. Various fair trial rights are implicated. An irregularity of this nature is so serious that it will vitiate the entire proceedings.

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<sup>7</sup> *S v Mkhize; S v Mosia; S v Jones; S v Roux* 1988 (2) 868 AD.

<sup>8</sup> *Ibid* at 871F-J.

<sup>9</sup> *Ibid* at 874D-G.

<sup>10</sup> Section 35(3) of the Constitution.



[19] Insofar as Platinum Wheels relies on the Namibian case of *Shalli v The Prosecutor General*,<sup>11</sup> this dealt with an *ex-parte* application brought in terms of Namibia's Prevention of Organised Crime Act 29 of 2004 (POCA). The legal practitioner representing the Prosecutor-General was not an admitted attorney at the time and, it was argued that she did not have the *locus standi* to move the application for the preservation order. The court said that the (Namibian) legislature's intention, behind s 21(1) of the Namibian Legal Practitioners Act 15 of 1995 (Namibian Legal Practitioners Act),<sup>12</sup> was that, if any person, other than a legal practitioner, issued court processes, then such process will be void *ab initio*.<sup>13</sup> The court went on to say any 'looseness' in the application of the rules of court was likely to bring the administration of justice into disrepute and erode the court's authority over its officers which would detrimentally affect the standard of litigation.<sup>14</sup> It relied on fundamental policy considerations to determine that a notice of motion which was signed by a person not admitted as a legal practitioner, was a fatal irregularity which rendered the preservation application null and void *ab initio*. It was stressed that only duly admitted legal practitioners could sign process as required by the relevant rule.

[20] In both our Legal Practice Act 28 of 2014 (the LPA) and the Namibian Legal Practitioners Act, it is an offence for an unqualified person to issue legal pleadings. The Uniform rules of court in both countries permit a party to sign pleadings and commence proceedings in their own name.<sup>15</sup> In this matter, the notice of referral of a complaint to the Tribunal is an internal process of the Commission. It was signed by

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<sup>11</sup> *Shalli v Prosecutor General* [2012] NAHC 112 (*Shalli*).

<sup>12</sup> Section 21 of the Namibian Legal Practitioners Act 15 of 1995 reads:

**'Certain offences by unqualified persons**

21(1) A person who is not enrolled as a legal practitioner shall not -

(a) practise, or in any manner hold himself or herself out as or pretend to be a legal practitioner;

(b) make use of the title of legal practitioner, advocate or attorney or any other word, name, title, designation or description implying or tending to induce the belief that he or she is a legal practitioner or is recognised by law as such;

(c) issue out any summons or process or commence, carry on or defend any action, suit or other proceedings in any court of law in the name or on behalf of any other person, except in so far as it is authorised by any other law; or

(d) perform any act which in terms of this Act or any regulation made under section 81(2)(d), he or she is prohibited from performing.'

<sup>13</sup> *Shalli* para 50.

<sup>14</sup> *Ibid*.

<sup>15</sup> Rule 18(1) of the Uniform Rules of Court, Republic of South Africa (2009) and Rule 18(1) of Rules of the High Court of Namibia Government Gazette no 59/1990 (10 October 1990).

Jabulani Mbeje as Divisional Head, Legal Services, National Consumer Commission. The founding affidavit was deposed to by Thezi Mabuza, the Deputy Commissioner of the National Consumer Commission, as was the replying affidavit. No court process other than the Commission's reply to the appellant's notice, in terms of rule 8(8) and rule 8(9), was signed by Mr Biyana. Certainly, no legal proceedings were commenced in the name of the Commission by Mr Biyana.

[21] Prejudice to the litigants plays a crucial role in determining whether a judgment should be set aside. In *Rajah and Rajah v Ventersburg Municipality*,<sup>16</sup> this Court held that a court will not interfere on review with the decisions of a quasi-judicial tribunal where there has been an irregularity, if it is satisfied that the complaining party has suffered no prejudice. There, a trading licence had been issued on the basis that a general dealer company had been formed. In fact, it was not formed until after the licence had been issued. The municipality on becoming aware of this, sought to have the licence set aside. The court held that, whatever the precise nature of the proceedings were, because there had been no prejudice to the public interest and no prejudice to the complaining party, the municipality and the court should not interfere. The underlying principle, said this Court, is that 'the Court is disinterested in academic situations'.<sup>17</sup>

[22] No person should benefit from fraud and no court will allow a person to keep an advantage obtained by fraud. Here, the complainant has committed no fraud and received no discernible advantage by Mr Biyana failing to reveal his true status. Unlike *Firststrand Bank Limited (t/a Rand Merchant Bank) v Master of the High Court, Cape Town (Firststrand Bank Limited)*,<sup>18</sup> Mr Biyana's actions had no direct bearing on the outcome of the case.

[23] In this matter, there can be no question of prejudice to the consumer as the high court upheld the finding of the Tribunal, thus finding in favour of the Commission

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<sup>16</sup> *Rajah and Rajah (Pty) Ltd and Others v Ventersburg Municipality and Others* 1961 (4) SA 402 (A) at 407H.

<sup>17</sup> *Ibid* at 408A.

<sup>18</sup> *Firststrand Bank Limited (t/a Rand Merchant Bank) and Another v Master of the High Court, Cape Town and Others* [2013] ZAWCHC 173; [2014] 1 All SA 489 (WCC); 2014 (2) (SA) 527 (WCC) (*Firststrand Bank Limited*) para 18.

who was representing the interests of the consumer. There has been no suggestion that any of the litigants' fair trial rights have been impinged. Nothing will be achieved by setting aside the judgment and referring it back to the high court. The matter has been argued entirely on the papers, these will not alter. This is not a trial so no further evidence can be led. Should the matter be remitted, as Platinum Wheels now seeks, the only change will be that a different legal representative, presumably suitably qualified, will represent the Commission. In my view, this is an instance where the irregularity is not such that it should vitiate the judgment. To do so would be a waste of scarce judicial resources.

### **Merits**

[24] Platinum Wheels has raised four grounds of appeal. Their first, is whether the dispute is excluded from the CPA in terms of s 5(2)(d), on the basis that the purchase and the financing documents of the vehicle constitute a credit transaction. Second, if it is not excluded, then it is contended that Mr Links was expressly advised of the condition of the vehicle and the need to take out an extended warranty and maintenance from BMW. In failing to do so, Mr Links is precluded in terms of s 55(6) from asserting any statutory rights as to the quality, fitness for purpose and use for a reasonable time in terms of s 55(2) of the CPA. Third, if Mr Links is found to have those rights in terms of s 55(2), the question should be asked whether they should be enforced against the credit supplier or repairer rather than Platinum Wheels as supplier. Finally, if it is found that Mr Links has the rights in terms of s 55(2) which he can enforce against Platinum Wheels, then does the purchase price to be repaid include the amount paid to extinguish the balance on the Chevrolet and the BMW 330D?

[25] The primary argument of Platinum Wheels is that the transaction in question was a credit transaction which is excluded from the ambit of the CPA in terms of s 5(2)(d). This section provides that the Act does not apply to any transaction which constitutes a credit agreement under the NCA, *'but the goods or services that are the subject of the credit agreement are not excluded from the ambit of this Act'*. (My emphasis.). The reasoning of Platinum Wheels appears to be based on various definitions in the CPA. The definition of a 'supplier', according to s 1 of the CPA, is 'a person who markets any goods or services', and, the definition of the verb 'supply', in

relation to goods, includes sell, rent, exchange or hire in the ordinary course of business, and, in relation to services, means to sell services or cause them to be performed. 'Transaction', as defined by the CPA, means an agreement for the supply or the potential supply of any goods or services between persons acting in the ordinary course of business. From the above definitions it is extrapolated that Platinum Wheels did not supply the M5. Instead, MFC was the true owner of the vehicle with whom Mr Links entered into a credit agreement in terms of the NCA.

[26] The contention is that the high court erred in finding that Platinum Wheels supplied the M5 and by doing so it impermissibly expanded the meaning of 'supply' when it should have been limited to sell, rent, exchange or hire. To 'supply' cannot, asserts Platinum Wheels, include to 'source' or to 'market', which was Platinum Wheels only role in respect of the M5. It buttresses its argument by claiming that this Court, in *Motus Corporation (Pty) Ltd and Another v Wentzel (Motus)*,<sup>19</sup> found that this type of tripartite transaction was a credit agreement. This is an incorrect interpretation of *Motus*. In that matter, the Court had to determine whether the purchaser of a brand new Renault vehicle who had utilised her repair remedy in terms of s 56(2) was entitled, in addition, to a refund remedy in terms of s 56(3). Both these sections will be dealt with later in this judgment. She sought repayment of the full purchase price she had to pay pursuant to a credit agreement she had entered into with MFC. This Court held that no case had been made out for a refund remedy in terms of s 56(3) and even if she did fall within the ambit of s 56(3), the amount claimed was not what was paid to Renault, but the amount she agreed to pay MFC in terms of the agreement with them. The Court said:

'Her claim for the refund was not against the financier but against the supplier of the vehicle.'<sup>20</sup> Rather than being authority for the proposition that the agreement between Platinum Wheels and Mr Links is excluded from the CPA, such a statement is an acknowledgement by this Court that a claim of this nature would be covered by the CPA.

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<sup>19</sup> *Motus Corporation (Pty) Ltd and Another v Wentzel* [2021] ZASCA 40; [2021] 3 All SA 98 SCA (*Motus*) para 36.

<sup>20</sup> *Ibid* para 45.

[27] Not only that, but it is evident from the clear wording of the section that the goods which are the subject of a credit agreement fall within the CPA. This also coincides with the stated purpose of the Act which acknowledges the high levels of poverty, illiteracy and inequality brought on by apartheid and sets out to promote an environment which supports a culture of consumer rights. It is now settled law that in interpreting a statutory provision, one considers text, context and purpose, all of which must be construed consistently with the Constitution. Words are to be afforded their ordinary meaning, and their context may be determined by considering other sections of the statutory instrument or from the statutory instrument as a whole. This is a unitary exercise and a sensible interpretation should be preferred to one that is absurd or leads to an unbusinesslike outcome.<sup>21</sup> Here, it would be unthinkable if a consumer who has sufficient funds to purchase his or her vehicle without credit was covered by the protection afforded by the CPA but the less wealthy consumer who requires credit were to be excluded. There can be no doubt that the agreement entered into by Mr Links and Platinum Wheels is not a credit agreement in terms of the NCA and is therefore not excluded from the CPA.

[28] The other defences are sourced in ss 55 and 56 of the CPA which provide as follows:

**'55 Consumer's right to safe, good quality goods**

(1) This section does not apply to goods bought at an auction, as contemplated in section 45.

(2) Except to the extent contemplated in subsection (6), every consumer has a 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; and

(d) comply with any applicable standards set under the Standards Act, 1993 (Act 29 of 1993), or any other public regulation.

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<sup>21</sup> *Cool Ideas 1186 v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) para 28; *Natal Joint Municipal Pension Fund v Endumeni* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 17; *Amabhungane Centre for Investigative Journalism NPC v President of the Republic of South Africa* [2022] ZACC 31; 2023 (2) SA 1 (CC); 2023 (5) BCLR 499 (CC) para 36; *Capitec Bank Holding Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] ZASCA 99; [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA) para 25.

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

(a) ordinarily offers to supply such goods; or

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

(4) In determining whether any particular goods satisfied the requirements of subsection (2) or (3), all of the circumstances of the supply of those goods must be considered, including but not limited to-

(a) the manner in which, and the purposes for which, the goods were marketed, packaged and displayed, the use of any trade description or mark, any instructions for, or warnings with respect to the use of the goods;

(b) the range of things that might reasonably be anticipated to be done with or in relation to the goods; and

(c) the time when the goods were produced and supplied.

(5) For greater certainty in applying subsection (4)-

(a) it is irrelevant whether a product failure or defect was latent or patent, or whether it could have been detected by a consumer before taking delivery of the goods; and

(b) a product failure or defect may not be inferred in respect of particular goods solely on the grounds that better goods have subsequently become available from the same or any other producer or supplier.

(6) 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.'

### **'56 Implied warranty of quality**

(1) In any transaction or agreement pertaining to the supply of goods to a consumer there is an implied provision that the producer or importer, the distributor and the 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.

(4) The implied warranty imposed by subsection (1), and the right to return goods set out in subsection (2), are each in addition to-

- (a) any other implied warranty or condition imposed by the common law, this Act or any other public regulation; and
- (b) any express warranty or condition stipulated by the producer or importer, distributor or retailer, as the case may be.'

[29] If it is found that the agreement falls within the ambit of the CPA, then Platinum Wheels contends that the motor vehicle falls within the category of excluded goods in terms of s 55(6) which states that a consumer's right to receive goods that are 'useable and durable for a reasonable period of time', will not apply if the consumer has been warned of the condition of the goods and agreed to accept them in that condition.<sup>22</sup> It is common cause that Mr Links was informed of the mileage and that the vehicle was nearing the end of its motor plan. But it can hardly be seriously contended that Mr Links agreed to accept a BMW which would have engine failure within three months and one week. This defence, too, must fail.

[30] The third argument was that, if Mr Links has the right to get a motor vehicle that is useable for a reasonable period of time, then the high court erred in relying on s 56(1) to hold Platinum Wheels liable for goods, and on the basis of s 56(3). The contention is that the word 'supplier' in the context of s 56(3) must mean the repairer, namely JSN. Because there were repeated problems with the vehicle, s 56(2) is not applicable, instead, it is 56(3), that is the relevant section. Once again, it is difficult to understand this argument. It is s 54 that deals with the consumer's right to demand

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<sup>22</sup> Section 55(6)(a) and (b) of the CPA.

quality service. Section 55 is headed 'Consumer's right to safe, good quality goods' and s 56 deals with the 'Implied warranty of quality'. A right afforded to a consumer in terms of s 55(2) exists by operation of law, so too, the protection afforded by s 56.<sup>23</sup> If the goods supplied do not meet the standards as contemplated in s 55(2) of the CPA, the consumer may return the goods within six months to the supplier without penalty. Section 56(2) affords the consumer the right to demand that the defective goods be repaired, or to claim a refund. In this instance, the consumer claimed a refund once the repairer failed to remedy the problems. The refund was claimable from the supplier of the vehicle, not the repairer whose role was limited to repairing the car every time a problem arose. JSN, as repairer, could not be held responsible for a motor vehicle that did not meet the standards set out in s 55(2). It is clear that Mr Link's complaint is not against the repair work done by JSN under the motor plan, but against the quality of the goods supplied by Platinum Wheels.

[31] The next question is the amount of the refund to which Mr Links is entitled. In terms of s 56(2)(b), the consumer is entitled to the price paid for the goods. 'Price' is defined in the CPA, when used in relation to a consideration for any transaction, as: '...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.'

Despite the offer to purchase reflecting a price of R697 500, it is not disputed that the motor vehicle was purchased by Mr Links for R450 000. Usually, one can deduct usage from this amount but in view of the fact that the vehicle was only driven for approximately 3 000 kilometres before the engine failed, usage will not feature in the equation. To the purchase price of the vehicle, should be added 14% VAT (R63 000) and licence and registration costs (R2 500). This is a total of R515 500 which is payable to Mr Links by Platinum Wheels. It is not the amount for which the vehicle was financed.

[32] The Commission has been largely successful in this appeal. But because of the negligence they exhibited in their employment of Mr Biyana, it is not appropriate that any costs order be made in their favour. The Commission is advised to lay criminal

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<sup>23</sup> *Motus* fn 22 above para 36.



charges against Mr Biyana. In addition, this matter should be referred to the Legal Practice Council in the event that Mr Biyana ever applies for his readmission as a legal practitioner.

[33] In the result I would have made the following order:

The appeal is dismissed save for paragraph 3.3 of the high court order which is substituted with the following:

‘Platinum Wheels is ordered to pay Mr Hiram Clinton Links an amount of R515 500 (inclusive of value added tax).’

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C E HEATON NICHOLLS  
JUDGE OF APPEAL

**Baartman AJA (Zondi DP and Mothle JA and Naidoo AJA concurring):**

[34] I have had the advantage of reading the judgment of my colleague, Nicholls JA (the first judgment). I gratefully adopt her setting out of the factual background to the appeal, the litigation history and the abbreviations used. I agree that there are two preliminary issues to be disposed of. The first is whether this Court has jurisdiction. I concur with the first judgment that this Court has jurisdiction for the reasons articulated therein.

[35] The second preliminary issue relates to Mr Biyana’s status. The first judgment concludes that Mr Biyana’s status amounts to an irregularity that does not vitiate the proceedings. With respect, I am unable to agree with the first judgment on this issue. The first judgment distinguishes these proceedings from *Mkhise* on the basis that the latter related to criminal proceedings. However, *Mkhise* emphasises that the conduct of a legal practitioner implicates public interest as follows:<sup>24</sup>

‘Firstly, though couched in another form, this contention in essence relies upon the absence of any prejudice in a case such as the one postulated: for that reason it is said that the

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<sup>24</sup> *Mkhise* fn 6 above at 875A-E.

irregularity should not necessarily vitiate the trial. However, as the *Moodie* case confirms and illustrates, the presence or absence of prejudice in a particular case is not a relevant consideration in deciding in the first place on the fundamental significance of the irregularity. *Secondly, when considerations of public interest are paramount, hardship in a particular case, should it arise, is to be regretted but cannot be avoided.* Thirdly, it would be wholly impracticable to attempt to determine *ex post facto*. . .whether counsel concerned was “a fit and proper person” in the sense that this term is applied and understood in the Act. . .If, on the other hand, these words are taken to refer to his competence in the actual conduct of the case the difficulty is, if anything compounded. It would be even more impracticable, if not impossible, for the court to attempt to determine, by applying some norm of competence...whether he in his defence of the accused has been proficient.’ (Own emphasis.)

[36] The Court’s reference to the ‘public interest’ transcends a reference to criminal proceedings. Public interest relates to the administration of justice and cannot be limited to criminal proceedings because *Mkhise* related to a criminal trial. The administration should meet the standard required to give the public at large confidence in the administration of justice and so instil respect for the courts and compliance with court orders. Therefore, an indulgent attitude towards fraud within the administration of court proceedings, broadly, is intolerable.

[37] The proposition that multiple fruitless court proceedings between the same parties should be avoided, is a generally correct statement. In pursuit of expedience; however, the duty to uphold the high standard required for public confidence in the administration of justice cannot be sacrificed, particularly, as we are battling to rid the administration of justice of the wave of corruption that has engulfed our country. Therefore, Blignault J,<sup>25</sup> in setting aside the Master’s decision, which had been influenced by the fraud of a legal representative involved in the process, to authorise a commission of enquiry in terms of ss 417 and 418 of the Companies Act 61 of 1973 held as follows:

‘Upon a consideration of Mr van der Westhuysen’s conduct I am of the view that his failure to disclose the facts in question to applicants’ attorney indeed amounted to a fraudulent misrepresentation. The prejudice to applicants is obvious.

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<sup>25</sup> *Firstrand Bank Limited* fn 17 above para 19-21.

It is trite that the effect of fraud is far-reaching. In *Farley (Aust) Pty Ltd v J R Alexander & Sons (Qld) Pty Ltd* [1946] HCA 29 the High Court of Australia, per Williams J, said this:

*“Fraud is conduct which vitiates every transaction known to the law. It even vitiates a judgment of the Court. It is an insidious disease, and if clearly proved spreads to and infects the whole transaction.”*

And in *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702 (CA) at 712 one finds Lord Denning’s well-known remarks:

*“No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all transactions whatsoever”.*

[38] Blignault J concluded as follows:<sup>26</sup>

*‘In South Africa the “insidious” effect of fraud permeates the entire legal system. It renders contracts voidable. It is one of the elements of delictual liability.... Fraud excludes the effect of an ouster clause in legislation. See *Narainsamy v Principal Immigration Officer* 1923 AD 673 at 675. It also nullifies a contractual exemption clause which purports to exclude a party from the consequences of fraudulent conduct. See *Wells v SA Alumnite* 1927 AD at 72.’*

[39] It is significant that Mr Biyana represented the Commission. The latter acts in the public interest *ex lege* and has historically briefed attorneys and advocates in private practice to represent members of the public. Due to an increase in high court litigation, it became cost-effective to employ in-house legal practitioners to represent the public. The Commission dismally failed in its due diligence processes in Mr Biyana’s appointment. This was to the detriment of the public at large. It is concerning that the Commission initially sought to persuade the appellant not to ‘persist with the point’. This was done in correspondence dated 7 December 2023. It is the duty of any legal practitioner to disclose incidents of fraud in court proceedings, irrespective of the consequences. The court is owed that duty.

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<sup>26</sup> Ibid para 22.

[40] It ill-behoves the Commission to complain, as it did, that it only became aware of Mr Biyana's fraud in October 2023 when the appellant brought it to its attention and therefore should not be held responsible for his fraud. The Commission had early warning that something was amiss with Mr Biyana's right of appearance. In 2021 the outcome of a verification report noted 'his admission status ...as "pending"'. It is inexplicable that it did not investigate what was meant by the pending status. It is the Commission's own 'ineptitude or remissness'<sup>27</sup> that paved the way for Mr Biyana's fraud affecting these proceedings and all others in which he participated. It is important to realise that Mr Biyana represented, on behalf of the Commission, many other innocent members of the public. Sweeping this matter under the carpet, as the Commission seems prepared to do, might mean that there would be no enquiry into whether their rights have been violated. That would be another undesirable effect that condoning the fraud committed in these proceedings might have.

[41] The first judgment points out the similarities between the South African and the Namibian systems but distinguishes the Namibian decisions relied upon by the appellant, among others, on the basis that no 'legal proceedings were commenced in the name of the Commission by Mr Biyana'. However, the latter had contravened s 25(1) of the LPA, which provides for the right of appearance of legal practitioners and candidate legal practitioners, as follows:

'Any person who has been admitted and enrolled to practise as a legal practitioner in terms of this Act, is entitled to practise throughout the Republic, unless his or her name has been ordered to be struck from the Roll or he or she is subject to an order suspending him or her from practising.'

[42] In contravening the provisions of the LPA, Mr Biyana committed a criminal offence and brought the administration of justice into disrepute. The fraud was committed in court: the institution tasked with ensuring that the values of our constitution are upheld. Our system allows persons not legally trained and those legally trained but not admitted as practitioners to assist the unrepresented litigant.<sup>28</sup> However, those persons have no right of appearance in court, irrespective of ability

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<sup>27</sup> *Saloojee and Another, NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 141G.

<sup>28</sup> Section 34(9) of the Legal Practice Act 28 of 2014; Protection from Harassment Act 17 of 2011 and Domestic Violence Act 116 of 1998.

and qualification. Therefore, Mr Biyana's ability is not a consideration in the present enquiry.

[43] I am persuaded, for the reasons stated above, that the absence or presence of prejudice to the consumer is irrelevant to the question of whether the fraud committed impacted negatively on the administration of justice to the detriment of the public interest. The proper functioning of the courts is premised on the absence of fraud in the process. The fraud committed in these proceedings was against the administration of justice, therefore, no litigant can condone it. It is for the court to protect the integrity of the proceedings and so retain public confidence in its orders and induce compliance. The people must be able to trust the judiciary to uphold the integrity of the judicial process.<sup>29</sup>

[44] Therefore, the first judgment's reference to *S v Malindi and Others* does not assist.<sup>30</sup> Irregularity in the composition of the bench means that the bench was not properly constituted and must result in the setting aside of the judgment of the bench so constituted. That irregularity is distinct from the criminal offence, fraud, committed in these proceedings.

[45] For these reasons, the second point *in limine* is upheld. It follows that the appeal succeeds. I make the following order.

- (a) The appeal is upheld with costs, such costs to include the costs of two counsel where so employed.
- (b) The order of the high court is set aside and replaced with the following order:

'The matter is referred to the high court for hearing by a differently constituted bench. Costs of the aborted high court application are awarded against the first and second respondents, jointly and severally.'

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<sup>29</sup> *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State v Zuma and Others* [2021] ZACC 18; 2021 (9) BCLR 992 (CC); 2021 (5) SA 327 (CC) para 88.

<sup>30</sup> Op cit fn 5.

(c) The Registrar of this Court is directed to forward a copy of this judgment to the South African Legal Practice Council.

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E D BAARTMAN  
ACTING JUDGE OF APPEAL

## Appearances

For the appellants:

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K Mvubu

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