

REPUBLIC OF SOUTH AFRICA



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

DELETE WHICHEVER IS NOT APPLICABLE:

(1) REPORTABLE: YES/~~NO~~

(2) OF INTEREST TO OTHER JUDGES YES/~~NO~~

(3) REVISED:

09 November 2023

DATE

SIGNATURE:

CASE NR: 79127/2023

In the matter between:

FFS FINANCE SOUTH AFRICA (RF) (PTY) t/a FORD CREDIT

PLAINTIFF

and

CLIFFORD KEAGILE LAMOLA

DEFENDANT

AND

CASE NR: 24590/2022

In the matter between:

BMW FINACIAL SERVICES (SOUTH AFRICA) (PTY) LTD

PLAINTIFF

and

HENDRICK JOHANNES WYNAND SMITH

RESPONDENT

Delivered: This judgment was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 09 November 2023.

JUDGMENT

MARUMOAGAE AJ

A INTRODUCTION

‘

The politics of judging is underscored by the constitutional mandate of doing public law justice in private law matters, including those traditionally governed by the common law of contract. A most crucial aspect of this mandate relates to a systematic realisation within contract law of the substantively progressive and transformative aims of the Constitution’.¹

[1] These are two different applications by two different Plaintiffs against two different Defendants wherein the Plaintiffs seek default judgments to be granted against their respective Defendants.

[2] Given the fact that the orders sought were similar and raised the same concerns, it was prudent to deal with both matters in the same judgment. In this

¹ Deeksha Bhana ‘The role of judicial method in the relinquishing of constitutional rights through contract’ (2008) 24 *South African Journal of Human Rights* 300 – 317 at 300 (may her soul rest in peace).

judgment, the court is not necessarily concerned with the applications for default judgment but the punitive costs orders that are sought by the Plaintiffs against their respective Defendants. In particular, the court is called to determine whether parties in their instalment sale agreement can strip the court of its discretion to make an appropriate costs order. In other words, is the court bound by the parties' agreement to order punitive costs against the consumer despite the matter not being defended?

- [3] For convenience purposes, these applications are referred to in this judgment as 'the first application' and the 'second application' respectively. Where the context dictates, these applications will be collectively referred to as 'the applications'.

B THE PARTIES

- [4] In both Applications:

[4.1] The Plaintiffs are companies duly incorporated and registered in accordance with the company laws of the Republic of South Africa. They are also registered credit providers as defined in terms of section 40 of the National Credit Act.²

[4.2] The Defendants are adult males who entered into different written instalment sale agreements with their respective Plaintiffs in their own right.

² 34 of 2005 (hereafter NCA).

C BACKGROUND

[5] With respect to the First Application:

[5.1] On 28 April 2017, the Plaintiff and Defendant concluded a written instalment sale agreement, wherein the Defendant undertook to purchase a 2017 Ford Fiesta 1:0 Ecoboost Ambiente SDR motor vehicle from the Plaintiff. This vehicle was duly delivered to the Defendant. However, due to the nature of the agreement, ownership of this vehicle remained vested with the Plaintiff.

[5.2] In terms of the agreement, the Defendant is bound to pay the Plaintiff an amount of R 201 321.06 plus finance charges calculated at a variable interest rate linked to prime plus 1.89% per annum. This amount was to be paid in terms of 71 consecutive monthly instalments of R 3 647.62 starting from 25 May 2017, with the final payment of R 59 069.90 payable on 25 April 2023.

[5.3] The agreement between the Plaintiff and Defendant also provides that should the Defendant fail to pay the payments due in terms of this contract, the Plaintiff will be entitled to cancel the contract and repossess the vehicle. Most importantly, for the purposes of this judgment, to also institute legal proceedings against the Defendant and claim costs on an attorney and client scale.

[5.4] The Plaintiff performed in terms of its obligations with respect to the agreement between the parties, but the Defendant failed to make payments. On 22 June 2023, the Defendant was in arrears in his payments in the amount of R 22 945.46. The Plaintiff sent a letter demanding payment from the Defendant and no payment was

forthcoming. The Defendant cancelled the contract and now seeks to repossess the vehicle and claim damages it suffered from the cancellation of the contract.

[6] With respect to the Second Application:

[6.1] On 28 November 2014, the parties concluded an instalment sale agreement, in terms of which the Defendant purchased from the Plaintiff a BMW 435i GRAND COUPE M SPORT for R 862 200.00. The Defendant agreed to repay the total purchase price and interest by way of 71 monthly payments of R 13 481.51 with the first payment made on 1 January 2015. In terms of the contract, the Defendant also agreed to pay the residual amount of R 258 717 on 1 December 2020.

[6.2] The Defendant failed to pay the required monthly amounts to the Plaintiff. The Plaintiff notified the Defendant that he was in arrears. There was no response from the Defendant. The current amount due to the Plaintiff in terms of the agreement is R 250 013. 97.

D APPLICABLE LAW AND ANALYSIS

i) Default

[7] Rule 31(2) of the Uniform Rules of Court empowered the Plaintiff to apply for default judgment when the time period within which the Defendant could serve and file his notice of intention to defend passed without the Defendant notifying the Plaintiff of his intention to defend the matter. The Defendant was served with the Plaintiff's combined summons on 23 August 2023 by the sheriff of the court. The Defendant failed to enter an appearance to defend within the

prescribed period which entitles the Plaintiff to apply for an order to be granted on a default basis.

ii) Costs

[8] In her minority judgment in *Khumalo and Another v Twin City Developers (Pty) Ltd and Others*, Molemela AJA (as she then was) held that:

'It is a trite principle of our law that a court considering an order of costs exercises a discretion. ... It is well-established that in the ordinary courts, the general rule is that 'costs follow the result'. It bears emphasising that notwithstanding the aforestated practice, all courts have an unfettered discretion in relation to the award of costs'.³

[8.1] This statement was neither criticised nor rejected by the majority in their judgment.

[9] This court in *Mulder v Kuhn*, held that:

'[i]t is known to the parties that in awarding costs this court has a discretion which should be exercised judicially upon the consideration of the facts in the matter and that, in essence, a decision be made where fairness to both sides should be considered'.⁴

[10] With respect to the applications for default judgment, there is a fundamental question that appears not to have seriously been engaged by our courts relating to whether a court faced with an application for a default judgment should simply rubberstamp the costs 'agreed' to by the parties in their commercial agreement. This question arises because of the potential for different judges of

³ (328/2017) [2017] ZASCA 143 (2 October 2017) para 17.

⁴ (41405/19) [2022] ZAGPPHC 336 (12 May 2022).

the same division or different divisions to grant different costs orders on the same facts through the exercise of their discretion.

[11] There are other equally important questions that arise from the rubberstamping of 'agreed' costs in commercial agreements without the proper contextual understanding of how such contracts came about.

[11.1] Is it constitutionally permissible to rubberstamp a clause in a commercial agreement that provides for punitive costs where the party against whom costs are sought did not defend the claim against them?

[11.2] Would the granting of punitive costs order further overburdened consumers who are clearly not coping with their current debts, in contravention of the aims of both the NCA and Consumer Protection Act?⁵

[12] The CPA aims:

'[t]o promote a fair, accessible and sustainable marketplace for consumer products and services and for that purpose to establish national norms and standards relating to consumer protection, to provide for improved standards of consumer information, to prohibit certain unfair marketing and business practices, to promote responsible consumer behaviour, to promote a consistent legislative and enforcement framework relating to consumer transactions and agreements'.

[12.1] There are several clauses in commercial agreements that have not been adequately tested against the above-quoted legislative aim. Clauses that make provision for punitive costs against consumers require courts to

⁵ 68 of 2008 (hereafter CPA).

adequately assess them with a view to protecting consumers who may not have even negotiated the terms of these agreements. These are often standard or *pro forma* contracts that consumers may have simply signed without adequately understanding their true legal implications. It is not clear whether at the time consumers sign these standard commercial agreements, the implications of the applicable legal costs should litigation be instituted against them upon non-payment are explained to them or, at the very least, highlighted.

[13] Among others, the preamble of the CPA provides that this Act was promulgated

‘... to promote an economic environment that supports and strengthens a culture of consumer rights and responsibilities, business innovation and enhanced performance ... and to give effect to the international law obligations of the Republic, ... [with a view to] promote and protect the economic interests of consumers; improve access to, and the quality of, information that is necessary so that consumers are able to make informed choices according to their individual wishes and needs; protect consumers from hazards to their well-being and safety; develop effective means of redress for consumers; ...’

[13.1] With respect to punitive costs clauses contained in commercial agreements, are consumers provided the necessary information to make informed choices? Are consumers alerted to the fact that should they default, the provider of goods or services can employ a firm of attorneys and counsel to pursue cases against them and that they will be liable for the payment of legal fees? Do consumers know the hourly rates of the legal professionals who will be instructed to institute and prosecute cases against them? Surely, without such information being provided to consumers in commercial agreements, there might be some justification that these clauses may be against public policy as demonstrated below.

[14] The Preamble to the NCA also provides, among others, that this Act was promulgated:

'[t]o promote a fair and non-discriminatory marketplace for access to consumer credit and for that purpose to provide for the general regulation of consumer credit and improved standards of consumer information'.

[14.1] In my mind, punitive costs clauses in commercial agreements offend against the spirit of the NCA because they create yet another avenue for continuous over-indebtedness of consumers whose payment default suggests that they are unable to pay their debts. The matter was not argued and there was no application to declare these clauses in the context of commercial agreements unlawful. As such, there is no need to declare these clauses unlawful in this judgment. Without deciding the issue, I am, however, convinced that these clauses are potentially unlawful.

[15] These matters were considered in my chambers. I then requested the legal representatives of the respective parties to provide me with concise heads of arguments dealing specifically with punitive costs clauses. I am appreciative to these legal representatives for their assistance in this regard.

[16] With respect to the first application, it was submitted that the Defendant caused the Plaintiff prejudice which the Plaintiff continues to suffer. Among others, this prejudice is caused by the depreciation of the vehicle that the Defendant refuses to return to the Plaintiff. The Plaintiff is entitled to be awarded costs as agreed in the instalment sale agreement. The Defendant agreed that in the event that the Plaintiff institutes legal proceedings against him, the Plaintiff will recover its fees and commission that it is charged by its attorneys on the attorney-client basis.

[16.1] In support of its claim for punitive costs order in its default application, the Plaintiff relied on the case of *University of Stellenbosch Law Clinic and others v National Credit Regulator and Others*.⁶ In this case, the court held that legal fees, including fees of attorneys and advocates comprise part of the collection costs that the credit provider can recover from the consumer. This case is clearly distinguishable from what I am confronted with. With respect to these applications for default judgment, I am not required to determine whether legal costs form part of collection costs. I am concerned with the punitive costs clauses in commercial agreements, an issue that the court in the *University of Stellenbosch Law Clinic and others case* was not called upon to determine.

[16.2] The facts with which I am confronted are also different from those that the court in the *University of Stellenbosch Law Clinic and others* dealt with. In the latter case, the court was faced with credit providers who struggled to collect small amounts that they lent to consumers. In this case, I am dealing with instalment sale agreement where the Plaintiff has a right to repossess the vehicle. These two cases are clearly distinguishable.

[16.3] I was also referred to the decision of the full bench (two judges) of this court in *Nkuna t/a Nkuna Attorneys v Octodec Investments - Olivetti House*.⁷ This was an appeal from the magistrates' court where the presiding magistrate granted a summary judgment. This case is also distinguishable from the current case in that the issue was the plaintiff's failure to pay his pro-rata share of rates and taxes in terms of an addendum to the lease agreement.

⁶ [2020] 1 All SA 842 (WCC); 2020 (3) SA 307 (WCC).

⁷ (A260/2020) [2023] ZAGPPHC 626 (2 August 2023)

[16.4] The plaintiff duly defended and participated in the matter, including the appeal where he was the appellant. Both the magistrates' court and the appellate court were not concerned with the implications of the punitive costs clause that was contained in the lease agreement. The Appellant was a legal practitioner and did not challenge the punitive costs clause in the lease agreement. Indeed, the lease agreement contained a punitive costs clause, and the full bench awarded a punitive costs order.⁸

[16.5] Herein, the issue of punitive costs orders against ordinary consumers without any legal training is raised directly by the court because none of the defendants are participating in these proceedings. *Nkuna t/a Nkuna Attorneys* case is clearly distinguishable. It was submitted that there is nothing that has been presented to this court that justifies a deviation from the scale of costs that have been agreed between the parties in their agreement. As such, costs on an attorney and client scale should be ordered. I do not agree with this submission.

[16.6] As will be demonstrated below, courts have the discretion to award costs. While this discretion can be limited by statute,⁹ I doubt that parties can in their contract bind the court to award a particular costs order that is clearly not in line with the purpose of both the NCA and CPA. I am alive to the fact that parties can persuade the court to grant a particular costs order, but the court retains its discretion to grant a fair and constitutionally compliant costs order that is in line with the ideals of the relevant legislation.

⁸ *Nkuna t/a Nkuna Attorneys v Octodec Investments - Olivetti House* para 16.

⁹ See *University of Stellenbosch Law Clinic and Others v National Credit Regulator and Others* (14203/2018) [2019] ZAWCHC 172; [2020] 1 All SA 842 (WCC); 2020 (3) SA 307 (WCC) para 18 where it was correctly held that 'In my view the legislature has always imposed significant limitations on courts when it comes to order as to costs. The court has never had an unfettered discretion. Its discretion is purely in terms of the prescripts of tariffs etc. imposed by the legislature. A court has never had a discretion to impose cost orders indiscriminately. The discretion has always been within the scope of options set down by legislative enactments'.

[16.7] There is no doubt in my mind that any successful litigant in court is entitled to recover its costs and the Plaintiffs in this case should recover their costs. However, given the fact that these matters are not opposed, I do not see any justification for punitive costs to be awarded against the Defendants.

[17] With respect to the second application, it was submitted that in terms of the common law principle of *Pacta Sunt Servanda*, the parties to the contract have the freedom to choose persons with whom they wish to conclude a contract and to agree to the terms and conditions of that contract. Further, the effect of this principle is that when parties conclude a contract legally and voluntarily, the contract must be strictly enforceable on the parties with as minimal judicial interference as possible. The court is required to recognise the sanctity of a contract and must strictly rely on the provisions of the contract when determining the enforceability of that contract. The Plaintiff relied on the case of *Mozart Ice Cream Classic Franchises (Pty) Ltd v Davidoff and Another*, where it was stated that:

'Manifestly without this principle the law of contract would be subject to gross uncertainty, judicial whim and an absence of integrity between the contracting parties'.¹⁰

[17.1] It is important to highlight, as correctly conceded by the Plaintiff in its heads of arguments, that contractual obligations are enforceable unless they are contrary to public policy, which is to be discerned from the values embodied in the Constitution generally and the Bill of Rights in particular. Further, where the enforcement of a contractual provision would be unreasonable and contrary to the fundamental values recognised in the Constitution, it will be contrary to public policy to

¹⁰ (2009 (3) SA 78 (C); (2009) 30 ILJ 1750 (C).

enforce such a contract or its offending contractual term. I agree with the Plaintiff that the power to declare contracts contrary to public policy should be exercised sparingly and only in the clearest of cases.

[17.2] I am of the view that standard/*proforma* commercial contracts that insert as a term, a clause that binds a consumer to pay punitive legal costs should litigation be instituted against such a consumer without any prior discussion or explanation of the implications of such clauses present the clearest case that warrants judicial intervention. Particularly where courts are required to grant punitive costs orders in default judgments where the defendants did not participate in the proceedings.

[17.3] It was submitted on behalf of the Plaintiff that the court has a residual discretion on whether to give effect to the parties' agreement regarding costs. It was correctly conceded that parties cannot by agreement deprive a court of its discretion regarding costs. It was however, submitted that the court would normally be bound to recognise the parties' freedom to contract and give effect to any agreement reached by the parties with respect to costs.

[17.4] I am not convinced that the court can ever be bound by the parties' agreement regarding costs. The court can award costs in favour of the successful party. However, the court cannot religiously rubberstamp a punitive costs clause in circumstances where it is absolutely clear that the Defendant in question will not even be able to pay costs in the ordinary sense. To do so will not be in line with what the legislature aims to achieve through legislation such as NCA and CPA.

[17.5] It was argued that good grounds may exist for a party to be deprived of the agreed costs, or be awarded something less than the costs agreed

upon. Further, in the absence of cogent reasons not to, the Court should grant costs as agreed between the parties. First, the Defendants in both these applications demonstrated their inability to service their debts. Secondly, they did not waste the court's time by defending what appeared to be strong cases against them. Thirdly, they signed *proforma* or standard instalment sale agreements which the court can reasonably conclude were not negotiated. Fourthly, there is no indication that those who assisted them in completing these forms were aware of the implications of the punitive costs clauses and if they were, took the liberty to explain the possible impact of these clauses in case of default in payments. In my view, there are good grounds for the court to deviate from the agreed costs.

- [18] It cannot be doubted as held by the Constitutional Court in *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others*, that:

'The application of the common law rules of contract should result in reasonably predictable outcomes, enabling individuals to enter into contractual relationships with the belief that they will be able to approach a court to enforce their bargain. It is therefore vital that, in developing the common law, courts develop clear and ascertainable rules and doctrines that ensure that our law of contract is substantively fair, whilst at the same time providing predictable outcomes for contracting parties. This is what the rule of law, a foundational constitutional value, requires. The enforcement of contractual terms does not depend on an individual judge's sense of what fairness, reasonableness, and justice require. To hold otherwise would be to make the enforcement of contractual terms dependent on the "idiosyncratic inferences of a few judicial minds".¹¹

- [19] It cannot be denied that contractual relations are the bedrock of economic activity, and South African economic development is dependent, to a large extent, on the willingness of parties to freely and voluntarily enter into

¹¹ 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC) para 81.

contractual relationships.¹² It is equally true that parties have the freedom to not only enter into agreements but also to choose who they wish to contract with. By so doing, they can decide on the terms of their agreements. However, this can justifiably be interfered with if any of the parties conduct themselves in a way that violates not only the spirit and purport of statutes such as the NCA and CPA but also constitutional rights and values.

[20] Generally, it is accepted that abstract concepts such as fairness should not be used to evaluate contracts because they can lead to an unjustified interference with contractual autonomy. The desire to promote commercial certainty dictates that the sanctity of contracts should prevail. It is worth noting, however, that the principles of freedom and sanctity of contract assume that parties generally have real freedom of choice to the extent that they enjoy equal bargaining power.

[21] However, available research indicates that one of the parties to the contract is usually in a more powerful position than the other which can lead to the abuse of that power in certain instances.¹³ Unequal bargaining power has been recognised as one of the factors that play a role in the determination of whether a contractual term is against public policy.¹⁴ This unequal bargaining power is clearly evident in *proforma*/standard instalment sale contracts, which consumers sign without discussing most of their clauses. Consumers may well negotiate the price, but it is doubtful that clauses making provision for legal costs are ever discussed, despite their impact should consumers default on their payments.

¹² *Ibid* para 84.

¹³ Micosha Palanee 'The role of unequal bargaining power in challenging the validity of a contract in South African contract law' (LLM Dissertation, UKZN, 2014) 1.

¹⁴ *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA); [2002] 4 All SA 125 (SCA).

- [22] Compliance with contractual obligations freely and voluntarily undertaken is relevant to the inquiry into public policy.¹⁵ It cannot be denied that '*... public policy, as informed by the Constitution, requires in general that parties should comply with contractual obligations that have been freely and voluntarily undertaken*'.¹⁶ Generally, parties' contractual autonomy ought to be respected and enforced.
- [23] However, in a constitutional democracy, contracts cannot merely be enforced by application of the core common law principles when there is a justifiable need to subject them to constitutional scrutiny. There are contracts that warrant contractual autonomy to be tested against the prevailing power relationships with a view to determining whether the terms to which a person presumably freely contracted themselves are not at '*... war with the fundamental values of the Constitution*'.¹⁷
- [24] This matter was not argued, and evidence was not presented to evaluate whether the Defendants were aware of these punitive costs clauses when they signed these agreements. As such, it is difficult to assess whether these clauses were brought to the defendants' attention.¹⁸ Most significantly, it is not even clear whether the officials of the Plaintiffs were aware of the financial implications of the punitive costs clauses on the Defendants as consumers at the time these contracts were concluded to the extent that they could reasonably be expected to have explained the severity of these clauses to the Defendants in the event that the Defendants breach these instalment sale agreements.

¹⁵ Den Braven S.A. (Pty) Limited v Pillay and Another 2008 (6) SA 229 (D); [2008] 3 All SA 518 (D) para 32.

¹⁶ Barkhuizen v Napier 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) (4 April 2007) para 57.

¹⁷ See *Advtech Resourcing (Pty) Ltd t/a The Communicate Personnel Group v Kuhn and another* [2007] 4 All SA 1368 (C) paras 30, where Davis J convincingly held that '[a] transformative constitution needs to engage with concepts of power and community. ... In its effort to create a new order, our Constitution must have been intended to address these oppressive and undemocratic practices at all levels. That intention must surely extend to all legal concepts, including the principles of contract'.

¹⁸ *Barkhuizen v Napier* 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) para 66.

[25] In determining whether there was an unequal bargaining power between the plaintiffs and defendants in these applications, it is important to assess whether the Defendants were placed in a position to negotiate how the issue of costs should be dealt with or were merely presented with standard or *proforma* forms to complete and sign. It is also important to assess whether the Plaintiffs would have continued with these car deals had the defendants refused to accept punitive costs clauses.

[26] In other words, was there scope to amend any clause of the standard or *proforma* printed contracts that were presented to the defendants? It goes without saying that these standard/*proforma* commercial contracts are carefully designed and drafted for the benefit of service providers and sellers of goods. In my view, in industries where there is a possibility of non-compliance by consumers of commercial contracts due to the structure of the economy, 'forcing' consumers to contract themselves to punitive legal costs in the event of a breach of these contracts demonstrates unequal bargaining power. According to Helveston and Jacobs:

'[c]ontracts that result from the abuse of unequal bargaining power have long been a concern of contract law. Courts have proscribed efforts by the "powerful" to take unfair advantage of the "weak" through contracts of adhesion and standard form contracts. Certain kinds of clauses ... regularly attract judicial suspicion because their appearance is deemed indicative of such advantage-taking'.

[27] It cannot be denied that the common law of contract is subject to the Constitution and courts are obliged to take fundamental constitutional values into account to develop the law of contract in accordance with the Constitution.¹⁹ However, judges are not generally empowered to incorrectly use the Constitution to declare contracts invalid because they believe they were

¹⁹ *Brisley v Drotsky* 2002 (4) SA 1 (SCA) paras 88-95

concluded in bad faith.²⁰ Nonetheless, it goes without saying that contracts that clearly offend against public policy or infringe upon the Constitution must be declared unlawful.²¹

[28] I am also of the view that contractual clauses that run contrary to legislative ideals sought to be achieved by legislation such as the NCA and CPA, the effect of which is to unreasonably burden consumers with debts, are potentially against public policy and unlawful and may be declared invalid. Unequal bargaining power is a relevant consideration to determine whether a contractual term is contrary to public policy.²² Public policy is rooted in the Constitution, and does not only endorse freedom and sanctity of contract but also precludes the enforcement of a contractual term in circumstances where such enforcement would be unjust and unreasonable.²³

[29] In my view, when assessing whether clauses of commercial contracts are compliant with public policy, legislation such as the CPA and the NCA must also be considered. In terms of section 48(1)(a) of the CPA:

‘[a] supplier must not offer to supply, or enter into an agreement to supply, any goods or services— (i) at a price that is unfair, unreasonable or unjust; or (ii) on terms that are unfair, unreasonable or unjust’.

[30] In terms of section 48(2)(a)&(b) of the CPA, an agreement is regarded as unfair, unreasonable, or unjust if:

²⁰ Ibid para 93.

²¹ *Napier v Barkhuizen* [2006] 2 All SA 469 (SCA); 2006 (9) BCLR 1011 (SCA) 2006 (4) SA 1 (SCA) para 7.

²² *United Reformed Church, De Doorns v President of the Republic of South Africa and Others* 2013 (5) BCLR 573 (WCC); 2013 (5) SA 205 (WCC) para 34.

²³ Yeukai Mupangavanhu ‘Fairness a slippery concept: The common law of contract and the Consumer Protection Act 68 of 2008’ (2015) *De Jure* 116 at 121.

'it is excessively one-sided in favour of any person other than the consumer or other person to whom goods or services are to be supplied' and it is so '... adverse to the consumer as to be inequitable'.

- [31] Instalment sale agreements that were provided to the court in these two applications are excessively one-sided with respect to the punitive costs issue. They do not make provisions for punitive costs to be awarded against the Plaintiffs should they breach these contracts. The reality is that in different magistrates' courts and various divisions of the High Court, judicial officers are seized with applications for default judgments wherein those who sell cars request punitive costs. In most instances, these orders are granted without any assessment of how they will affect similar-situated Defendants who are already experiencing financial challenges.
- [32] The fact that there may be judges who refuse to grant punitive costs orders will lead to a great deal of inconsistencies in the way courts exercise their discretion with respect to these contracts. This simply means that punitive costs will be denied or granted depending on the presiding judicial officer who is considering these kinds of applications. This situation is untenable and there is a need for a consistent approach.
- [33] I am of the view that courts have a duty to protect parties who are not before them by ensuring that they are not overburdened with extensive costs orders even though they did not participate in the court proceedings. The defendants are also protected by the Constitution which is founded on the values of human dignity, equality, and freedom. Bhana correctly argues that:

'the value of equality requires evidence of unequal bargaining power to be taken into account so as to ensure that there is autonomy in substance as opposed to mere form'.²⁴

[34] Courts are also enjoined by section 39(1)(a) of the Constitution when interpreting the Bill of Rights to '*... promote the values that underlie an open and democratic society based on human dignity, equality and freedom*'. Rubberstamping punitive costs clauses that will unreasonably worsen the financial position of defendants who are brought to court due to their failure to pay their debts is clearly contrary to this constitutional ideal.

[35] Notwithstanding the fact that courts have discretion to make costs orders and are not bound by what parties include in their contracts, the fact that these punitive costs orders are granted by some judges is a matter of concern. In this context, I have no doubt that punitive costs clauses in commercial agreements are against public policy, potentially unlawful, and should not be granted.

E CONCLUSION

[36] While it is important that all the clauses of commercial agreements should be respected and where necessary enforced, it is also important to understand the circumstances under which these agreements are concluded. Indeed, courts do not have a leeway to unreasonably refuse to grant orders that would assist parties to enforce the terms of their contracts. However, courts also have a duty to carefully assess whether the contracts, the terms of which the parties seek to enforce, do not offend against not only public policy but also legislation such as NCA and CPA.

²⁴ Deeksha Bhana 'The role of judicial method in the relinquishing of constitutional rights through contract' (2008) 24 *South African Journal of Human Rights* 300 – 317 at 301.

ORDER

[35] In the result, I make the following order:

With respect to the first application

[24.1] The termination of the agreement is confirmed.

[24.2] The Defendant and/or any person who is in possession of a 2017 FORD FIESTA 1.0 ECOBOOST AMBIENTE 5DR with engine number GY86846 and chassis number WF0DXXGAKDGY86846 must deliver this vehicle to the Plaintiff.

[24.3] The Defendant is ordered to pay the Plaintiff's taxed party and party costs.

With respect to the second application

[24.4] The Defendant must pay an amount of R 250 013. 97 to the Plaintiff, including interest calculated at the rate of 10% per annum from the date of judgment.

[24.5] The Defendant is ordered to pay the Plaintiff's taxed party and party costs.


C MARUMOAGAE

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

PRETORIA

ATTORNEYS FOR THE PLAINTIFF: Strauss Daly Incorporated
(in the first application)

COUNSEL FOR THE PLAINTIFF: Adv B A Loxton-Kamba
(in the second application)

INSTRUCTED BY: Macrobert Incorporated

DATE OF CONSIDERATION: 20 October 2023

DATE OF JUDGMENT: 09 November 2023