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Refunds for defective goods: Examining the *actio redhibitoria* versus the section 56(3)(b) remedy

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ABSTRACT

Every consumer has the right to receive goods that are safe, of high quality, in proper working condition, and without any defects. This entitlement becomes relevant when a consumer receives a faulty or flawed product. Consequently, a remedy is activated once a faulty product is received. This article explores the refund remedies available to consumers in terms of the aedilitian remedy of actio redhibitoria *and section 56(3)(b) of the Consumer Protection Act 68 of 2008 in South Africa, in the course of which it clarifies the causes of action that are required in order to rely on any of them. The article compares and contrasts the two refund remedies, and identifies which one is likely to result in a full refund of the purchase consideration.*

Keywords: *actio redhibitoria*; administrative fine; buyer; defect; goods; jurisdiction; supplier; consumer; remedy

1 INTRODUCTION

In 2015, the United Nations (UN) General Assembly passed a resolution[1] to reshape the world.[2] This resolution introduced 17 Sustainable Development Goals (SDGs)[3] as an action plan to eradicate poverty, protect the planet, and ensure prosperity for all.[4] In pursuit of this transformative agenda, the resolution aims to create a world where every country enjoys sustained, inclusive, and sustainable economic growth.[5] In addition, it strives to foster universal respect for human rights and dignity; uphold the rule of law; promote justice, equality, and non-discrimination; provide equal opportunities to achieve human potential; ensure shared prosperity; and eradicate poverty in all its forms.[6] To implement the SDGs, the UN General Assembly revised[7] and adopted its resolution on consumer protection,[8] assigning the UN Conference on Trade and Development (UNCTAD) the mandate to promote guidelines that encourage member states to provide consumer protection in the provision of public and private goods and services.[9] Subsequently, the UNCTAD released a manual on consumer protection which, among other things, outlines consumer rights and underscores the importance of safeguarding consumers through the principles of economic efficiency, individual rights, distributive justice, and the right to development.[10]

The UNCTAD's guidelines[11] and manual[12] on consumer protection emphasise the importance of addressing the "legitimate interests" of consumers. This includes ensuring

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1 United Nations *Transforming our world: The 2030 Agenda for Sustainable Development* Resolution 70/01 (2015) at 1–4 ("UN General Assembly Resolution 70/01 (2015)").

2 United Nations Conference on Trade and Development (UNCTAD) *Achieving the Sustainable Development Goals through consumer protection* (2017) ("UN Sustainable Development Goals UNCTAD") at 1.

3 UN General Assembly Resolution 70/01 (2015) at 18.

4 UN Sustainable Development Goals UNCTAD at 2.

5 UN General Assembly Resolution 70/01 (2015) at 9.

6 UN General Assembly Resolution 70/01 (2015) 8.

7 The Guidelines were initially adopted by the General Assembly in resolution 39/248 on 16 April 1985. They were later expanded by the Economic and Social Council in resolution 1999/7 on 26 July 1999, and subsequently revised and readopted by the General Assembly in resolution 70/186 on 22 December 2015.

8 UN General Assembly Consumer Protection Resolution 70/186 (2015) at 1–3.

9 UNCTAD United Nations Guidelines for Consumer Protection (2016) ("UN Guidelines for Consumer Protection (2016) UNCTAD") 3.

10 UNCTAD Manual on Consumer Protection (2018) ("UN Manual on Consumer Protection (2018) UNCTAD") at 2.

11 UN Guidelines for Consumer Protection (2016) UNCTAD at 7–9.

12 UN Manual on Consumer Protection (2018) UNCTAD at 3–11.

access to essential goods and services, protecting vulnerable and disadvantaged consumers, safeguarding consumers from health and safety hazards, promoting consumers' economic interests, providing adequate information for informed choices, and ensuring accessible dispute resolution mechanisms. However, legitimate interests are jeopardised when a consumer buys a defective product. This situation necessitates rectification and protection of the consumer's interests, raising two critical questions: How could the consumer's legitimate interests be safeguarded, and what remedies address these issues effectively? In South Africa, one approach to protecting economic interests and seeking redress is to claim a refund for defective products. Among the available remedies are the aedilitian remedy of *actio redhibitoria* and section 56(3)(b) of the Consumer Protection Act 68 of 2008 (CPA).

This article explores these remedies within the context of a motor vehicle sale contract where defects prompt return and refund claims. It is structured in six sections. Section 2 presents a modified real-life scenario to illustrate compromised consumer rights. The purpose thereof is to contextualise the question this article seeks to answer. Section 3 deals with the legal basis for redress by identifying the applicable remedies. In section 4, we delve into the legal nature of these two remedies by outlining the requirements for invoking them. We also compare and contrast the remedies to determine which of them offers the optimal refund outcome. In section 5, we argue that *actio redhibitoria* guarantees a full refund, unlike the section 56(3)(b) remedy, which may deduct reasonable charges. The article concludes with a recommendation that the South African legislature review and amend the CPA (particularly the application of the section 20 mechanism, in such a way that it is only applied in very exceptional cases) so as to make it a more sufficient remedy available to consumers.[13]

2 SCENARIO MAPPING

The following case scenario[14] contextualises the central question of this article. On 1 February 2022, Mr Y sold a new double cab to Mr X for R788,000 under an oral agreement. Mr X took delivery on the same day after full payment. On 7 July 2022, while driving uphill, the vehicle felt sluggish and lost power (odometer: 6,000 km). Mr X contacted Mr Y

[13] A note on usage: in this article, "purchaser", "buyer", and "consumer" are used interchangeably, as are "good(s)" and "product(s)".

[14] Based on *Van der Boon NO and Others v Moletsane* (2019) ZAFSHC 208 at paras 1–3.

unsuccessfully. The following day, Mr X had the vehicle inspected by an accredited dealership. The inspection revealed a defective piston, which was identified as the cause of the power loss. The vehicle was booked in for repairs. Despite the repairs, the fault recurred after three weeks. As a result, Mr X sought to return the vehicle for a full refund. In this scenario, Mr Y sold a defective vehicle, breaching Mr X's legitimate interests. The central question is whether it is *actio redhibitoria* or section 56(3)(b) that best facilitates a full refund.

3 LEGAL BASIS FOR REFUND

To address the question above, the legal basis for refunds must be established. This involves examining the nature of the transaction and the resultant rights or duties. The starting-point is that the transaction occurred under a contract.

3.1 The nature of a contract

A contract is an agreement between two or more parties creating rights and duties that are recognised by law and satisfying certain legal requirements in order to be enforceable.[15] The essential elements for validity include the serious intention to conclude a contract, consensus between the parties, contractual capacity, lawfulness, possibility of performance, and formalities.[16] Collectively, these constitute the general requirements of a valid contract.

Beyond these, a contract also comprises *essentialia* and *naturalia*.[17] The *essentialia* denote the indispensable elements or characteristics required by law to categorise the contract.[18] For example, in a contract of sale, specific elements over and above the general requirements define it as such,[19] namely agreement on the price and the subject matter being sold.[20] The *naturalia* are terms automatically incorporated into a contract by operation of law, unless expressly excluded by the parties.[21] These terms bind the parties

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15 De Wet J & Van Wyk A *Die Suid-Afrikaanse kontraktereg en handelsreg* 4th ed (1978) at 4; Fouché M *Legal principles of contracts and commercial law* 8th ed (2016) at 33–34.

16 Hutchinson D et al. *The law of contract in South Africa* 3rd ed (2017) 6; Fouché (2016) at 33–34.

17 Fouché (2016) at 35.

18 Fouché (2016) at 35.

19 Fouché (2016) at 35.

20 Fouché (2016) at 35.

21 Barnard J "The influence of the Consumer Protection Act 68 of 2008 on the warranty against latent defects, voetstoots clauses and liability for damages" (2012) 45(3) *De Jure* 456; Fouché (2016) at 35.

without requiring explicit agreement. An example is the tacit warranty against latent defects inherent in a contract of sale,[22] unless expressly excluded. This means that upon formation of a valid sale contract, this implied warranty binds both parties.

It follows that a valid enforceable contract comprises both the general requirements and the *essentialia* and *naturalia*. Collectively, these elements create binding rights and obligations[23] enforceable by law when breached. For the purposes of this article, we focus on duties arising from sale contracts.

3.2 Contract of sale

A contract of sale is a reciprocal agreement whereby the seller undertakes to deliver identified goods (*merx*) to the purchaser, who in turn undertakes to pay an agreed sum (*pretium*) in exchange.[24] This contract must satisfy all general requirements for validity, alongside its *essentialia,* which include a mutual agreement to buy or sell, certain or ascertainable *merx* (goods), and a certain or ascertainable *pretium* (price).[25] These general and essential elements collectively establish legally enforceable obligations between the parties.

Three primary obligations arise in a contract of sale. The first two accrue to the buyer, who must pay the agreed purchase price[26] and (where applicable) reimburse the seller for pre-delivery expenses.[27] This purchase price must be agreed upon by both parties and forms the basis for the buyer to demand performance[28] from the seller. The final obligation accrues to the seller, who, upon payment of the purchase price, must deliver the item sold to the buyer free from defects.[29]

Crucially, this duty on the seller stems from the implied warranty against latent defects, which guarantees that the item is free from such hidden faults.[30] Although latent

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22 Barnard (2012) at 456.

23 Zulman R & Dicks H *Norman's law of purchase and sale in South Africa* 6th ed (2017).

24 De Wet & Van Wyk (1978) at 278.

25 Fouché (2016) at 132–133 and 142.

26 Fouché (2016) at 134.

27 Fouché (2016) at 143.

28 Performance in the context of a contract of sale is an obligation a contracting party – the purchaser – takes upon him- or herself and consists in the payment of an amount of money. See Fouché (2016) at 35.

29 Fouché (2016) at 136.

30 *Barnard and Another v de Klerk* (2020) ZAECPEHC 38 at para 10; *Kondile v Nothnagel NO* (2018) ZAGPPHC 858 at para 35.

defects relate specifically to the *naturalia* of the contract and the seller's corresponding duties, the general obligation of the seller to supply defect-free goods persists even where defects are patent (that is, easily discoverable). If the goods supplied are patently defective, the buyer can seek redress using the usual remedies for breach of contract.[31] However, where the seller supplies goods with a latent defect, the buyer has access to special remedies against the seller;[32] such remedies are known as aedilitian actions.[33]

3.3 Aedilitian actions

Aedilitian actions are legal remedies under Roman law whereby parties protect themselves against latent defects in goods sold.[34] The basis for this protection lies in a cardinal principle of contract of sale, namely that a seller is bound to warrant to the purchaser that the thing sold is free from faults and defects that would render it useless or partially useless for the purpose for which it was sold.[35]

The two remedies available are the *actio quanti minoris* and the *actio redhibitoria*.[36] They have some elements in common and differ in others. Both remedies apply in the context of a sales contract and are activated in cases of a breach of the implied warranty against defects in the item sold.[37] However, the *actio quanti minoris* differs from the *actio redhibitoria* in relation to the actual redress achieved.[38] The *actio quanti minoris*[39] basically retains the contract and seeks a reduction[40] of the purchase price of the defective

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31 Such as claim-specific performance, cancelling the contract, or seeking an interdict; where the purchaser seeks to claim damages, he or she can institute the *actio empti.* See Fouché (2016) 138; Otto J, Van Heerden C & Barnard J "Redress in terms of the National Credit Act and the Consumer Protection Act for defective goods sold and financed in terms of an instalment agreement" (2014) 26(2) *SA Merc LJ* at 253–254.

32 Fouché (2016) at 138.

33 Barnard (2012) 457; *Kondile v Nothnagel NO* (2018) ZAGPPHC 858 at para 35; Fouché (2016) at 36–137.

34 Schulze H et al. *General principles of commercial law* 8th ed (2015) at 157.

35 Zulman & Dicks (2017) at 18.1.

36 Abatino B & Dari-Mattiacci G "The dual origin of the duty to disclose in Roman law" in Dari-Mattiacci G & Kehoe D (eds) *Roman law and economics* vol 2 Oxford: Oxford University Press (2020) at 406.

37 Naudé T "The consumer's right to safe, good quality goods and the implied warranty of quality under sections 55 and 56 of the Consumer Protection Act 68 of 2008" (2011) 23(3) *SA Merc LJ* 339; Hutchinson (2017) at 137; Schulze (2015) at 157.

38 Fouché (2016) at 143.

39 *Actio quanti minoris* is instituted when the defect is not so severe as to render the product completely unusable. The defect still impacts the value of the product, but the purchaser retains the product and seeks a reduction in price. This reduction is typically the difference between the purchase price and the actual value of the product affected by the defect.

40 This is done by deducting the value of the goods (together with their defect) from the purchase price.

item sold,[41] whereas the *actio redhibitoria* seeks the rescission of the contract and restoration of the parties to the position they occupied at the time at which the contract was entered into.[42] The basis of this contrast is that in the former, the defect merely affects the value of the product, while in the latter, the defect is so severe that the purchased item cannot be used for its intended or normal purpose.[43]

Thus, the *actio redhibitoria* offers the purchaser of a defective item a remedy entailing rescission of the sales contract and recovery of the price paid. [44] This refund may include not only the purchase price but also interest, plus reimbursement for all useful and necessary expenses incurred in regard to the defective item.[45] The seller may reclaim the defective product sold. For the purposes of this article, we focus on the *actio redhibitoria.*

4 LEGAL NATURE OF THE REMEDIES

4.1 Actio redhibitoria

The purpose of the *actio redhibitoria* is to restore the parties to a contract of sale to their original position prior to the conclusion of the contract.[46] This remedy allows the purchaser to rescind the contract and claim restitution.[47] Successful reliance on the *actio redhibitoria* requires the allegation and proof of specific legal elements.[48]

4.1.1 Essential legal elements

The *actio redhibitoria* requires the following essential elements: the purchased item must have a defect[49] that existed at the time of purchase;[50] the defect must be latent, meaning it was not reasonably discoverable upon inspection;[51] the defect must not have been

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41 Cornelius S "*Banda v Van der Spuy* 2013 4 SA 77 (SCA): Quantifying a claim with the *actio quanti minoris*" (2013) 46(3) *De Jure Law Journal* 868 at 870; Schulze *Commercial law* 157; Van Huyssteen L et al. *Contract general principles* 5th ed Cape Town: Juta (2016) at 141.

42 Van Huyssteen (2016) at 149; Zulman & Dicks (2017) at 20.2; Barnard (2012) at 458.

43 Fouché (2016) at 143.

44 Zulman & Dicks (2017) at 20.1.

45 *Van der Boon NO and Others v Moletsane* (2019) ZAFSHC 208 at para 5; Nagel C et al. *Commercial law* 6th ed Durban: LexisNexis (2019) at 231; Fouché (2016) at 138.

46 Nagel C et al. (2019) at 231.

47 Zulman & Dicks (2017) at 20.2; Abatino B & Dari-Mattiacci G "The dual origin of the duty to disclose in Roman law and economics" (2020) 2 *Exchange, Ownership, and Disputes* 407.

48 *Barnard and Another v de Klerk* (2020) ZAECPEHC at para 11.

49 *Barnard* (2020) at para 11.

50 *Barnard* (2020) at para 11.

51 *Barnard* (2020) at para 11.

known to the purchaser at the time of sale;[52] and the defect must be such that, had the purchaser been aware of it, he or she would not have purchased the goods.[53] We now examine these elements in detail.

i) Defect

Goods are defective if they possess deficiencies that either destroy or impair their usefulness, or diminish their ordinary value.[54] This principle was articulated in *Holmdene Brickworks Ltd v Roberts Construction Co Ltd*, where Corbett JA defined a defect as "an abnormal quality or attribute which destroys or substantially impairs the utility or effectiveness of the *res vendita* (thing or object) for the purpose for which it has been sold or for which it is commonly used". [55]

This definition has three key components: a flaw or imperfection; a reduction in utility or value; or the complete elimination of utility or utility. The flaw or imperfection in the product must be of such a nature that it renders the product unfit for the purpose for which it was bought or for which it is normally used.[56] This flaw or imperfection must be significant enough to either prevent the good from being used for its intended purpose or to diminish its effectiveness. A defect may be classified as either latent or patent.[57] For the purposes of the *actio redhibitoria*, our focus is exclusively on latent defects.

ii) Latent defect

A defect in goods is latent when it is not reasonably visible or discoverable upon inspection[58] by a diligent person.[59] This type of defect renders the item sold unfit for the

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52 Barnard (2012) at 458.

53 Barnard (2012) at 458.

54 Tilbury M "Discovery of latent defects by the buyer" (1969) 10(2) *Zimbabwe Law Journal* 124 at 126; *Vousvoukis v Queen Ace CC t/a Ace Motors* (2015) ZAECGHC 64 at para 114; *Odendaal v Ferraris* (2008) ZASCA 85 at para 25.

55 *Holmdene Brickworks v Roberts Construction Co Ltd* 1977 (3) SA 670 (AD) at 683H–684A; Van Rooyen J "Review of recent cases" (1977) *De Rebus Procuratoriis* 715 available at https://journals.co.za/doi/pdf/10.10520/AJA02500329_499 (accessed 18 July 2024).

56 Nagel (2019) at 227.

57 A patent defect is an evident defect that can be discovered or noticed by an ordinary, diligent person by ordinary common inspection of the product in question. See Temur F & Ataseven B "Defect liability and latent defect within the scope of Turkish law of obligations' (2016) 15 *GSI Articletter* 220.

58 Islam J "Delivery and post-delivery issues in e-commerce consumer goods and services: A study of Indian judicial approach" (2023) 11(5) *Russian Law Journal* 1068; Van Huyssteen (2016) at 150 fn 284.

59 Nagel (2019) at 226; Barnard (2012) at 456–457.

purpose for which it was bought or for which it is normally used.[60] To qualify as a latent defect, the imperfection must be both material and substantial, significantly affecting the utility of the *merx*.[61] For example, a brand-new smartphone advertised with a 48-hour battery life is discovered after purchase (when fully charged) to last only eight hours. This constitutes a latent defect, as the flaw was neither easily discoverable nor visible at the time of purchase,[62] and substantially lessens its usable working time. The test for determining a latent defect is objective, based on the usefulness of the goods;[63] it does not depend on the specialist knowledge of the purchaser.[64]

iii) Purchaser's unawareness of the defect

Closely linked to the latent nature of the defect is the requirement that the purchaser must have been unaware of it at the conclusion of the sale.[65] The purchaser must demonstrate that the defect was not disclosed to him or her before purchase, and that it was not reasonably (that is, easily) discoverable through inspection. This element overlaps with the "latency" requirement, since alleging that a defect is latent necessarily implies the purchaser's lack of awareness of it.[66] The rationale for this overlap is clear: if the purchaser were informed of the defect, or could have discovered it easily before purchase, it cannot be considered latent.[67] Consequently, no grounds for rescission would exist. Nevertheless, it remains essential to aver explicitly that the purchaser was unaware of the defect[68] in order to satisfy this element of the *actio redhibitoria*.[69]

iv) Defect existing at time of the sale

The purchaser must allege and prove that the defect existed at the time of sale.[70] The rationale is that if the defect arose *after* transfer of risk (which generally occurs on delivery), the seller cannot be liable. The onus is on the purchaser, who must prove on a

60 Barnard (2012) at 456.
61 Barnard (2012) at 457.
62 Barnard (2012) at 456.
63 Barnard (2012) at 457.
64 Barnard (2012) at 457.
65 *Barnard* (2020) at para 11; Barnard (2012) at 458.
66 *Cullen v Zuidema* 1951 (3) SA 817 (C) at 825.
67 Tilbury (1969) at 126.
68 *Cullen* (1951) at 824F.
69 *Cullen* (1951) at 824F.
70 *Mkhize v Lourens and Another* 2003 (3) SA 292 (T) at 294; *Lakier v Hager* 1958 (4) SA 180 (T) at 181; *Moreno's Inc. v. Lake Charles Catholic High Schs Inc*., 315 So. 2d 660 (La. 1975).

balance of probabilities that the defect existed at the time of the sale.[71] Notwithstanding this onus,[72] a rebuttable presumption arises if a defect manifests itself almost immediately after sale, thus suggesting that it existed at the time of contract.[73] However, this presumption[74] does not shift the legal burden of proof to the seller [75] but merely assists the purchaser in discharging his or her evidential burden.[76] The purchaser retains the ultimate obligation to prove the defect's existence at the time of sale.[77] In addition, he or she must demonstrate that the defect had a *redhibitory effect* (examined next).

v) Redhibitory effect of the defect

A latent defect has a redhibitory effect if it either renders the goods useless or makes their use so inconvenient that a reasonable purchaser, aware of the defect, would not have bought them.[78] Goods are "useless" when they are substantially impaired for the purpose for which they were sold or commonly used.[79] The test to ascertain if defective goods sold have a redhibitory effect is objective, as it involves assessing whether a reasonable person would have purchased the goods if he or she were aware of their defects.[80] The presence of the redhibitory effect justifies rescission and refund. This is so because if a purchaser buys goods for specific purposes and it emerges that the goods are not suitable for those purposes or that their usefulness is diminished due to defects, and if the purchaser would not have proceeded with the purchase had he or she been aware of the defect, this may justify a request for a refund. With the redhibitory effect having been established, the requirement of restitution follows.

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71 Barnard (2012) at 458.

72 *Mkhize v Lourens and Another* 2003 (3) SA 292 (T) at 294; *Seboko v Soll* 1949 (3) SA 337 (T) at 349

73 *Seboko v Soll* 1949 (3) SA 337 (T) at 348.

74 *Seboko* (1949) at 347.

75 *Seboko* (1949) at 350.

76 *Seboko* (1949) at 350.

77 *Seboko* (1949) at 350.

78 *Whalen v Monsanto Company* Civil Action No. 19-9334 (E.D. La. June 14, 2023) ia.

79 *Mkhize* (2003) at 294.

80 *Vousvoukis v Queen Ace CC T/A Ace Motors* 2016 (3) SA 188 (ECG) at para 119; *Du Plessis v West* (1998) JOL 202 (N) at para 5.

vi) Restitution

A purchaser seeking *actio redhibitoria* must generally be willing and able to restore the *res* (goods) to the seller, unless excused.[81] The principle stems from equity and the well-established rule of law that a person is not permitted to enrich themselves unjustly at the expense of others.[82] Besides, the (redhibitory) remedy aims to return parties to the position they were in before the sale[83] – *restitutio in integrum*.[84]

However, there are instances[85] where this restitution is excused.[86] One such instance is when defective goods break down or are completely damaged or destroyed because of the latent defect itself[87] (for instance, a car engine seizes due to an undisclosed manufacturing flaw). In such a case, there is truly nothing to return. A similar situation arises where the defective goods perish or wear out through ordinary use contemplated by both parties,[88] provided the purchaser derived no benefit due to the defect, or where the goods are partly destroyed during reasonable examination to determine their quality or defect.[89] In such instances, the purchaser would be entitled to recover the purchase price claimed, even without returning the goods.[90]

The rationale for not requiring restitution in these instances is based on equity,[91] as the purchaser has not derived any benefit from the defective goods, and the law protects the innocent party by assisting purchasers when they are deceived by sellers.[92] A purchaser who successfully alleges and proves all essential elements may claim a full

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81 *Vousvoukis v Queen Ace CC t/a Ace Motors* (2015) ZAECGHC 64 at paras 116–117; *Du Plessis v West* [1998] JOL 202 (N) at para 5; *Hall-Thermotank Natal (Pty) Ltd v Hardman* 1968 (4) SA 818 (D) 826; *Schwarzer v John Rodericks Motors (Pty) Ltd* 1940 OPD 170 at para 183.

82 *Hall-Thermotank Natal (Pty) Ltd v Hardman* at 828 and 832.

83 Barnard (2012) at 458.

84 *Hall-Thermotank Natal (Pty) Ltd v Hardman* at 827.

85 Such instances arise when justice demands so. See *Mkhwanazi v Quarterback Investment (Pty) Ltd and Another* 2013 (2) SA 549 (GSJ) 65; *Harper v Webber* (1956) (2) SA 495 (FC) 500A-B.

86 *Hall-Thermotank Natal (Pty) Ltd v Hardman* 826; *Schwarzer v John Rodericks Motors (Pty) Ltd* 1940 OPD 170 at 183.

87 *African Organic Fertilizers and Associated Industries Ltd v Sieling* 1949 (2) SA 131 (W) 136.

88 *Sieling* (1949) at para 137.

89 *Harper v Webber* at 499 quoting *Theron v Africa* 10 SC 246 at 250; *Dodd v Spitaleri,* 27 SC 196 at 196.

90 *African Organic Fertilizers and Associated Industries Ltd v Sieling* at 132.

91 *Prefix Properties (Pty) Ltd and Others v Golden Empire Trading 49 CC and Others* 2011 (2) SA 334 (KZP) at 334.

92 Barnard (2012) at 458.

refund via *actio redhibitoria*. This action must be instituted within three years of discovering the defect.

Another remedy available to the purchaser for a defective product is provided by the CPA.

4.2 The Consumer Protection Act

The CPA is a significant legislative framework providing comprehensive consumer protection within South Africa.[93] Its primary objectives are to develop, enhance, and protect consumer rights[94] and interests[95] while eliminating unethical suppliers and improper business practices.[96] The CPA applies to all transactions occurring within the Republic,[97] including transactions concerning the supply of goods or services.[98] The importance of the CPA lies in its enhancement of consumer rights beyond common law protections.[99] It not only codifies and broadens existing rights,[100] but also introduces new ones, reinforcing them by means of dedicated enforcement mechanisms and remedies for infringement.[101] In the discussion that follows, we focus on section 55.

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93 As seen from section 3, the CPA is aimed at, inter alia, promoting fair business practices; protecting consumers against unconscionable, unfair, unreasonable, unjust and improper business practices; and establishing a legal framework to achieve and maintain a fair consumer market which is efficient, sustainable and accessible. See *Shoprite Checkers (Pty) Ltd v Das Neves* (2019) ZAWCHC 63.

94 Lombard M "The Consumer Protection Act 68 of 2008 and parole evidence" (2021) 24 *Potchefstroom Electronic Law Journal* 1 at 10.

95 Woker T "Consumer protection: An overview since 1994" (2019) *Stellenbosch Law Review* 103 at 115. *Motus Corporation (Pty) Ltd and Another v Wentzel* (2021) ZASCA 40 at para 33.

96 Preamble of the CPA; Jacobs WS P & Van Niekerk R "Fundamental consumer rights under the Consumer Protection Act 68 of 2008: A critical overview and analysis*"* (2010) 13(3) *PELJ* 303; *Nzwana v Dukes Motors t/a Dampier Nissan* (2019) ZAECGHC 81 at para 21.

97 Gowar C "Product liability: A changing playing field" (2011) *Obiter* 521 at 526.

98 Section 5(1)(a) and (c) of the CPA; Mupangavanhu Y & Kerchhoff D "The regulation of false advertising in South Africa: An analysis of the Consumer Protection Act 68 of 2008 and self-regulation" (2021) 33(2) *SA Mercantile Law Journal* 260 at 262.

99 Jacobs & Van Niekerk (2010) at 304.

100 Sections 8–55 of the CPA. These rights include the right to equality in the consumer market; right to privacy; right to choose; right to disclosure and information; right to fair and responsible marketing; right to fair and honest dealing; right to fair, just and reasonable terms and conditions; and right to fair value, good quality and safety.

101 Section 69 of the CPA.

4.2.1. Rights under section 55

Section 55 of the CPA grants consumers the fundamental right to safe, good-quality goods.[102] Specifically, section 55(2) guarantees every consumer the right to receive goods which are reasonably suitable for their general intended purpose; of good quality, in good working order, and free from defects; usable and durable for a reasonable period, considering their normal use and the circumstances of their supply; and compliant with applicable standards under the Standards Act 29 of 1993 or other public regulations.[103] In essence, section 55(2) affords consumers statutory rights regarding suitability, quality, operational integrity, absence of defects, usability, durability, and safety.[104] Importantly, the right to goods free from defects arises automatically by operation of law, irrespective of any contractual warranties, and is enforceable under section 56.[105]

4.2.2 Section 56

Section 56 governs remedies available to consumers who receive defective goods under agreements covered by the CPA.[106] The provision states:

> (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

[102] Section 55(2)–(3) of the CPA, *Platinum Wheels (Pty) Ltd v National Consumer Commission and Another* (2022) ZAGPPHC 831 at para 57; *Motus Corporation (Pty) Ltd and Another v Wentzel* (2021) at para 35.

[103] Section 55(2)(a)–(d) of the CPA; Barnard (2012) at 259; *Yahav v Okoh Motors* (GCC 06/2021) [2021] ZACONAF 3 at para 9.3.1.

[104] Barnard (2012) at 260.

[105] *Wentzel* (2021) at para 36; *Platinum Wheels (Pty) Ltd v National Consumer Commission and Another* (2022) ZAGPPHC 831 at para 60.

[106] Section 56 of the CPA; Barnard (2012) at 260; *Wentzel* (2021) at para 37.

> 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.

The fundamental mechanism of section 56 is its creation of an implied warranty of quality.[107] This statutory warranty guarantees that goods comply with section 55 standards,[108] subject to stated exceptions. [109] This implied provision is embedded in any transaction or agreement pertaining to the supply of goods to a consumer; it also binds all parties in the supply chain, be they producers, importers, distributors or retailers.[110] Where this warranty is breached, section 56[111] provides consumers with tiered remedies.[112] The first remedy is the right of the consumer to direct the supplier to repair or replace (the failed, unsafe or) defective goods.[113] Another is the right to request the supplier to refund the consumer the price paid for the defective good (section 56(2) refund remedy).[114] There is, however, a further remedy available to the consumer in terms of section 56(3). This remedy is the replacement of the defective product[115] or a refund

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[107] Section 56(1) of the CPA; *Platinum Wheels (Pty) Ltd v National Consumer Commission and Another* (2022) ZAGPPHC 831 at para 73; *Zola Soyaya v Mykatrade* 87 CC (2021) ZANCT 5 at para 56.

[108] *Platinum Wheels (Pty) Ltd v National Consumer Commission and Another* (2022) ZAGPPHC 831 at para 73; CPA, s 56(1).

[109] Such as 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.

[110] *Platinum Wheels (Pty) Ltd v National Consumer Commission and Another* (2022) ZAGPPHC 831 at para 73.

[111] Section 56(2)–(3) of the CPA.

[112] Du Plessis M "Gauteng Consumer Affairs Court: Enforcement of s 56 of the Consumer Protection Act" (2016) 28(1) *SA Mercantile Law Journal* at 152; Barnard (2012) at 468.

[113] Section 56(2)(a) of the CPA; Du Plessis (2016) at 152.

[114] Section 56(2)(b) of the CPA; Du Plessis (2016) at 152.

[115] Section 56(3)(a) of the CPA.

of the price paid by the consumer for the goods.[116] For the purposes of this analysis, our focus is on the section 56(3)(b) refund remedy.

4.2.3 The section 56(3)(b) remedy

A claim for defective goods falls within section 56(3)(b) when specific procedural and substantive requirements are satisfied. This is so because there are prescribed time limits for lodging such a claim, and it must relate to a defect as defined under the CPA.[117] These requirements are explored below.

i) Essential legal requirements

The goods must possess a defect as defined in Section 53(1)(a)(i) or (ii) of the CPA.[118] A "defect" is

- "any material imperfection in the manufacture of goods or components, or in the performance of the services, that renders the goods or results of the services less acceptable than persons generally would be reasonably entitled to expect in the circumstances";[119] or
- "any characteristic of the goods or components that renders them less valid, practicable, or safe than persons generally would be reasonably entitled to expect in the circumstances".[120]

Once a defect satisfying this statutory definition is established, it must be determined whether it manifested within the prescribed periods.

ii) Manifestation of the defect

Strict time limits govern when defects must manifest themselves in order to trigger remedies.[121] This manifestation occurs within two distinct timeframes. The first requires the defect to become apparent within six months of delivery of the goods.[122] When the

[116] Section 56(3)(b) of the CPA.
[117] Du Plessis (2016) at 154.
[118] *Wentzel* (2021) at para 39.
[119] Section 53(1)(a)(i) of the CPA; *Wentzel* (2021) at para 38; *Ndlovu v Toyota Randburg* (2022) ZANCT 22 at para 21; Barnard (2012) at 465.
[120] Section 53(1)(a)(ii) of the CPA; *Wentzel* (2021) at para 38; Barnard (2012) at 465.
[121] *Platinum Wheels (Pty) Ltd v National Consumer Commission and Another* (2022) ZAGPPHC 831 at para 75.
[122] Section 56(2) of the CPA.

defect manifests within this six-month period, the consumer may return the goods to the supplier without penalty and at the supplier's risk and expense,[123] and may request repair, replacement, or a refund under section 56(2).[124] To invoke the section 56(3) remedy, however, a second manifestation must occur within a prescribed timeframe. This manifestation arises when, following repair of the defective goods or any component thereof, the original defect persists, or a new defect is discovered within three months.[125] The manifestation presupposes three cumulative elements.

First, the consumer must notify the supplier of the defect(s).[126] Failing to do so would imply that the second element, namely that the consumer must have requested the supplier to repair the goods,[127] would not also come into play.[128] The final element is that the supplier must have attempted to repair the goods, as contemplated by sections 56(2)(a) and 56(3). Without a prior repair attempt, the persistence or discovery of defects is irrelevant for section 56(3). Where the second manifestation takes the form of a new defect, it must be reported to the supplier. Such a defect must be alleged and proven by the consumer. In *Motus Corporation (Pty) Ltd and Another v Wentzel*,[129] the court held that although section 56(3) requires a further defect to be discovered for the consumer to be entitled to replacement or refund, the consumer must report new defects to the supplier within three months of the repair. This reporting is required to enforce the warranty provisions.

In essence, to obtain the refund remedy under section 56(3), the consumer must show, first, that the seller repaired the defective goods or parts thereof, and secondly, that within three months after the repairs, the defects had not been remedied or that a further

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123 Section 56(2) of the CPA.

124 Section 56(2) of the CPA.

125 Section 56(2)(a) and (3) of the CPA.

126 See *Wentzel* (2021) at para 4.

127 Section 56(2)(a) and (3) of the CPA; *Wentzel* (2021) at para 43.

128 It has been argued that where the limitation period of six months under section 56(2) or three months under section 56(3)(b) has expired before the rights could be exercised under the CPA, the National Consumer Tribunal or court may use its powers under section 4(2)(b)(ii)(bb) to extend the application of section 56(2) beyond six months by making an "innovative order" to that effect. However, the current legal position, as stated in *Vousvoukis v Queen Ace CC t/a Ace Motors* (2015) ZAECGHC 64 at para 110, is that the CPA is clear on the limitation period. It is not open to a court, under the guise of making an "innovative order", to extend this period. Any innovative order made under section 56(2) must be within the constraints of the legislation and cannot grant consumers more rights than those specifically provided under the CPA. See also *MFC (a division of Nedbank Ltd) v Botha* (2013) ZAWCHC 107 at para 10.

129 *Wentzel* (2021) at para 44.

defect was discovered. Once these requirements are satisfied, the buyer must return the defective goods to the supplier[130] and is entitled either to replacement by the supplier or to a refund of the purchase price.[131] In calculating the refund, the provisions of section 20 of the CPA must be considered.

4.2.4 Section 20 framework

Section 20 of the CPA establishes the mechanism for calculating refunds for defective goods.[132] The general framework of this mechanism is outlined in sections 20(1)–(4).[133] However, the issue of deducting a reasonable charge from the purchase price paid to the seller arises as a factor that must be considered.[134] Under section 20(5) of the CPA,[135] upon the return of the goods, the supplier must refund the consumer the price paid for the goods, less any reasonable amount charged by the supplier.[136] A deduction is deemed reasonable only if it aligns with section 20(6) conditions, namely the use, depletion, or deterioration of the goods while in the consumer's possession,[137] or other circumstances specified in section 20(6)(c). The formula for applying this mechanism would be the price paid for the product less any deductible charges as determined in terms of section 20(6).

This mechanism is mandatory for section 56(3)(b) refunds.[138] In *Motus Corporation (Pty) Ltd and Another v Wentzel*,[139] the court held that when seeking a refund remedy

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130 Section 56(3)(a) of the CPA.

131 Section 56(3)(b) of the CPA; *Motus Corporation (Pty) Ltd and Another v Wentzel* (2021) ZASCA 40 at para 45.

132 *Motus Corporation (Pty) Ltd and Another v Wentzel* (2021) ZASCA 40 at para 47.

133 A discussion of this falls beyond the scope of the article.

134 Section 20(5) of the CPA.

135 Section 20(5) provides that "[i]n determining the right of a supplier to impose a charge contemplated in s 20(5), if any goods referred to the supplier are … (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. (c) in any other case, the supplier may charge the consumer a reasonable amount – (i) as contemplated in paragraph (b); and (ii) for necessary restoration costs to render the goods fit for re-stocking, unless, having regard to the nature of the goods, and the manner in which they were packaged, it was necessary for the consumer to destroy the packaging in order to determine whether the goods – (aa) conformed to the description or sample provided, in the case of goods that had not been examined by the consumer before delivery, as contemplated in subsection (2)(b); or (bb) were fit for the intended purpose, in a case contemplated in subsection (2)(d)."

136 *Zola Soyaya v Mykatrade* 87 CC (2021) ZANCT 5 at para 36.

137 Section 20(6)(a)–(b) of the CPA; *Zola Soyaya v Mykatrade 87 CC* (2021) ZANCT 5 at para 58.

138 *Wentzel* (2021) para 48.

139 *Wentzel* (2021) para 48.

under section 56(3)(b), it must be considered whether the supplier is entitled to a deduction of a reasonable amount.[140] The court further held that the failure of the court *a quo* to consider the said mechanism constituted a material misdirection on its part.[141] Even if a proper case for a section 56(3)(b) refund remedy had been made and an award granted accordingly, this failure would entitle the court to interfere with the court *a quo*'s award.[142] One may conclude that when all the applicable legislative requirements for the section 56(3)(b) remedy are met, the consumer would be entitled to return the defective goods in exchange for a refund of the purchase price, less any applicable and reasonable deductions.

Having said this, there appear to be some similarities and dissimilarities between the *actio redhibitoria* and section 56(3)(b) remedy.

4.3 The nexus of *actio redhibitoria* and the section 56(3)(b) remedy

Several similarities exist between the *actio redhibitoria* and section 56(3)(b) remedy. Both address defective goods manifesting *after purchase* and generally offer a purchase price refund. However, section 56(3)(b) additionally provides repair or replacement options. Despite these similarities, notable differences distinguish these remedies. The *actio redhibitoria* exclusively addresses latent defects present at sale but discoverable thereafter. In contrast, section 56(3)(b) covers any defect type manifesting within statutory timeframes. Furthermore, under the *actio redhibitoria* , returning goods is not absolute (exempted if destroyed by defect), whereas under section 56(3)(b), refund is conditional on returning goods, with no exceptions.

It is also the case that under the *actio redhibitoria*, the buyer can approach the courts directly to seek a refund of the purchase price for defective goods. In contrast, before a buyer can approach a court with jurisdiction to seek a refund under section 56(3)(b), the buyer must first exhaust all other remedies available under the CPA.[143] Moreover, the *actio redhibitoria* is available to the buyer for three years from defect discovery. In contrast,

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[140] *Wentzel* (2021) para 48.

[141] *Wentzel* (2021) para 48; *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* 2015 (5) SA 245 (CC) para 88.

[142] *Wentzel* (2021) at para 48; *Trencon* (2015) para 88.

[143] Sections 69, 70 and 71 of the CPA; *Makadu v NTT Volkswagen and Others* (2024) ZANCHC 52 at paras 17–34. Other legislation that provides the same principle of exhausting internal remedies includes the Promotion of Administrative Justice Act 3 of 2000, s 7(2)(a).

while the remedies under section 56(2) are available for the first six months, if the buyer requests a repair, the remedy under section 56(3) will be available only for three months post-repair.[144]

These differences favour buyers under *actio redhibitoria* due to its direct refund recourse, flexible restitution rules, and absence of pre-litigation procedures. Crucially, however, *actio redhibitoria* is uniquely positioned to secure full refunds unencumbered by deductions like those mandated in section 56(3)(b) via section 20 of the CPA. This distinction will be demonstrated in our case scenario.

5 FULL REFUND IN OUR CASE SCENARIO: *ACTIO REDHIBITORIA* OR SECTION 56(3)(B) REMEDY?

Both remedies apply to Mr X's case[145] but yield fundamentally different refund outcomes due to their distinct legal frameworks. In regard to the remedy under section 56(3)(b), the vehicle defect satisfied the statutory definition, existed at delivery, and manifested within six months of delivery to Mr X. Although Mr Y repaired the defect, it recurred within three months. Consequently, Mr X is entitled to return the vehicle to Mr Y and claim a refund of the purchase price. However, any refund calculation must incorporate the section 20 mechanism.

This requirement is illustrated by *Motus Corporation (Pty) Ltd and Another v Wentzel*. In that case, the applicant (now respondent) purchased a new vehicle that exhibited multiple defects. [146] Repairs were undertaken at 270 kilometres,[147] 2,863 kilometres,[148] and 6,211 kilometres[149] in terms of the odometer readings. The respondent sought to cancel the credit agreement between herself and the appellants in respect of the vehicle

[144] Section 56(2)(a) and (3) of the CPA.

[145] The aedilitian remedies (in common law) and indeed the *actio redhibitoria* are still available to the consumer where the CPA is applicable. Section 2(10) indicates that no provision of the CPA may be interpreted so as to preclude a consumer from any rights afforded in terms of the common law. Section 56(4) provides that the implied warranty of quality and the right to replace, refund or repair goods are in addition to any implied warranty or condition imposed by the common law, the CPA or other public regulation, as well as to any express warranty or condition stipulated by a retailer, producer, importer, distributor, as the case may be.

[146] See *Wentzel* (2021) at para 8. The vehicle was taken in for repairs by Renault on 27 December 2017, 23 January 2018 and 23 February 2018.

[147] *Wentzel* (2021) at para 10.

[148] *Wentzel* (2021) at para 11.

[149] *Wentzel* (2021) at para 14.

and to claim the refund of the purchase price.[150] The court *a quo* granted cancellation of the credit agreement and ordered a full refund of the purchase price plus finance charges.[151] On appeal, the Supreme Court of Appeal held that the court *a quo* materially misdirected itself by failing to consider section 20 of the CPA.[152] This provision entitles the seller to deduct a reasonable amount for the buyer's use of the vehicle[153] – which, in *Wentzel*, had been used for more than 18 months.[154] This omission, among other reasons, justified appellate intervention[155] and ultimately led to the denial of the section 56(3)(b) remedy.[156] The *Wentzel* judgment establishes the prevailing legal position.

Consequently, in Mr X's scenario, the section 20 mechanism must be applied. The vehicle was purchased new on 1 February 2022 and had accrued 6,000 kilometres by 7 July 2022. Given the use of the vehicle by Mr X for over six months, resulting in mileage accrual and associated wear and tear, Mr Y is entitled to deduct a reasonable charge from the refund. Mr X must therefore account monetarily for this usage. Accordingly, the section 56(3)(b) remedy does not entitle Mr X to a full purchase price refund.

At the same time, the common law *actio redhibitoria* is also potentially applicable. If its essential elements are alleged and proven on a balance of probabilities, the buyer is entitled to a full purchase price refund without any deduction for use. A price reduction arises only under the *actio quanti minoris*, where the buyer claims a proportional reduction in the price. Such a reduction is not relevant where *actio redhibitoria* is successfully invoked.

In our case scenario, the latent nature of the defect (a faulty piston) substantiates the application of *actio redhibitoria*. The assessment report from the accredited dealership confirms that this defect was present at the time of sale to Mr X. Furthermore, the defect was inherently undiscoverable by Mr X upon reasonable inspection at purchase. Consequently, it possesses a demonstrable redhibitory effect: Mr X would not have purchased the vehicle had he been aware of the faulty piston. This conclusion is reinforced

[150] *Wentzel* (2021) at para 1.
[151] *Wentzel* (2021) at para 2.
[152] *Wentzel* (2021) at para 48.
[153] *Wentzel* (2021) at para 48.
[154] *Wentzel* (2021) at para 48.
[155] Namely, to review and possibly vary the order.
[156] *Wentzel* (2021) at para 49.

by the objective standard that a reasonable person, knowing of such a fundamental defect in a new vehicle, would likewise have declined the purchase. Crucially, Mr X stands ready and able to make full restitution of the vehicle. As all essential elements for *actio redhibitoria* are therefore present and demonstrable, Mr X would be entitled to a full refund of the purchase price upon successful proof of these facts on a balance of probabilities.

6 CONCLUSION

It is evident that the remedy under section 56(3)(b) of the CPA does not assure the consumer a full refund of the purchase price for defective goods due to the mandatory application of section 20 deductions for use. Conversely, the common law doctrine of *actio redhibitoria* – where its requirements are met, as demonstrated in the case of Mr X – provides a more protective outcome by entitling the consumer to a full purchase price refund without deduction. Consequently, *actio redhibitoria* offers superior protection for consumer interests within the sale-of-goods context, particularly where latent defects render goods fundamentally non-conforming.

Given the statutory primacy of the CPA, this discrepancy suggests potential grounds for legislative review. Parliament may consider amending the CPA to restrict the application of the section 20 deduction mechanism to *exceptional circumstances only*. Such reform would better align the statutory regime with the common law's protective stance by ensuring that, where goods are returned due to latent defects existing at sale, suppliers are generally *not* entitled to offset deductions, irrespective of subsequent use or deterioration. This approach would incentivise suppliers to prevent defects proactively, thereby strengthening the CPA's foundational purpose of safeguarding the fundamental right of consumers to defect-free goods and addressing inherent power imbalances.

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