



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, DURBAN**

CASE NO: 6916/13

In the matter between:

FOUR WHEEL DRIVE ACCESSORY DISTRIBUTION CC

PLAINTIFF

and

LESHNI RATTAN N.O

DEFENDANT

Date of Hearing : 05-6 December 2016, 29 May 2017

Date of Judgment : 4 July 2017

ORDER

1. The claim is dismissed with costs.

JUDGMENT

D. Pillay J:

Introduction

- [1] 'Poor legal writing might result in an injustice for a client: a judge might misunderstand what a lawyer is seeking; an adversary might seize on an ambiguity. To avoid these problems, strive for perfection.'¹

To this exhortation must be added the observation of the Constitutional Court:

'The movement towards the infusion of justice and equity or fairness into certain legal relationships is also taken further in the National Credit Act 34 of 2005. . . and in the Consumer Protection Act 68 of 2008 (see in part G the reference to the "right to fair, just and reasonable terms and conditions" and s 48).'²

And all writers, including lawyers must know:

'We write ethically when as a matter of principle, we would trade places with our intended readers and experience what they do as they read our writing. None of us wants to hack through gratuitously unclear writing, so it seems self-evidently unethical to impose that kind of writing on others.'³

What if the legal writing is not easy to see let alone to read and understand? At the heart of this action is the quality and quantity of the form and content of a written agreement on the basis of which the plaintiff claims payment of an amount of R559 817.45 as the cost of repairing a motor vehicle, a Land Rover Discovery, that was damaged whilst it was in the possession of the late Ivin Chutergun Rattan. Leshni Rattan is Mr Rattan's executrix representing his estate. It was common cause that the deceased did not cause the damages to the Discovery.

- [2] In terms of a written agreement dated 26 November 2012, Land Rover Experienced Rentals CC (LRER CC) leased a Land Rover Freelander to the deceased whilst the deceased's own vehicle was undergoing repairs at Land Rover Umhlanga. On 28 November 2012, LRER CC replaced the Freelander with the Discovery in terms of another similar standard agreement annexed to the particulars of claim as B2.

- [3] The terms and conditions agreed could not be gleaned clearly from B2 because the quality of its form was not easy to read. Instead they emerged during

¹ Hon. Gerald Lebovits 'Legal Writing Myths' *Michigan Bar Journal* February 2017 51-2.

² *Hattingh and others v Juta* 2013 (3) SA 275 (CC) para 33 fn 49.

³ Joseph M Williams 'Style- Ten Lessons in Clarity and Grace' 8th edition Pearson-Longman 179.

the testimony of Mrs Brown and Mr Murton, the witnesses for the plaintiff. The evidence for the plaintiff was that in terms of B2 the deceased had the use of the Discovery for as long as his own vehicle was undergoing repairs. The Discovery had to be returned in the same condition as when he had received it. Clarity about the insurance of the vehicle whilst it was in the deceased's possession emerged when Mr Murton testified that the Discovery would be insured for the first 72 hours; thereafter the deceased would have had to make arrangements for his own damage insurance (ODI) or be personally responsible for the vehicle, its rental and other charges. During the initial 72 hour period the deceased was liable only for the excess of R20 000.⁴ Counsel conceded that the conditions pertaining to the 72 hour period were not written into B2.

[4] For its part Land Rover Umhlanga, which was not party to B2 had 72 hours in which to fix the deceased's vehicle. Mrs Brown gave conflicting evidence about whether it was able to do so and whether it had to secure an extension of one day from Europe-Assist who facilitated the hire of courtesy vehicles on behalf of the plaintiff. Exhibit 1A, a car hire request dated 26 November 2012 on the letterhead of Lazarus Car Hire, bearing the name of the deceased but listing Europe-Assist as its client, has a hand-written note that an extension was granted. The crucial question was whether the plaintiff informed the deceased that he should return the vehicle before the expiry of 72 hours? There was no evidence of this.

[5] On 30 November 2012 the deceased was shot and killed whilst driving the Discovery, which was damaged as a result. Naturally the deceased was unable to return the vehicle. It was recovered from the South African Police Services on 3 December 2012.

[6] The defendant challenges the *locus standi* of the plaintiff, firstly on the grounds of its identity, and secondly its interest in the claim. It had no witnesses to call and closed its case without leading any evidence. I deal with *locus standi* before considering the enforceability of B2 under the common law and the Consumer Protection Act 68 of 2008 (CPA).

Locus Standi

⁴ Page 54-56 of the transcript.

[7] As for the plaintiff's identity, B2 is an agreement between LRER CC and the deceased. Surprisingly the plaintiff was cited as follows:

'Four Wheel Drive Accessory Distributors CC a close corporation, which has been duly incorporated and registered in accordance with the provisions of the Close Corporations Act 1984 trading under the style of Lazarus Car Hire and formerly trading under the style Land Rover Experience Rentals having its place of business at Church Street Extension Pretoria West, 0001'.

Mrs Brown testified that there 'isn't a Land Rover Experience Rentals CC' and that 'Experience Care Hire' is a name of another firm that the plaintiff uses.

[8] The plaintiff led its evidence and the matter was adjourned for about five months. On resumption it applied to rectify B2 by deleting the abbreviation 'CC' in LRER CC. Its explanation was that the plaintiff formerly traded under the name of 'Land Rover Experience Rentals' but B2 did not correctly record the description of its trading name. Apparently, the 'incorrect description of the plaintiff was occasioned by an error common to the parties' (*sic*). For these reasons the plaintiff sought the deletion of the extension 'CC' in B2.

[9] That this was a mutual mistake is an allegation the deceased is no longer available to confirm or refute. In the circumstances the court has to be especially careful in assessing the amendment, which was effected without opposition. It cannot be correct that it was an 'error common to the parties' because the likelihood of the deceased taking notice of the identity of the other party to B2 when he signed it is remote considering the quality of the form of B2 and the hurried circumstances in which he signed it. Not even Mr Murton noticed that LRER CC was a close corporation. Both issues are expatiated below.

[10] What the plaintiff failed to explain is how the 'CC' came to be in B2 in the first place when that was not its trading name. Did such a close corporation ever exist? As B2 is a standard term agreement that was used on both the occasions that the deceased received courtesy vehicles, the plaintiff's explanation remains wanting if not suspect.

[11] Despite the defendant challenging the status of the plaintiff in its plea and throughout the cross-examination of its witnesses, the plaintiff failed to produce any documents to prove its incorporation and its relationships with Lazarus Car Hire and LRER with or without the 'CC'. Its explanation that it was not obliged to produce the documents because its oral evidence could not be refuted is unacceptable. Faced with the defendant's persistent and vigorous challenge to the plaintiff's standing, the court could not reasonably accept the say-so of the plaintiff, especially when manifestly it did not conclude B2, which founded its action.

[12] As for the plaintiff's interest in the claim, the evidence is all the more convoluted. The *causa* of the action between LRER CC and the deceased was recorded in B2 as an agreement to 'rent' the Discovery. The plaintiff pleaded that it was the lessee of the Discovery. But it referred to the Discovery as:

'(the plaintiffs vehicle) in terms of an agreement of lease with the owner of the plaintiff's vehicle.'

Furthermore:

'[i]n terms of the agreement of lease between the plaintiff and the owner of the plaintiff's vehicle, the plaintiff bore the risk of loss of damage to the plaintiff's vehicle.'

In both these extracts the plaintiff was referring to its lease agreement with the owner of the Discovery. Who was its owner?

[13] This emerged only during cross-examination when Mrs Brown testified that Land Rover South Africa (LRSA) owned the Discovery. Allegedly, the arrangement between the plaintiff and LRSA was that LRSA would in terms of an oral arrangement lease its vehicles to the plaintiff; it would then re-hire it from the plaintiff. LRSA paid rent to the plaintiff for the rehire of its own vehicle. In direct response to the question: 'What gives you the right to sue on this case if the vehicle belongs to LRSA?' Mrs Brown replied: 'We in effect lease the vehicle from them'. If this response were true then it implied that LRSA hired its own vehicle and re-leased it to the plaintiff so that the plaintiff, not LRSA, could 'lease' the Discovery to the deceased. But the deceased paid no rental for the Discovery.

[14] According to Mr Murton the plaintiff was in the business of renting vehicles throughout the country. He was the assistant manager for its Durban operations. To the best of his knowledge the clients paid no rental for the vehicles. He was unable to confirm whether LRSA leased and re-leased vehicles from the plaintiff. He was unsure about whether LRSA paid rent for the vehicles.

[15] As for the relationship with LRSA, Europe-Assist, and other companies involved with the plaintiff, he deferred to Mrs Brown who dealt with them. According to Mr Murton the plaintiff is a 'mobile operation' that does not have physical premises.⁵ The transaction with the deceased took place at a vacant desk at Land Rover Umhlanga.

[16] Unsurprisingly the defendant had no knowledge of these averments not least because they are not self-evident from B2. Nor did the plaintiff's particulars disclose who the owner of the Discovery was. Describing the Discovery as 'the plaintiff's vehicle' when the plaintiff was not the owner was at best confusing, if not an attempt to conceal the identity of the owner of the Discovery.

[17] Notwithstanding the plaintiff's particulars of claim, Mrs Brown contradicted her evidence further by testifying that LRSA 'contracts [her] to give a loan vehicle.' This evidence showed that the real agreement was not the lease in B2 that the plaintiff presented as the foundation of its case, but an agreement for the use of the Discovery (*commodatum*).

[18] That is not all. The Discovery was insured for 72 hours from 28 November 2012. The insurance would not have expired by 30 November 2012 when the deceased was killed. Irrespective of what the insurance arrangements were, the deceased was incapable of performing his obligations. Surprisingly, the plaintiff has not disclosed any documents pertaining to the insurance of the Discovery and what the attitude of the insurers, if any, was to paying for the damages. I was not referred to any term in B2 about what liability the defendant would attract despite the supervening impossibility of the deceased to perform.

⁵ Page 46 of the transcript.

[19] Fathoming where truth lies in this extraordinary convulsion is all the more difficult without documents to support the transactions between the plaintiff and LRSA. That such complicated transactions would be oral is incredible as it involves a multinational enterprise like Land Rover. For LRSA, which is a dealership in the stable of Combined Motor Holdings Ltd, a company listed on the Johannesburg Stock Exchange, to engage in such business practices is unusual.⁶ The plaintiff offered no explanation as to why LRSA did not sue in its own name to recover damages to its own vehicle, nor did it disclose whether any insurers settled any claims arising from damage to the Discovery.

[20] The reasons for these convoluted transactions have not been forthcoming. Trying to unravel them falls beyond the competence of the court and the scope of this judgment. Agencies with investigative capabilities are best placed to deal with them. However, the plaintiff's failure to disclose relevant information is material to the extent that it assists the court in making findings of credibility against it.

[21] In view of the defendant's denial in her plea, the plaintiff had a duty to prove every element of its action starting with its *locus standi*. This obligation was reinforced by the absence of any witnesses for the defendant through no fault of the deceased. To allow the plaintiff to snatch a tactical advantage from the passing of the deceased would be unjust. It was not the plaintiff's case that it could not produce the documents because they were not available. Nor did it claim that they were irrelevant or confidential. In the circumstances I find that the plaintiff has failed to discharge its onus of establishing its *locus standi* by proving its identity.

[22] It also failed to prove its interest in the litigation. It concluded agreements with other entities not party to the agreement with the deceased or this litigation in ways that raise further questions about who actually bore the risk of loss. Non-disclosure of the insurance, if any, of the Discovery casts doubt not only about the plaintiff's interest but also its good faith. The plaintiff failed to prove that it carried any risk whatsoever.

[23] This finding that the plaintiff failed to prove its *locus standi* is dispositive of the entire action. For completeness I turn to the enforceability of B2.

⁶ <http://www.cmh.co.za> (accessed 16 June 2017).

Enforcing B2 under the common law

[24] Evidentially, the starting point is the circumstances in which the deceased came to sign B2. Mr Murton delivered the Discovery to the deceased at his butchery business at Phoenix Industrial Park. He handed its keys to the deceased personally after the latter confirmed his identity. As the deceased was busy he did not spend much time with him. The deceased scanned over the contract quickly. Mr Murton explained the terms relating to the insurance, the fuel and the return of the Discovery after which the deceased signed B2.

[25] Under cross-examination Mr Murton testified that he had read and understood B2 but conceded that it was 'very complex, in small writing, very difficult to read.'⁷ B2 presented as one page. Asked on no less than three occasions about several references in B2 to 'overleaf', Mr Murton responded that he could not remember 'the fine print'.⁸ He was unaware of the references to 'overleaf'. He was unable to explain certain abbreviations in B2. Asked whether he explained clause 3 to the deceased he responded as follows:

'Sir if I were to go through the whole document with each and every client and every single clause in there I would not be getting any vehicles out. I am under a strict process - between five and ten vehicles a day, I can't sit for three hours and explain the whole document to a client.'⁹

And further:

'client has the opportunity to take a copy of the document, I don't sit and go through each clause on here; it is a substantial document.'¹⁰ (*sic*)

[26] Asked several times about the insurance in clause 3, Mr Murton was unable to explain the terms. If his memory had faded since he left the employ of the plaintiff he had B2 before him to remind him. But he was still unable to read and explain its contents to the court. He was unsure as to how a client would know that he would have to have his own insurance.¹⁰ When he parted company with the deceased he

⁷ Page 39-40 of the transcript.

⁸ Page 31-42 of the transcript.

⁹ Page 51 of the transcript.

¹⁰ Page 51 of the transcript.

left the latter with the understanding that he would be liable only for the excess of R20 000 if the Discovery was involved in a collision and became un-roadworthy.

[27] Mr Murton's evidence proves that the deceased signed an incomplete agreement and without reading it. As for the quantity of terms and conditions in B2 none of the 25 clauses and the multitude of sub-clauses cast any light on the issues in dispute. Attached to the particulars of claim, B2 served no useful purpose. Given that the court could not read B2 easily even with the aid of a magnifying glass, that the plaintiff's representatives did not read B2 to know that the condition that founded its action was not in there, that Mr Murton did not read and explain the contents of B2 to the deceased and that the deceased did not read B2 before he signed it, then overwhelmingly the evidence supports a finding that there was no consensus about the contents of B2, at least, not about those aspects that were not specifically discussed and arranged. An elementary principle of the common law is that without consensus no agreement can exist.¹¹

[28] Mr Murton's evidence also reminds that:

'Most of us do work hard to understand – at least until we decide that a writer failed to work equally hard to help us reach that understanding, or worse, has deliberately made our reading more difficult than it has to be. Once we decide that a writer was careless or thoughtless or lazy – well, our days are too few to spend them on those indifferent to our needs.'¹²

[29] However, an agreement of some kind did come into being. It was common cause that the Discovery was delivered to the deceased for use as a courtesy service. At a minimum the deceased acknowledged receipt of the Discovery by signing B2. The delivery was on the condition that the Discovery would be returned at some point. Mr Murton's evidence that he told the deceased about the conditions concerning the return of the Discovery is reasonably probably true. In the absence of any other evidence I accept in favour of the plaintiff that 72 hours was the deadline. Additional to B2, an oral agreement came in being in terms of which the deceased had use of the Discovery for 72 hours when the plaintiff provided the insurance. This much is either common cause or not disputed. However, the plaintiff fails to prove

¹¹ Wessels *The Law of Contract in South Africa* 2ed Vol I para 43.

¹² Joseph M Williams 'Style- Ten Lessons in Clarity and Grace' 8th edition Pearson-Longman 178.

that the deceased was aware that he had to provide ODI after 72 hours; at most he had to pay the excess of R20 000. *Pacta sunt servanda* applies to the limited terms agreed.¹³ On this basis the deceased had no obligation to have the Discovery insured during the 72 hours. Even if he knew that he had to provide ODI it was not possible for him to do so.

[30] The deceased died about 48 hours after he received the Discovery. This triggered another rule of the common law: *lex non cogit ad impossibilia* - no one should be compelled to perform or comply with that which is impossible. This maxim originates from the principles of justice and equity underlying the common law.¹⁴ In *Barkhuizen v Napier* the Court confirmed that it is 'inconceivable' that a court would hold a party to a time-limitation clause if factors beyond that party's control caused the non-compliance.¹⁵ It was impossible for the deceased to insure the Discovery or return it within 72 hours. On the basis of this maxim too I find that B2 and any other agreement that required the deceased to perform the impossible are invalid. Accordingly the plaintiff's claim must be dismissed on this ground too.

[31] There is yet another common law principle that applies to the plaintiff's assertion that the deceased had to insure the Discovery or return it within 72 hours: the duty to act in good faith.¹⁶ Good faith embodies the community's evolving conception of reasonableness, justice and equity.¹⁷ It finds expression in other rules notably the common-law rule that contractual clauses that are impossible to comply with should not be enforced.¹⁸

[32] Another unsettling aspect to the plaintiff's claim is the lack of any explanation as to why LRSA as the owner of the Discovery did not sue the defendant. Nor is there disclosure about whether any insurer paid for the damages now claimed in this action, to whom such damages were paid and the extent to which the Plaintiff was actually out of pocket as a result of this transaction. It is intriguing that the plaintiff alleged that it carried the risk of loss to the Discovery when it incurred no expenses in the form of rental and insurance for it. The convoluted arrangements amongst the

¹³ *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

¹⁴ *Barkhuizen v Napier* para 75.

¹⁵ *Barkhuizen v Napier* para 73.

¹⁶ *Barkhuizen v Napier* paras 79-82.

¹⁷ *Barkhuizen v Napier* para 80.

¹⁸ *Barkhuizen v Napier* para 82.

plaintiff, LRSA, LRER with or without the CC, Lazarus Car Hire and Europ-Assist alleged in this litigation deserve the attention of LRSA whose voice has been absent.

For now the non-disclosure simply fortifies the finding of bad faith against the plaintiff. Accordingly the plaintiff's claim must be dismissed for want of good faith on the part of the plaintiff.

[33] Public policy is also a consideration when determining the enforceability of firstly the plaintiff's claim that the deceased had to insure the Discovery or return it within 72 hours and secondly B2. In *Barkhuizen v Napier* the majority considered the public policy implications of a time-bar clause to hold that public policy must be assessed against the values underlying the Constitution,¹⁹ including:

'the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, and the rule of law.'²⁰ (footnotes omitted)

Public policy is inseparable from:

'[n]otions of fairness, justice and equity, and reasonableness ... Public policy takes into account the necessity to do simple justice between individuals. Public policy is informed by the concept of *ubuntu*.'²¹ (footnotes omitted)

The holding in *Barkhuizen v Napier* that it is 'inconceivable' that a court would find against a party if factors beyond its control caused the non-compliance²² applies to the plaintiff's claim that the deceased had to insure the Discovery or return it within 72 hours; it follows that for public policy considerations these obligations are unenforceable and therefor invalid.

[34] Regarding B2, it would also be unfair if there is evidence that the party proposing it did not draw its clauses to the attention of the other party.²³ To enforce an unfair or unjust clause would be contrary to public policy.²⁴ Factors that go to considering public policy include the unequal bargaining power of the contracting

¹⁹ *Barkhuizen v Napier* para 29.

²⁰ *Barkhuizen v Napier* para 28.

²¹ *Barkhuizen v Napier* para 51.

²² *Barkhuizen v Napier* para 73.

²³ *Barkhuizen v Napier* para 66.

²⁴ *Barkhuizen v Napier* paras 67, 73.

parties²⁵ and that many people conclude contracts without any bargaining power and without understanding what they are agreeing to.²⁶

[35] In *Barkhuizen v Napier* the court was similarly burdened as in this case with a standard term insurance contract. Sachs J described it thus in his minority opinion:

‘A multitude of provisions appear in the following 22 pages, dealing with terms covering such diverse themes²⁷. . . More than 20 pages of small print in single space follow, covering a vast range of topics, much of it relating to matters. . . that could have no bearing on the relationship between the applicant and the insurer²⁸. . . It was in fact a prolix, dense and hard to read example of a standard-form contract, sometimes referred to as a contract of adhesion, and copyrighted to boot²⁹. . . It contains endless provisions in a font sufficiently small to reduce the costs of the paper used while simultaneously discouraging any reasonable person from ploughing through it.³⁰

[36] After critiquing the pros and cons of standard term contracts Sachs J opined that:

‘A strong case can be made out for the proposition that clauses in a standard-form contract that are unreasonable, oppressive or unconscionable are in general inconsistent with the values of an open and democratic society that promotes human dignity, equality and freedom.’³¹

[37] He distinguished *Barkhuizen v Napier* from other standard term contract cases in which both parties were aware of the challenged clause at the time of contracting, but pitched the challenge against its extortionate character. In *Barkhuizen v Napier* Mr Barkhuizen had not signed the clause, which was ‘buried in a voluminous add-on document.’³²

²⁵ *Barkhuizen v Napier* para 59.

²⁶ *Barkhuizen v Napier* para 65.

²⁷ *Barkhuizen v Napier* para 131.

²⁸ *Barkhuizen v Napier* para 132.

²⁹ *Barkhuizen v Napier* para 134.

³⁰ *Barkhuizen v Napier* para 147.

³¹ *Barkhuizen v Napier* para 140.

³² *Barkhuizen v Napier* para 147.

[38] Sachs J posed several questions in order to define the ambit of the application of public policy, including:

‘Does it countenance a person being bound by onerous terms even though they were unilaterally attached to the actual bargain made? To what extent does public policy in an open and democratic society require that the service provider who authored such provisions show that these terms were specifically drawn to the consumer’s attention? . . . And what weight does public policy attach to the reality that the person negatively affected cannot in the circumstances reasonably be expected to have understood the provision to constitute an obligation actually undertaken by him or her under the contract?’³³

His researched response to these questions led him to find in that case that the enforceability of the impugned clause:

‘. . . is open to challenge because on its face it:

. . .

- lies buried obscurely in the small print of an exceptionally long, dense and structurally inelegant certificate of insurance apparently sent on to the insured after negotiations had been completed;
- is not highlighted in the text so as visually, and in keeping with internationally accepted standards of consumer protection, to bring the consequences of non-compliance to the attention of the insured at the time the contract was entered into. . . .’³⁴

[39] The majority found on the facts that the agreement was binding as:

‘there was no evidence that the contract had not been freely concluded between parties in equal bargaining positions or that the clause was not drawn to the applicant’s attention.’³⁵

Furthermore, the 90-day time-limitation clause was not against public policy, especially as the insured did not offer any reasons as to why he could not comply with it.

³³ *Barkhuizen v Napier* para 150.

³⁴ *Barkhuizen v Napier* para 183.

³⁵ *Barkhuizen v Napier* para 87.

[40] Unusual as it is for disputes of fact to arise at appellate level, the majority decision is premised on the insured being aware of the condition whereas Sachs J's findings above suggest otherwise. The differences stem from their respective approaches to the facts rather than the facts themselves. As the Supreme Court of Appeal recalls the debate between Davis J and Wallis J, *pactum sunt servanda* tends to split opinions along ideological and philosophical lines³⁶ or more simplistically 'personal preference[s]'.³⁷ Similarly, notions of fairness in contracts 'remains a slippery concept', as Jajbhay J and Lamont J demonstrated by deciding differently on basically the same facts.³⁸ The recent journey of *Paulsen and another v Slip Knot Investments 777 (Pty) Ltd* concerning an agreement to suspend the *in duplum* rule, started as a decision of a single judge in the High Court, proceeding to a full court, then onwards to yield a narrow majority decision in the Supreme Court of Appeal until finally resulting in three decisions of the Constitutional Court.³⁹ Given that the drafters of contracts often represent powerful interests as the providers of credit, goods and services, balancing the sanctity of contracts against transformative constitutional values will remain an on-going tension as the following extract rekindles:

'We need to look at South Africa's socio-economic realities. A large percentage of the providers of credit are large, established and well-resourced corporates. On the other hand, although there may be what the dissenting judgment refers to as 'stout-boned' credit consumers, it would be ignoring our country's economic reality to suggest that there is any comparison between these corporates and most credit consumers. To many credit consumers, who fall on the wrong side of this country's vast capital disparities, astronomical interest may mean the difference between economic survival and complete financial ruin. While in some cases creditors may lose money to inflation during litigation, this is very unlikely to have the same catastrophic effect on the creditor compared to what the accumulation of runaway interest will have on the debtor.'⁴⁰ (Footnote omitted)

³⁶ *Bredenkamp and others v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) para 36.

³⁷ *Paulsen and another v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC) para 88.

³⁸ *Bredenkamp and others v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) para 54.

³⁹ *Paulsen and another v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC) para 23

⁴⁰ *Paulsen and another v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC) para 66.

[41] Although Sachs J was in the minority in *Barkhuizen v Napier*, and the majority disagreed with his conclusions, the latter nevertheless shared many of his concerns about:

‘. . . standard-form contracts, actual and implied consensus, public policy, the significance of small print in written contracts, and the power imbalance between insurers supported by legal expertise and people without expertise.’⁴¹

And further:

‘*Pacta sunt servanda* is a profoundly moral principle, on which the coherence of any society relies. It is also a universally recognised legal principle. But the general rule that agreements must be honoured cannot apply to immoral agreements that violate public policy. As indicated above, courts have recognised this and our Constitution reinforces it. Furthermore, the application of *pacta sunt servanda* often raises the question whether a purported agreement or pact is indeed a real one, in other words whether true consensus was reached. Therefore the relevance of power imbalances between contracting parties and the question whether true consensus could for that matter ever be reached, have often been emphasised.’⁴²

In short, the morality of the maxim *pacta sunt servanda* is binary: moral agreements are binding; immoral agreements are not. Agreements are immoral if they are against public policy, unfair, in bad faith or incapable of eliciting genuine consensus. That the maxim has never been absolute is now well established.⁴³ How it will be balanced against other rights and values remains an on-going challenge.

[42] Against this jurisprudential backdrop the facts of this case pose the question: Can the validity of B2 be tested under the common law for consistency with public policy on the grounds of its format and style, content, clarity and comprehensibility, and its functionality in terms of informing its readers of the rights, obligations and

⁴¹ *Barkhuizen v Napier* para 87.

⁴² *Barkhuizen v Napier* para 87. In *Bredenkamp and others v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) paras 50, 51, 60 the court applied *Barkhuizen v Napier* to confirm the right of a banker to close a client's account. Finding that *Barkhuizen v Napier*:

‘did not hold that the enforcement of valid contractual terms had to be fair and reasonable even if no public policy considerations found in the Constitution, or elsewhere, were implicated, nor were there any indications in the minority judgments of an overarching requirement of fairness’

it resolved that closing the account was not against public policy because the client had failed to prove that considerations of fairness imposed on the bank a duty not to do so.

⁴³ *Paulsen and another v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC) para 71.

remedies of those it implicates? Mr Murton's evidence typifies the conundrum about standard term contracts generally. B2 was impractical to decipher without costs and inconvenience to those who had to read and understand it. B2 is offensive as it impairs the dignity of the deceased and all those who have to work with it. Proving consensus as a pre-requisite for a valid agreement would be a hard row to hoe if *prima facie*, as in the case of B2, it appears from its very form and contents that the class of persons party to it would not have read and understood it, that it was difficult to read, that it might not have been explained because logistically it was not possible to do so cost-effectively and conveniently, and that it was manifestly beyond the comprehension of the persons involved. Applying *Barkhuizen v Napier* to the facts here I find that B2 is against public policy and therefore invalid. The public policy concerns discussed in that case now find expression in the CPA.

Enforcing B2 under the CPA

[43] After the plaintiff's case the court invited the parties to consider the implications of the CPA to B2. When the matter resumed Ms *Smart* submitted the CPA did not apply to B2 because the definitions of 'transaction', 'service' and 'consideration' in the CPA precluded it. Mr *Macintosh* for the defendant submitted that B2 failed to comply with both the common law and the CPA.

[44] In so far as my findings that B2 and the plaintiff's claim that the deceased had to insure the Discovery or return it within 72 hours are invalid under the common law are unsustainable, they must still be tested against the CPA. It is no bar to a court raising *mero motu* questions about the application of the CPA or any other matter that it is in the interest of justice to do. Whenever a judge sees an issue that has escaped the attention of the parties but which could influence the decision, the practice is to afford the parties an opportunity to respond to the new issue. If the issue raised turns out to be irrelevant that would be the end of the matter.

[45] If the CPA applies to B2, s 4(2) of the Act behoves the court to develop the common law as necessary to improve the realisation and enjoyment of consumer rights generally and in particular for poor, isolated and vulnerable people,⁴⁴ in order

⁴⁴ S 4(2)(a) read with 3(1)(b) of the CPA.

to redress for and prevent the impact of discrimination. Discrimination and socio-economic rights, of which consumer rights are a part, are constitutional matters. So too is compliance with international obligations⁴⁵ and regard for foreign and international law when interpreting the Bill of Rights.⁴⁶ The CPA seeks 'to give effect to internationally recognised customer rights and 'to the international law obligations of the Republic.'⁴⁷ Furthermore the court and parties 'may consider appropriate foreign and international law' and 'international conventions, declarations or protocols relating to consumer protection' when interpreting the CPA.⁴⁸ High Courts have inherent power and the duty 'to develop the common law, taking into account the interests of justice.'⁴⁹ Furthermore, in constitutional matters the High Court may make any order that is just and equitable.⁵⁰ Given these wide powers it would be remiss of a court not to exercise them most carefully and only after inviting participation of the litigants.

[46] Notwithstanding the existence of the CPA since 24 April 2009, little jurisprudence has developed especially to define the scope of its application, an observation echoed in *MFC (a division of Nedbank Ltd) v Botha*.⁵¹ Given the uncertainty of its application to B2 the court was duty bound to raise this question with the parties who were given sufficient time to prepare. In the circumstances the submissions on the CPA were properly elicited and received. The next issue to determine is the scheme of the CPA⁵² and its possible relevance to B2.

[47] The CPA is social legislation aimed at protecting vulnerable people. By its very name it seeks to protect consumers. The CPA would not have been necessary if consumers did not need protection. The preamble to the CPA begins by recognising the burden of 'unacceptably high levels of poverty, illiteracy and other forms of social and economic inequality.' It accepts the need to innovate to fulfil 'the rights of historically disadvantaged persons and to promote their full participation as

⁴⁵ S 231-4 of the Constitution of the Republic of South Africa, 1996.

⁴⁶ S 39 of the Constitution.

⁴⁷ Preamble to CPA.

⁴⁸ S 2(2)(a) and (b) of the CPA.

⁴⁹ S 173 of the Constitution.

⁵⁰ S 172(1)(b) of the Constitution.

⁵¹ *MFC (A division of Nedbank Ltd) v Botha* (6981/13) [2013] ZAWCHC 107 (15 August 2013) para 10.

⁵² For an overview see Elizabeth de Stadler 'Consumer Law Unlocked' <https://books.google.co.za/books>.

consumers; protect the interests of all consumers, ensure accessible, transparent and efficient redress for consumers who are subjected to abuse or exploitation in the marketplace; and to give effect to internationally recognised customer rights.’ It commits to promoting ‘an economic environment that supports and strengthens a culture of consumer rights and responsibilities, business innovation and enhanced performance.’ The CPA seeks to achieve these aims and aspirations by promoting and protecting the economic interests of consumers, improving access to the quality of information to enable them to make informed choices, to protect their wellbeing and safety, and to develop effective means of redress for them.⁵³

[48] Emphasising the social policy aims of the CPA,⁵⁴ s 3 includes ‘promoting fair business practices’, protecting consumers from ‘unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices’ and ‘deceptive, misleading, unfair or fraudulent conduct’.⁵⁵ Within an over-arching legal framework aimed at achieving and maintaining a ‘fair, accessible, efficient, sustainable and responsible’ consumer market ‘for the benefit of consumers generally’,⁵⁶ the CPA targets consumers especially from low income, isolated communities, and vulnerable persons including those who struggle to read and understand agreements and other materials.⁵⁷

[49] For its part the court must not only promote the spirit and purpose of the CPA but also ‘make appropriate orders to give practical effect to the consumer’s right of access to redress’.⁵⁸ An appropriate order is not limited to ‘any order provided for’ in the CPA but also ‘any innovative order that better advances, protects, promotes and assures the realisation by consumers of their rights’ in terms of the CPA.⁵⁹ However, an innovative order ‘must be made within the constraints of the legislation and cannot afford consumers more rights than those specifically provided to them’ for example by extending a time-bar clause in an agreement.⁶⁰

[50] As for the interpretation of the CPA, if any provision in the CPA can

⁵³ Preamble to the CPA.

⁵⁴ See *Standard Bank of South Africa Ltd v Dlamini* 2013 (1) SA 219 (KZD) paraS 77-78.

⁵⁵ S 3(1)(c) and (d) of the CPA.

⁵⁶ S 3(1)(a) of the CPA.

⁵⁷ S 3(1)(b) of the CPA.

⁵⁸ S 4(2)(b) of the CPA.

⁵⁹ S 4(2)(b) (ii)(bb) of the CPA

⁶⁰ *Vousvoukis v Queen Ace CC trading as Ace Motors* [2016] JOL 35677 (ECG) para 110.

reasonably give rise to more than one meaning the court ‘must prefer the meaning that best promotes the spirit and purposes’ of the CPA and one that ‘will best improve the realisation and enjoyment of consumer rights generally, and in particular by persons contemplated in s 3(1)(b)’, that is those who are poor, isolated and vulnerable. If an inconsistency arises between provisions of the CPA (excluding Chapter 5) and any other statute (excluding Public Finance Management Act, 1999, or the Public Service Act, 1994) the provisions of both Acts apply concurrently, to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second. If this is not possible, then ‘the provision that extends the greater protection to a consumer prevails over the alternative provision’.⁶¹ Significantly nothing precludes a consumer from exercising any rights afforded in terms of the common law.⁶²

[51] Against this backdrop of aims, aspirations, policies and protections I turn to consider the submission for the plaintiff that the CPA does not apply to B2. The plaintiff contends that the provision of a courtesy car is not a transaction because no consideration was given or received. It also disputed that the deceased was a ‘consumer’ as defined. Section 5 of the CPA must be the starting point of my analysis followed by the relevant definitions in s 1.

[52] Relevant sub-sections of s 5(1) provide that the CPA applies to:

‘(c) goods or services that are supplied or performed in terms of a transaction to which this Act applies, . . .

(d) goods that are supplied in terms of a transaction that is exempt from the application of this Act, but only to the extent provided for in subsection (5).’

Those parts of the definition of ‘consumer’ relevant to my analysis include:

‘(a) a person to whom those particular goods or services are marketed in the ordinary course of the supplier’s business;

(b) a person who has entered into a transaction with a supplier in the ordinary course of the supplier’s business, unless the transaction is exempt from the application of this Act. . . .’

⁶¹ S 2(9) of the CPA.

⁶² S 2(10) of the CPA.

[53] Although the deceased's signature appears above the word 'consumer' in B2 it does not necessarily follow that he falls within the statutory definition. He would if B2 is a transaction.

[54] What then is a 'transaction'? It means:

'(a) in respect of a person acting in the ordinary course of business—

(i) an agreement between or among that person and one or more other persons for the supply or potential supply of any goods or services in exchange for consideration; or. . .

(iii) the performance by, or at the direction of, that person of any services for or at the direction of a consumer for consideration.'

[55] B2 is purportedly an agreement between two persons for the supply of a courtesy car. Is that a supply of goods or services? Was it in exchange for consideration? To deconstruct 'transaction' further at least five more words must be defined.

'[S]upply' when used as a verb:

'(b) in relation to services, means to sell the services, or to perform or cause them to be performed or provided, or to grant access to any premises, event, activity or facility in the ordinary course of business for consideration.'

'[G]oods' includes –

(b) any tangible object. . . .'

'[S]ervice' includes, but is not limited to—

(a) any work or undertaking performed by one person for the direct or indirect benefit of another;

...

(d) the transportation of an individual or any goods;

(e) the provision of—

...

(v) access to or use of. . .property in terms of a rental.'

'[R]ental' means:

‘an agreement for consideration in the ordinary course of business, in terms of which temporary possession of . . . property is delivered. . . to the consumer, or the right to use. . . property is granted. . . but does not include a lease within the meaning of the National Credit Act.’

‘[C]onsideration’ is defined broadly to mean:

‘anything of value given and accepted in exchange for goods or services, including—

- (a) money, property, a cheque or other negotiable instrument, a token, a ticket, electronic credit, credit, debit or electronic chip or similar object;
- (b) . . .
- (c) . . .
- (d) any other thing, undertaking, promise, agreement or assurance, irrespective of its apparent or intrinsic value. . . .’

[56] B2 falls within the definitions of ‘supply’, ‘service’ and ‘goods’ because, on the plaintiff’s evidence, B2 obliged the plaintiff to perform a benefit or provide a facility for the deceased. Section (e)(v) of the definition of ‘service’ could also apply if the deceased had access to the Discovery in terms of a rental.

[57] Providing a courtesy car was a supply of goods and services in exchange for a consideration albeit that such consideration was not money payable by the deceased. The ‘consideration’ certainly fell within the breadth of ‘any other thing, undertaking, promise, agreement or assurance’ in sub-sec (d) of that definition.⁶³ Therefore the sub-sections of the definition of ‘transaction’ cited above apply to B2. As the recipient of goods and services and as a person who entered into a transaction in the ordinary course of business, the deceased was a consumer.⁶⁴

⁶³ Contrast *Vousvoulkis v Queen Ace CC trading as Ace Motors* [2016] JOL 35677 (ECG) paras 80 – 81, 102 in which the court held that an agreement for the supply of a second engine free of charge ‘could not constitute a “transaction” as defined in the Act inasmuch as the “supply” of the second engine to plaintiff was not “in exchange for consideration”.’ The learned judge came to this conclusion without referring to the definition of ‘consideration’ in the CPA in particular sub-sec (d) possibly because it would have made no difference to the outcome.

⁶⁴ In contrast in *Bondev Midrand (Pty) Ltd v Ndlangamandal NO* (38331/2015) [2016] ZAGPPHC 939 (11 November 2016) paras 42-44 the Court concluded that a pre-emptive clause in an agreement of sale and for the re-transfer of property if the purchaser failed to develop it were not unfair, unreasonable or unjust, nor was the agreement excessively one-sided and unconscionable in terms of s 40 of the CPA and that the re-transfer of property was not a ‘transaction’.

[58] The CPA applies to every transaction within the Republic unless it is exempted.⁶⁵ One of the exemptions is from the application of the National Credit Act 34 of 2005 (NCA). B2 is not a credit agreement.⁶⁶ Accordingly, I find that B2 is a 'consumer agreement between a supplier and a consumer [that] is in writing,' and that the CPA 'applies irrespective of whether or not the consumer signs the agreement.'⁶⁷

[59] Even if it is inferred that the deceased had by his signature consented to its contents, B2 still had to comply with the CPA. The threshold to qualify for protection is a mere 'arrangement or understanding' because the CPA protects consumers who are party to 'agreements' and 'consumer agreements' defined as follows:

An '[A]greement' means:

'an arrangement or understanding between or among two or more parties that purports to establish a relationship in law between or among them.'

A 'consumer agreement' means:

'an agreement between a supplier and a consumer other than a franchise agreement.'

[60] The CPA directs that it must be interpreted in the manner that gives effect to its purpose and policy in s 3 summarised above.⁶⁸ Section 4 prescribes additional directives to realise consumer rights. Specifically for the interpretation of standard form contracts sub-sec (4) provides:

'To the extent consistent with advancing the purposes and policies of this Act, the Tribunal or court must interpret any standard form, contract or other document prepared or published by or on behalf of a supplier, or required by this Act to be produced by a supplier, to the benefit of the consumer—

(a)...

(b) so that any restriction, limitation, exclusion or deprivation of a consumer's legal rights set out in such a document or notice is limited to the extent that a

⁶⁵ S 5(a) of the CPA.

⁶⁶ For commentary on the interface between the CPA and the see Elizabeth de Stadler 'Consumer Law Unlocked' <https://books.google.co.za/books>. 14-15.

⁶⁷ S 50(2)(a) of the CPA.

⁶⁸ S 2 of the CPA.

reasonable person would ordinarily contemplate or expect, having regard to—

- (i) the content of the document;
- (ii) the manner and form in which the document was prepared and presented; and
- (iii) the circumstances of the transaction or agreement.’

[61] The right at stake in B2 is the right to information in plain and understandable language provided in s 22 of the CPA. B2 is not ‘in plain language’ because Mr Murton was unable to decipher, understand and explain its contents, despite it being his job to do so. Consequently,

‘it is reasonable to conclude that an ordinary consumer of the class of persons for whom [B2] is intended, with average literacy skills and minimal experience as a consumer of the relevant goods or services, could [not] be expected to understand the content, significance and import [of B2]...

without undue effort, having regard to—

- a. the context, comprehensiveness and consistency of [B2];
- b. the organisation, form and style of [B2];
- c. the vocabulary, usage and sentence structure of [B2]; and
- d. the [lack of] use of any illustrations, examples, headings or other aids to reading and understanding.’⁶⁹

[62] In terms of s 22(1)(b) the plaintiff as the ‘producer’ of B2 was required to comply with the requirement that it be ‘in plain language, if no form has been prescribed.’⁷⁰ B2 fails to meet the definition of ‘clearly’ in that the quality of its text does not satisfy the requirements of s 22. It follows that when the plaintiff failed to ‘satisfy the requirements of section 22’ it also failed to provide the deceased with an agreement in terms of s 50(2)(b)(i).’

[63] Consequently B2 itself deprives a consumer of his legal rights in s 22. Accordingly s 4(4) requires B2 to be so interpreted and applied as to limit such

⁶⁹ S 22(2) of the CPA.

⁷⁰ Enquiries reveal that the Commission has not published the guidelines anticipated as follows in S22:

(3) The Commission may publish guidelines for methods of assessing whether a notice, document or visual representation satisfies the requirements of subsection (1)(b).

(4) Guidelines published in terms of subsection (3) may be published for public comment.’

deprivation reasonably. However, the nature of the deprivation is unlawful and defies the purpose and policy of the CPA in breach of s 4(5) below. The only way to limit B2 is to reject it altogether, as I now do.

[64] Other rights that fall to be scrutinised through the prism of s 4(4)(a) are the right to fair, just and reasonable terms and conditions to be found in ss 48 to 52 and the protection against unconscionable conduct in s 40. Section 4(4)(a) provides that a court must interpret a standard form agreement:

‘so that any ambiguity that allows for more than one reasonable interpretation of a part of such a document is resolved to the benefit of the consumer.’

Section 4(5) provides:

‘In any dealings with a consumer in the ordinary course of business, a person must not—

- (a) engage in any conduct contrary to, or calculated to frustrate or defeat the purposes and policy of, this Act;
- (b) engage in any conduct that is unconscionable, misleading or deceptive, or that is reasonably likely to mislead or deceive; or
- (c) make any representation about a supplier or any goods or services, or a related matter, unless the person has reasonable grounds for believing that the representation is true.’

[65] As stated above deciphering B2 in order to interpret its contents and assess whether it complies with the CPA is possible only at great costs and inconvenience to its readers. The most important condition relating to the ODI and return of the Discovery upon which the plaintiff relied is not in B2. Furthermore, B2 was incomplete without an ‘overleaf’. The other party to it was misrepresented to be a close corporation, the import of which became significant in this litigation in determining standing. Non-disclosure of the insurance arrangements pertaining to the Discovery was material. Cumulatively, these factors attract a finding that the any agreement, arrangement or understanding of or arising from B2 violated s 4(5)(a) and (b); consequently an interpretation of that favours the deceased applies in terms of s 4(4)(a).

[66] Regarding the unconscionable conduct in s 4(5)(b), the plaintiff relied on B2 to claim that the deceased had an obligation to insure the Discovery after 72 hours or to return it before that period expired. Claiming that such obligations existed when they were not included in B2 and the deceased is not able to accept or refute such a claim and then enforcing them when the deceased was physically unable⁷¹ to fulfil them are unfair, unreasonable and unjust as expatiated as follows in s 48(2):

1. They are excessively one-sided in favour of persons other than the deceased.
2. The terms of the transaction or agreement are so adverse to the deceased as to be inequitable.
3. The transaction or agreement was subject to a term or condition unconscionable.

[67] Therefore they are inconsistent with the prohibition in s 48(1) against entering into or administering a transaction for the supply of the Discovery in a manner that was unfair, unreasonable or unjust; by requiring the deceased to assume obligations on such terms; and by imposing them as a condition of entering into the transaction. By definition such conduct amounts to unconscionable conduct prohibited in s 40(1) because:

1. it is 'unfair tactics or any other similar conduct, in connection with any—
 - (a) ...
 - (b) supply of goods or services to a consumer;
 - (c) negotiation, conclusion, execution or enforcement of an agreement to supply any goods or services to a consumer;
 - (d) demand for, or collection of, payment for goods or services by a consumer; or
 - (e) recovery of goods from a consumer.'
2. the conduct meets the definition of 'unconscionable', which means not only conduct characterised in s 40 but also conduct that is:

⁷¹ I have considered s 40(2) but conclude in passing that *prima facie* it applies to a disability to understand an agreement and not to a disability resulting in impossibility of performance.

‘(b) otherwise unethical or improper to a degree that would shock the conscience of a reasonable person.’⁷²

Remedies

[68] Section 52 of the CPA gives the court wide powers to ensure fair and just conduct if it finds that a transaction is ‘unconscionable, unjust, unreasonable or unfair.’ These powers would include making appropriate cost orders.

[69] The plaintiff’s failure to establish its standing, its non-disclosure of relevant facts, especially as the deceased was not available to testify, its amendment of the agreement in an attempt to cure defects in its version, its persistence in this claim especially after the evidence was concluded, its reliance on an agreement that conflicts with specific provisions of the CPA and could attract a punitive order for costs. Section 52(3) authorises:

‘. . .[an] order the court considers just and reasonable in the circumstances, including, but not limited to, an order—

(i) . . .

(ii) to compensate the consumer for losses or expenses relating to—

(aa) . . .

(bb) the proceedings of the court. . . .’

However, the defendant did not ask for a special order for costs and the plaintiff has not had an opportunity to address the court in this regard.

Order

[70] The claim is dismissed with costs.

D. Pillay

⁷² For a discussion on the interpretation and application of ‘unconscionable’ and ‘unconscionable conduct’ see G Glover ‘Section 40 of the CPA’ *TSAR* 689.

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