



NATIONAL CONSUMER COMMISSION

a member of **the dtic** group

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## EXPLANATORY NOTE 2/2023

### 1. INTRODUCTION

- 1.1 The purpose of this Explanatory Note is to give guidance to consumers, and other stakeholders on issues that they need to guard against when signing a finance agreement for purposes of purchasing goods , so that the provisions of the CPA are not excluded in terms of section 5 (2) (d) of the CPA. It also promotes compliance with the CPA by discouraging suppliers from relying on technical grounds provided by section 5 (2) (d) of the CPA, where such section is not applicable.
- 1.2 In this Explanatory Note, the NCC will address issues raised in the Judgment of **Platinum Wheels (Pty) (Ltd)** and its effect on the application/ interpretation of Section 5 (2) (d) of the CPA.
- 1.3 For purposes of this Explanatory Note, the consumer, or stakeholder is required to refer to the sections or subsections of the CPA that are mentioned in this explanatory note, as well as both the National Consumer Tribunal's and High Court's judgement relating to this matter.

### 2. FACTUAL BACKGROUND

- 2.1 The consumer bought a BMW M5, 2012 (model) motor vehicle (hereinafter referred to as BMW M5 or motor vehicle) for R586 956,52 from the Respondent. He took delivery of the vehicle on or about the 8<sup>th</sup> of June 2018.

- 2.2 The motor vehicle was financed through Motor Vehicle Finance Corporation (i.e., MFC). After the addition of the initiation fee, additional charges, value -added products, and Value Added Tax (VAT), MFC, the financier advanced an amount of R705 979,87 to the consumer/complainant.
- 2.3 With interest, the consumer became liable to MFC for the sum of R969 708,99, payable in monthly instalments of R12 911,79.
- 2.4 The consumer later complained that he experienced several problems with the motor vehicle after he took possession thereof and that the engine of the motor vehicle failed within four (4) months of taking possession. Between the 21<sup>st</sup> of June 2018 and 23<sup>rd</sup> of July 2018, the consumer returned the motor vehicle to the supplier on least four (4) occasions. On each of these occasions, the supplier took the motor vehicle to JSN Motors (Pty) (Ltd) (i.e., JSN Motors) an approved BMW dealer for diagnosis and repairs.
- 2.5 Based on the above information, the NCC took enforcement action against the supplier and referred the complaint to the NCT. The NCT found that Platinum Wheels (Pty) (Ltd) has contravened Section 55 (2)(c) and Section 56 (3) of the CPA. The NCT ordered Platinum Wheels (Pty) (Ltd) to refund the consumer, the purchase price paid for the motor vehicle.
- 2.6 Platinum Wheels (Pty) (Ltd) was dissatisfied with the order of the Tribunal and appealed against such order to the High Court. Various grounds of appeal were raised , however , during the hearing Platinum Wheels (Pty) (Ltd) sought to rely on Section 5 (2) (d) of the CPA and argued that because the purchase of the motor vehicle was financed by MFC, the CPA does not apply to the transaction of sale of the motor vehicle. In raising this point, Platinum Wheels (Pty) (Ltd) sought to rely on the wording of the Finance Agreement and argued that there was a Tripartite Agreement in terms of which, Platinum Wheels (Pty) (Ltd) sold the motor vehicle to MFC, who in turn sold it to the consumer.

2.7 In other words, Platinum Wheels (Pty) (Ltd) implied that the motor vehicle Finance Agreement between the consumer and MFC was not a Loan Agreement but rather an Instalment Sale Agreement.

### **3. HIGH COURT JUDGEMENT**

3.1 The High Court ruled that the question for determination requires the court to look at the nature of the transaction between the consumer and Platinum Wheels (Pty) (Ltd) and the facts of the matter before it.

3.2 The High Court decided that the ordinary business of Platinum Wheels (Pty) (Ltd) is that of a second-hand dealership and that Platinum Wheels (Pty) (Ltd) supplied the goods (i.e. Motor vehicle) and not MFC. The payment and how the proceeds were to be dealt with, were agreed to between the consumer and Platinum Wheels (Pty) (Ltd).

3.3 The transaction complained about remained the transaction of supply of the goods between the consumer and the supplier for consideration, in the ordinary course of business.

3.4 The High Court ruled that the transaction between Mr Link, the consumer and Platinum Wheels (Pty) (Ltd) is not a credit agreement as envisaged in terms of Section 8 of the National Credit Act, and consequently finds no application nor is relevant to the facts before it.

### **4. CONCLUSION:**

4.1. Consumers are advised to scrutinise the finance agreement concluded with the bank/ financier, to ensure that it is a Loan Agreement and not an Instalment Sale Agreement, as described in terms of Section 8 of the National Credit Act.

4.2. The effect of this judgement is that the consumer borrows money (i.e. Purchase price) from the bank/ financier and concludes a cash sale transaction for the purchase of goods with the supplier of the goods. The bank/ financier only has a lien over such goods until such time that the loan amount, inclusive of interest and other charges is paid in full.

Dated and signed on this 29<sup>th</sup> day of March 2023.

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