IN THE HIGH COURT OF SOUTH AFRICA, DURBAN
REPUBLIC OF SOUTH AFRICA

Case no.: 2877/2011

In the matter between

STANDARD BANK OF SOUTH AFRICA LIMITED **Applicant**

and

MBUYISENI DLAMINI **Defendant**

JUDGEMENT

Heard August 2012
Handed down:23 October 2012

D. PILLAY J

[1] Mbuyiseni Dlamini bought a 2004 Toyota Corolla 160i GLE on credit from Standard Bank for R85 745.02 on 3 June 2010. Starlight Auto Sales, a second hand car dealership in Pinetown, acted as the Bank's agents to facilitate the Bank's financing of the purchase of the vehicle. Four days later he had it towed back to the dealership. He informed the salesman, Sibusiso Mthetwa, that the vehicle malfunctioned and that he did not want it or any other vehicle from that dealership. He demanded a refund of his deposit. When he did not get his refund he approached Scorpion Legal Protection (Pty) Ltd for legal assistance.

[2] On 5 October 2010 Scorpion despatched a letter to the dealership demanding the refund of the deposit of R15 000 and cancellation of the agreement. On 21 October 2010 the Bank's attorneys sent a notice in terms of s 129 of the National Credit Act 34 of 2005 (the NCA) addressed to Mr Dlamini but to an incorrect address demanding payment in terms of the credit agreement. On 3 March 2011 the Bank had summons issued for judgment to be entered against Mr Dlamini confirming the termination of the agreement, ordering the return of the vehicle, costs of suit and the costs of locating, removing, storing and disposing of the vehicle.

[3] In support of its claims, the Bank relied on clause 10.6 in its credit agreement which provided that if the agreement was not entered into at the

Bank's registered business premises, Mr Dlamini could, within five business days after signing the agreement, terminate it on notice to the Bank's vehicle and asset finance division head office at fax number 011 6313168, and return or tender the return of the vehicle. If he terminated the agreement in this way he was obliged to pay the rental for the use of the vehicle for the time that he had it and any reasonable costs the Bank might incur to have the vehicle returned or restored to a saleable condition. What the agreement did not record was that he was also entitled to a refund in terms s 121(3)(a) of the NCA.

[4] In short, the Bank relied on s 121 the NCA read with reg 37 of the National Credit Regulations, GN R713, *GG* 28893, 31 May 2006 (the NCR). Because Mr Dlamini did not notify the Bank of the termination in the manner prescribed by clause 10.6 of the agreement and reg 37, the Bank contended that the termination was a voluntary surrender contemplated in s 127(5) to (9) of the NCA.

[5] Clause 10.3 which provides for termination by voluntary surrender, entitles the Bank to sell the vehicle, account to Mr Dlamini and claim any shortfall due by him under the agreement. In the circumstances, finding the basis for the termination is important to determine the consequences and remedies each party has on termination.

[6] In his defence, Mr Dlamini denied that he surrendered the vehicle. He alleged that he returned it because it broke down. On driving it from the dealership he had noticed that it was jerking and smoking. He consulted his cousin, a mechanic who testified in corroboration. After they test drove it for about two kilometres they diagnosed that it would not last for more than 30 kilometres. They discovered that the vehicle was rebuilt following an accident. As predicted, it broke down and they had it towed back to the dealership.

[7] In his answering affidavit to the summary judgment application Mr Dlamini elaborated on his defence that he was unaware that he had to notify the Bank of the termination of the agreement in the prescribed manner. He alleged that it was

only Sibusiso Mthetwa who attended to him at the dealership at all times. Mr Mthetwa created the impression that he worked for both Starlight and the Bank when he assisted Mr Dlamini to complete the paperwork to arrange the loan from the Bank. Mr Dlamini denied that Mr Mthetwa or anyone else had explained the terms of the agreement to him. If he had known that he had to telefax notice to the Bank at the number provided in the agreement informing it that he terminated the agreement and tendered the return of the vehicle he would have complied.

[8] As it was common cause that Mr Dlamini did not notify the Bank of the termination of the agreement by fax as prescribed in the agreement, the only issue in dispute on the facts was: did Mr Dlamini know and understand the terms of the agreement?

[9] On the facts, the only material witnesses for the Bank were the persons from the dealership who interacted with Mr Dlamini when he bought and returned the vehicle. Mr Dlamini persisted that it was Mr Mthetwa who attended to him on both occasions. However, the Bank first called Nomuso Eugenia Ndlela, an employee in its legal department, to testify about how credit agreements were usually concluded at motor dealerships, the importance of receiving notice of termination in the prescribed way, how the vehicle had been repossessed from Starlight in September and that it has yet to be resold.

[10] Strangely, although the Bank authorised its agent at the dealership to forward applications for credit, explain the terms to consumers and attend on signing credit agreements, it did not authorise its agents to receive vehicles on its behalf when agreements were terminated. Nor did it expect its agents to notify it of the termination. As Ms Ndlela surmised, this must have been so for the convenience of not the consumer, but of the Bank.

[11] Much of Ms Ndlela's evidence was unnecessary as Mr Dlamini admitted his signature to the agreement and did not dispute that the agreement was what it purported to be. The interpretation of the termination clause and its materiality were also not disputed. Ms Ndlela's evidence could easily have been curtailed, if not dispensed with altogether, if the parties had defined the issues in dispute

precisely at their pre-trial conference.

[12] At the end of Ms Ndlela's evidence the Bank signalled its intention to call Ms N. Marimutho whose signature appeared on the agreement on behalf of the Bank. Mr Dlamini vehemently denied having any dealings with Ms Marimutho at all.

[13] On resumption, the Bank abandoned Ms Marimutho as its witness and called Mr Mthetwa instead. The gist of Mr Mthetwa's evidence was that he was the salesman who sold the vehicle to Mr Dlamini. He informed Mr Dlamini that the dealership could arrange finance from one of several institutions including Standard Bank. He took Mr Dlamini to Ms Marimutho and left him with her to complete the application for finance. The only conversation he heard between them was Ms Marimutho asking Mr Dlamini in English whether he was Mr Dlamini. They were together for 25 minutes. He alleged that it was neither his function to explain the agreement to Mr Dlamini nor to complete the forms for applying for credit and concluding the credit agreement. Besides, Mr Dlamini had not brought a copy of the contract with him when he returned the motor vehicle.

[14] Mr Mthetwa studiously avoided accepting any responsibility for interpreting and explaining the terms of the agreement to Mr Dlamini. Even if Mr Dlamini did not bring the agreement, it was a standard credit agreement. Mr Mthethwa had earlier testified that Starlight was an agent for several banks including Standard Bank. The probabilities of Starlight not having a standard term credit agreement for Standard Bank are remote. It should at least have had its own copy as a record of the transaction for which it received R15 000 as deposit but reflected only R13 000 in the agreement.

[15] There is no evidence that Ms Marimutho spoke IsiZulu. Considering that Mr Mthetwa was the salesman and the person who spoke IsiZulu at Starlight the probabilities favour Mr Dlamini's version that only Mr Mthetwa communicated with him.

[16] Mr Mthetwa confirmed that Mr Dlamini had towed the vehicle back to the

dealership. Mr Dlamini was angry and informed him that he did not want that or any other vehicle that Starlight offered him. Mr Mthetwa surmised that Mr Dlamini might change his mind in due course. However, he conceded that nothing from what Mr Dlamini said or did suggested that Mr Dlamini might change his mind and return to the dealership.

[17] The vehicle was repaired by the in-house mechanic employed by the dealership. This was usually done for all defective vehicles in the dealership. Authority from the Bank as the owner was not specifically sought to repair the vehicle.

[18] Unsurprisingly, Mr Mthetwa denied that Mr Dlamini demanded the return of his deposit of R15 000. To admit the demand Mr Mthetwa would have had to explain why Starlight or the Bank had not refunded the deposit. As the salesman, Mr Mthetwa earned commission income only. The termination of the agreement meant that he and Starlight would lose their commission.

[19] In response to questions from the court, Mr Mthetwa testified for the first time that when Mr Dlamini returned the vehicle he took Mr Dlamini aside and informed him that he should notify the Bank of the termination of the agreement and that if he could not see what was in the agreement then he should get his child to read it for him. This was vital evidence that he should have given in chief. The Bank knew that Mr Dlamini’s defence was that he was not aware that he had to notify it in any prescribed manner. If Mr Mthetwa was being truthful about advising Mr Dlamini as he alleged, he would have given this evidence in chief. Coming as it did in response to questions from the court, it is an afterthought and contrived.

[20] However, not all of Mr Mthetwa’s evidence about advising Mr Dlamini is false. He acknowledges that Mr Dlamini could neither read nor see the terms of the agreement.

[21] The Bank’s designated agent, Ms Marimuthu, the only person authorised to enter into the contract with Mr Dlamini, failed to testify. At the end of the

Bank's case there was no evidence that anyone explained the terms of the agreement to Mr Dlamini. More specifically, no one informed him on signing the agreement and especially when he terminated it, that he had to notify the Bank by telefax. No one established whether Mr Dlamini knew what it means to fax.

[22] According to Mr Dlamini all he was told about the Standard Bank documentation was that it was about the sale of the vehicle and that he would be required to pay an instalment with effect from the 1st of July 2010. His answering affidavit to the application for summary judgment is vague about the documents he signed. He understood that they were necessary to enable him to get the money to purchase the vehicle and that he was required to pay instalments. That was the information that was imparted and understood by Mr Dlamini at the point of the sale.

[23] Mr Dlamini is functionally illiterate and does not understand English. This is as obvious to me as it was to Mr Mthetwa. Mr Dlamini completed schooling at standard one. At 52 years, he is an unsophisticated African male. He had difficulty in the witness stand engaging with the documents. He had become so excited about the purchase of a vehicle that he paid little attention to the repayment plan. He relied on the Bank to deduct reasonable instalments. He did not expect the Bank to deduct a high amount that left him without the means to support himself, his wife and his two little children. He expected to discover what the amount of those instalments would be when the Bank deducted its first instalment from his account. He trusted his bank. On discovering that he bought a defective vehicle he returned it intuitively to the person who sold it to him.

[24] Initially when he testified, Mr Dlamini tended to deny almost everything that was put to him, including facts that were common cause or the basis of his defence. I warned him that it did not assist him to deny facts that he knew to be true and that I could find him to be evasive. Thereafter, he made a conscious effort to give a considered response to questions put to him. His illiteracy, lack of sophistication and general discomfort at being in a courtroom rather than deliberate mendacity caused him to lapse into the easy option of simply denying everything.

[25] On these facts I find firstly that Mr Dlamini terminated the agreement by returning the vehicle because it was so defective that it could not be driven. A voluntary surrender is usually triggered by a consumer's inability to comply with the credit agreement. Not a whiff of evidence suggested that Mr Dlamini was unable to pay for the vehicle or that he returned it for any reason other than it being incapable of being driven The Bank failed to establish a factual basis for any finding that the termination was a voluntary surrender. Mr Dlamini's mere non-compliance with the procedural formality of faxing notice of termination does not lead to the inference that he terminated the agreement by voluntarily surrendering the vehicle.

[26] Secondly, the Bank and its agents caused Mr Dlamini to enter into a credit agreement without reading, interpreting and explaining the material terms to him which he did not know and understand. Could he nevertheless in law be held to have assented to the agreement by virtue of his signature?

[27] Turning to the law, the Bank relied on the common law principles of quasi-mutual consent and *caveat subscriptor* and the cases in which these principles were invoked.[1] However, when the NCA applies, the constitutional right to equality comes to my mind immediately. The Preamble to the Constitution and to the NCA connect them. What then is the interface between the Constitution, NCA and the common law principles of *caveat subscriptor* and *quasi* mutual consent?

[28] In its Preamble the Constitution recognises the injustices of our past. It commits to healing the divisions of the past, establishing a society based on democratic values, social justice and fundamental human rights, and to improve the quality of life of all citizens. The founding values of the Constitution include human dignity, achieving equality, advancing human rights and non-racialism.[2] The right to equality declares everyone equal before the law and has the right to

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1 *Brink v Humphries & Jewell (Pty) Ltd* 2005(2) SA 419 (SCA); *George v Fairmead (*Pty) Ltd 1958(2) SA 465 (A) at 471*; National and Overseas Distributors Corp (Pty) Ltd v Potato Board* 1958(2) SA 473 (A) at 479; *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis* 1992(3) SA 234 (A) at 239I – 240B; *Hartley v Pyramid Freight (Pty) Ltd t/a Sun Couriers* 2007(2) SA 599 (SCA).

2 Section 1 of the Constitution of the Republic of South Africa, 1996..

equal protection and benefit of the law.[3] Discrimination whether direct or indirect on a listed or proven ground is prohibited.

[29] Academics Fredman *et al* observe:

> 'In many countries, equality legislation initially sought to free individuals from the negative effects of these group characteristics, believing that in a colour-blind and gender-neutral world individuals could thrive and develop their potential free from stereotypical assumptions. But this view of equality was narrowly circumscribed. It was a relative principle dependent upon identifying an appropriate comparator. It also operated symmetrically so that the benefits provided to a disadvantaged group could be challenged as a violation of the principle of equality. Moreover, it assumed that the only legitimate role of state action was negative, to stop discrimination, rather than requiring positive steps and measures to be taken to remedy disadvantage. The failure of this formal view of equality to address deeply entrenched and complex patterns of group disadvantage led to sustained criticism by feminist and other writers, and to calls for formal equality to be replaced with substantive equality. Substantive equality, unlike formal equality, requires attention to context, the intersection of different grounds of disadvantage, difference, and positive obligations upon the state.[4]

[30] Our Constitutional Court (CC) has repeatedly endorsed the substantive approach to equality.[5] Likewise, national legislation contemplated in the equality clause aimed at preventing or prohibiting unfair discrimination[6] must also be interpreted in ways that achieve substantive effect. Therefore achieving equality, non-discrimination and human rights through legislation are policy objectives flowing from the Constitution itself.

3 Section 9(1) of the Constitution.
4 Catherine Albertyn, Sandra Fredman, Judy Fudge 'Introduction: Substantive equality, social rights and women: A comparative perspective' (2007) 23 *SAJHR* 209 p 209.
5 For example *Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (CC) para 146; *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) para 62.
6 Section 9(2) of the Constitution.

[31] One category of legislation promulgated includes the obvious examples of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 and the Employment Equity Act 55 of 1998. These Acts target specific groups of people discriminated on recognised grounds of discrimination. As the learned authors Fredman and others point out, substantive equality looks beyond the recognised grounds to context and positive obligations. Accordingly, the legislature did not stop with this category in pursuit of its transformative agenda.

[32] Another category of legislation includes the NCA, the Consumer Protection Act 68 of 2008 (CPA) and even the Companies Act 71 of 2008 (the CA) which 'promote(s) compliance with the Bill of Rights…in the application of company law.'[7] Socio-economic status and illiteracy are not listed grounds of discrimination. Discrimination on these grounds is often indirect and therefore harder to diagnose and prove. Hence the NCA and CPA are but two statutes on a raft of national legislation aimed specifically at consumers to reverse historical socio-economic inequalities and adjust the imbalances.

[33] The preamble of the NCA begins:

> 'To 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; to promote black economic empowerment and ownership within the consumer credit industry; to prohibit certain unfair credit and credit-marketing practices; ….to regulate credit information; … to establish national norms and standards relating to consumer credit; …'

[34] Section 3 elaborates that the purposes of the NCA are to promote and advance the social and economic welfare of South Africans, to promote a fair transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers by, amongst other things, promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers.[8] Importantly, its

7 Section 7(a) of the Companies Act 71 of 2008.
8 Section 3(d) of the NCA.

purpose is also to address and correct:

> '. . . imbalances in the negotiating power between consumers and credit providers by -
>
> i) providing consumers with education about credit and consumer rights;
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> ii) providing consumers with adequate disclosure of standardised information to enable them to make informed choices; and
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> iii) providing consumers with protection from deception and from unfair or fraudulent conduct by credit providers and credit bureaux[9].'

[35] Section 2 of the NCA requires the Act to be interpreted in a manner that gives effect to the purposes of s 3. Section 2(6) acknowledges that a person is historically disadvantaged if that person is one of a category of natural persons who, before the Interim Constitution of the Republic of South Africa, 1993 came into operation, were disadvantaged by unfair discrimination on the basis of race.

[36] Section 121 applies to an instalment agreement entered into at any place other than the registered business premises of the credit provider. Furthermore, the section gives a consumer the right to terminate the credit agreement within five business days after the date on which it was signed by the consumer, by firstly, delivering a notice in the prescribed manner to the credit provider; and secondly, tendering to return any money or goods, or paying in full for any services received by the consumer.

[37] When a credit agreement is terminated in terms of s 121, the rights of the credit provider and consumer are balanced by subsecs (3)(a) and (b) as follows:

> '. . . the credit provider -
>
> '(a) must refund any money the consumer has paid under the agreement within seven business days after the delivery of the notice to terminate; and
>
> (b) may require payment from the consumer for—
>
> i) the reasonable cost of having any goods returned to the credit

9 Section 3(e) of the NCA.

provider and restored to saleable condition; and

ii) a reasonable rent for the use of those goods for the time that the goods were in the consumer's possession,….'

[38] Clause 10.6 of the agreement paraphrases s 121(1), (2) and (3)(b) of the NCA but studiously excludes any reference to subsec (3)(a) which gives the consumer the right to a refund from the credit provider. Subsection (3)(b) clearly favours the Bank; the consumer has to pay the Bank. Subsection (3)(a) which favours the consumer because the Bank must to pay the consumer is omitted.

[39] Rescission of an agreement referred to in the heading of s 121 of the NCA and termination of an agreement at the instance of the consumer under s 122 of the NCA have distinctly different causes and consequences. Rescission aims to restore the contracting parties to the status ante quo. In other words the agreement is revoked or withdrawn. Termination retains and enforces the agreement. The remedy to which Mr Dlamini was entitled when he discovered that the Bank's agent sold him a vehicle that could not be driven at all was a refund in terms of subsec (3)(a).

[40] Despite the agreement being silent about rescission and a refund the Bank does not deny that Mr Dlamini has a right arising from the NCA to rescind the agreement. Clause 8 of form 20.2 which reg 30 of the NCR prescribes for small agreements, is headed 'Consumer's right to rescind the agreement (*if applicable*)'.The Bank does not deny that it is applicable. However, the Bank contends that he may only invoke the right to rescind after he delivered a notice to rescind in terms of reg 37 of the NCR. If such notice was important to the Bank then it should have included it in the agreement as a material procedural step not only to surrender but also to claim a refund. It should also have ensured that Mr Dlamini was aware of it.

[41] Non-disclosure of s 121(3)(a) violates the right of consumers to education and information in terms of s 3. The Bank's selection of what parts of s 121 of the NCA it should record in the agreement and what it should exclude is deliberate

and deceptive. The heading of s 121 highlights its purpose as the 'Consumer's right to rescind credit agreement'. Instead of informing the consumer of this right, the Bank pitches it as an onerous bundle of obligations on the consumer to pay the Bank the costs of renting and recovering the vehicle. Projecting the consumer's obligations whilst understating his rights discourages rescission which is the consumer's statutory right.

[42] Disclosure of only subsec (3)(b) creates the impression that consumers have no choice but to pay the Bank even when the Bank sells them defective vehicles. Such non-disclosure and selective disclosure is designed to deceive consumers. Such deception conflicts with the letter and spirit of the NCA. Above all, it reinforces the patterns of inequality and inequity that persist in South Africa.

[43] The Bank could not have misunderstood Mr Dlamini's reasons for returning the defective vehicle. Any doubt it had should have dissipated once it knew that it could not gainsay the fact that Starlight sold Mr Dlamini a seriously defective vehicle.

[44] The Bank gave Starlight no mandate to report vehicles that were returned within five days in terms of the termination clause 10.6. Such a business practice makes credit transactions unduly onerous and a veritable trap for poor, illiterate and disadvantaged people who intuitively would return defective goods to a supplier and ask for a refund.

[45] Given the importance of the notice to the Bank of the basis of the termination, the Bank should have mandated its agent to assist consumers like Mr Dlamini to fax the notices. Even if the Bank and its agents provided this service at a fee it would have been far cheaper than litigating to determine the basis of the termination. Imposing such a duty on the agents would also acknowledge the potential conflict of interest between an agent that sells defective vehicles and the consumer. Although the legal obligation to notify the Bank rested on Mr Dlamini, the Bank cannot absolve Starlight of its duty to act in good faith to notify the Bank in the ordinary course of commercial practice. The Bank should hold its agent accountable for not reporting immediately that the

vehicle was towed back and that it could not be driven.

[46] Another two consumer rights are important in the context of this case. The first is the consumer's right to information in an official language in terms of s 63 of the NCA. Section 63(1) gives consumers a right to receive any document that is required in terms of the NCA in an official language that the consumer reads or understands, to the extent that is reasonable having regard to usage, practicality, expense, regional circumstances and the needs and preferences of the population ordinarily served by the person required to deliver that document.

[47] The second is the right to information in plain and understandable language in terms of s 64 of the NCA. Subsection (1)(b) requires the producer of a document that is required to be delivered to a consumer in terms of the NCA to provide that document in the prescribed form, if any, for that document, or in plain language. For the purposes of the NCA, a document is in plain language if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the document is intended, with average literacy skills and minimal credit experience, could be expected to understand the content, significance and import of the document without undue effort, having regard to, the organisation, form and style of the document, and the vocabulary, usage and sentence structure of the text.[10]

[48] Strictly interpreted neither s 63 nor s 64 of the NCA assists an illiterate consumer. Purposively interpreted they embody the right of the consumer to be informed by reasonable means of the material terms of the documents he signs. What is reasonable and material varies depending on the circumstances of each case. Amongst other things, the industry, regional circumstances or geographical location, price, nature of the goods and services and class of consumers likely to contract for them are relevant to determining what are reasonable means and material terms. Purposively interpreted, the credit provider bears the onus to prove that it took reasonable measures to inform the consumer of the material terms of the agreement.

10 Section 64 (2) (b) & (c) of the NCA.

[49] This transaction arose at a second hand car dealership in Pinetown, KwaZulu Natal. IsiZulu is the predominant African language. In the nature of such a business the Bank must anticipate that it will be dealing with historically disadvantaged persons. It enters into contracts in terms of which vehicles are returned for repairs and re-collection, for defects or as voluntary surrender because of the consumer's inability to pay the instalments. Establishing at the earliest opportunity what the basis is for the termination of an agreement is therefore important in the second hand car dealership industry. From the consumer's perspective the circumstances in which he is entitled on termination to a refund, or obliged to pay the Bank, are also important. Accordingly, the Bank should have had better measures in place to ensure that its historically disadvantaged customers are aware of their rights and responsibilities. Pitched as consumer rights, ss 63 and 64 impose the onus on credit providers to inform their consumers of their rights and responsibilities. Relying on agents whose interests as second hand car dealers conflicted with consumers' interests needed better control of the agent to avoid any finding that the Bank was complicit.

[50] Where possible, the Bank should also take reasonable steps to facilitate compliance by consumers with their responsibilities. In this case, the Bank simply had to have Mr Mthetwa interpret the material terms of the agreement when he sold the vehicle to Mr Dlamini or at the latest when Mr Dlamini returned the vehicle.

[51] Regulation 30 of the NCR picks up the themes in ss 63 and 64 of the NCA of consent, clarity and certainty in the form and style of credit agreements. Regulation 30(1) prescribes that:

> 'A document that records a small credit agreement must contain all the information as reflected in Form 20.2.'

The agreement in this case does not disclose that Mr Dlamini had a right to rescind it. Furthermore, reg 30(2) states that:

> 'The information listed in Form 20.2 may be disclosed in the order of

choice of the credit provider.'

I understand this to mean that the consumer may choose the order in which the terms of the agreement are recorded. Presumably this clause is aimed at vesting the consumer with this prerogative so that the credit provider does not conceal important clauses in obscure parts of the agreement. However, if consumers are uninformed of their rights and responsibilities and what agreements should contain, they cannot know how to order the information prescribed in Form 20.2. Furthermore, when the gap in the bargaining relationship between the consumer and the credit provider is huge (as in this case) the consumer may be reticent about exercising this prerogative.

[52] Form 20.2 prescribes the content of a small agreement. Although it merely offers the headings and brief references to particular sections of the NCA, its style and format is designed as a short document spanning over about two pages. In this case the form of the credit agreement presents a two-page A4 size document in size eight font. Part B of the agreement which incorporates the terms and conditions, an acceptance form and an authority to release goods form is seven pages. The terms and conditions span over five pages incorporating 18 main clauses with several sub-clauses. Clause 1 is a list of definitions usually found in complex agreements and legislation.

[53] For lawyers and lay persons alike, the form of the Bank's standard agreement is an unappetising formidable read. For a labourer like Mr Dlamini who did not read, write or understand English there might just as well have been no written agreement at all. Mr Dlamini was in a worse position than the purchaser who signed one page of an agreement but who was sued in terms of a clause appearing on the reverse of that page which had not been sent to him.[11]

[54] A credit agreement is also unlawful if it purports to waive any common law rights that apply to the credit agreement. [12] The above rights and protections for consumers under the NCA develop and ameliorate the potentially harsh

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11 *Home Fires Transvaal CC v Van Wyk and Another* 2002 (2) SA 375 (W) at 381.

12 S 90 (2) (c) (i) of the NCA.

impact on consumers of the common law principles of *caveat subscriptor* and quasi-mutual consent relied on by the Bank. These principles mean that a person who signs a document is taken to have assented to what appears above his signature.[13] The cases show that mutual consent is absent when a party is unaware of the terms of the agreement. A party may be unaware because the agreement contains terms that were not expected or were not disclosed. Or a party may be misled,[14] misinformed[15] or not informed; or the form and getup of the agreement is inaccessible.[16]

[55] In the three appellate decisions to which Mr Broster helpfully referred me, the court found that there was no consent by the signatories because their errors were justifiable. However, the uncertainty of how the common law principles are applied is evident in *Brink v Humphries and Jewell (Pty) Ltd 2005(2) SA 419 (SCA)* and *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis* 1992 (3) SA 234 (A) 240J-241D. In *Brink v Humphries* the minority disagreed with the majority on findings of fact and consequently the inferences to be drawn from them. The minority found that the signatory failed to discharge the onus of showing that his error was justifiable. In *Sonap Petroleum v Pappadogianis* the appellate court disagreed with the findings of fact of the trial court. The trial court was under the impression that the signatory had not read the document presented to him. In contrast, the appeal court unanimously believed that the signatory was misled, that the other party was alive to the real possibility of a mistake and that he had a duty to speak but chose instead to snatch a bargain.[17] The NCA minimises the casuistry, unpredictability and uncertainty of judicial opinion by setting the norms and standards for the communication and form of valid credit agreements.

[56] Nevertheless the common law remains relevant. Case law developed the test for consent to be:

'(D)id the party whose actual intention did not conform to the common

13 *Brink v Humphries & Jewell (Pty) Ltd* 2005(2) SA 419 (SCA) para 1; *George v Fairmead (Pty) L*td 1958(2) SA 465 (A) at 470C-E.
14 *Brink v Humphries & Jewell (Pty) Ltd* 2005(2) SA 419 (SCA) para 11.
15 *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis* 1992 (3) SA 234 (A) 240J-241D.
16 *George v Fairmead (Pty) L*td 1958(2) SA 456 (A) at 470C-E.
17 *Sonap Petroleumv Pappadogianis* 241E – F – 242A-C

> intention expressed, lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention?'[18]

The NCA does not dispense with this test. The norms and standards it prescribes for a valid agreement readjusts and clarifies the rights and responsibilities of the parties, the onus of proof and consequently, the statutory context in which the common law test applies.

[57] Mr Dlamini's defence is not that he did not intend to conclude the agreement but that he did not know that he had to notify the Bank in a prescribed manner of his intention to rescind it. Knowing about this formality would not have stopped him from signing the agreement. Therefore, his failure to comply with a purely procedural obligation was not due to an unwillingness to comply but rather an unawareness of such an obligation.

[58] In *Davids en Andere v ABSA Bank Bpk* 2005 (3) SA 361 (C) (headnote) in which the appellants alleged that they had signed deeds of suretyship in the *bona fide* but mistaken belief that it encapsulated a prior oral agreement limiting the liability of the appellants, the full bench held that a reasonable person in the position of the bank official would have explained the nature and content of the deeds to the appellants so as to ensure that they reflected the appellants' true intention. The bank official failed to do so. Consequently, he could not have been misled into believing that the deeds reflected the appellants' true intention. The court further held that public interest demanded that a complicated document be explained to the signatory especially if signing could result in drastic consequences.

[59] In *Home Fires Transvaal CC v Van Wyk and Another* 2002 (2) SA 375 (W) at 381 a full bench held:

> 'A party will not be held bound by his signature to a contract which he has not read, where the other party knew that he had not done so, was not misled by the signature and only had himself to blame for the other's

18 Supra at 239 I – 240 B

> ignorance of the contents of the document. (See *Van Wyk v Otten* 1963 (1) SA 415 (O) at 418A-419H; *Payne v Minister of Transport* 1995 (4) SA 153 (C) at 159G-160I'

[60] In *Diners Club SA (PTY) Ltd v Thorburn* 1990 (2) SA 870 (C) a full court remarked that:

> 'A signatory can be misled by the form and appearance of the document itself . . .'[19]

Reflecting on problems with exemption clauses Lord Denning remarked in *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* (1983) QB 284 296 – 297, 1983 (1) ALL ER 108 (CA) 113:

> 'They were printed in small print on the back of tickets and order forms and invoices. They were contained in catalogues or timetables. They were held to be binding on any person who took them without objection. No one ever did object. He never read them or knew what was in them. No matter how reasonable they were, he was bound. All this was done in the name of 'freedom of contract'. But the freedom was all on the side of the big concern which had the use of the printing press. . . . Faced with this abuse of power, by the stronger against the weak, by the use of the small print of the conditions, the judges did what they could to put a curb on it.'

[61] Similarly, in *Diners Club SA (Pty) Ltd v Livingstone and Another* 1995 (4) SA 493 (W) at 495-496 the Witwatersrand Local Division observed that the whole get-up of an enrolment form was misleading. A series of conditions were printed in 'incredibly small print, not designed to be read without the aid of magnifying equipment'.[20] The court opined that there was a duty on Diners Club to have drawn to the defendant's attention the provisions of the enrolment form which imposed personal liability on him. Its failure to do so reasonably led to the defendant signing the enrolment form ignorant of incurring personal liability.

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19 At 875B-C.
20 At 495I.

[62] In *Mercurius Motors v Lopez* 2008 (3) SA 572 (SCA) the conditions on which the appellant relied had not been brought to the attention of the respondent. Furthermore, the style and format of the lease agreement on which the cause of action was founded was misleading and framed in small print which was not easily accessible. Having regard to the item lost (a Jeep) and the amount of the claim (R245 000) it seems that the claimant Mr Lopez was educated, literate and economically well off.[21] Nevertheless the Supreme Court of Appeal found that he had been misled by the form of an agreement.

[63] In contrast, *Van Zyl v Kotze* 2007 JOL 19893 (T) differs from the facts of this case. There a full court found that the appellant failed to discharge the onus of proving her defence of common mistake which arose from her own negligence in that she failed to read the contract. Mr Dlamini's situation is distinguishable from that appellant. To begin with, the appellant was a relatively successful business woman who ran guest houses. Furthermore, she had been involved in a number of property transactions over a decade. The respondent in that case was a dentist and former neighbour of the appellant before emigrating. As the agreement related to the payment of occupational interest in a property transaction the appellant was either at an advantage or on par with her opponent as far as literacy and social and economic standing went.

[64] Applying the common law principles of *caveat subscriptor* and mutual consent, the Bank cannot hold Mr Dlamini bound to the agreement. The unpalatable form and get-up of the agreement would have been immaterial to Mr Dlamini because of his illiteracy. That was all the more reason why the Bank should have ensured that its agents explained the material terms to Mr Dlamini. As Mr Dlamini was ignorant of the prescribed notice requirements of the agreement, there was no mutual consent as regards this term. Accordingly, Mr Dlamini's defence succeeds under the NCA and the common law.

[65] The validity of the entire agreement is an issue that neither party addressed. A credit agreement must not contain an unlawful provision.[22] A

21 See also CJ Pretorius 'Exemption clauses and mistake *Mercurius Motors v Lopez* v 2008 (3) SA 572 (SCA)' 2010 (73) THRHR 491–502.
22 Section 90 (1) of the NCA.

provision is unlawful if its effect is to defeat the purposes or policies of the NCA or deceive the consumer[23] or if it directly or indirectly purports to waive or deprive a consumer of a right set out in the NCA or set aside or override the effect of any provision of the NCA.[24]

[66] As stated above the selective disclosure of Mr Dlamini's s 121 rights in terms of the NCA as a consumer to rescind the agreement was deceptive. Furthermore, the breach of his ss 63 and 64 rights in terms of the NCA to be informed of the contents of the agreement and his rights to an agreement that complies in form with reg 30 skewed the agreement in favour of the Bank. Distorting the balance created in the NCA in this way in the agreement is unlawful. It defeats the purpose and policy of the NCA and renders the entire agreement unlawful.

[67] An unlawful provision in any credit agreement is void.[25] The court must sever the unlawful provision from the agreement, or alter it to render it lawful, if it is reasonable to do so.[26] If the unlawfulness was confined only to not recording fully and communicating clause 10.6 of the agreement to Mr Dlamini, then clause 10.6 could have been altered to render it lawful. However, when the form and get-up of the agreement is inconsistent with the NCA and its regulations, and the Bank has not interpreted, translated or explained its material terms, severance is not an option. The entire agreement must be set aside.

[68] Turning to the jurisdiction of the court, Mr Luthuli who represented Mr Dlamini challenged the Bank's non-compliance with the jurisdictional prerequisite of giving proper notice in terms of s 129 of the NCA of its intention to enforce the agreement. The Bank denied that these proceedings amount to enforcement. On its behalf Mr Broster submitted that ss 127 and 129 of the NCA would apply only after the nature and extent of Mr Dlamini's liability was determined. That would be once the basis of the termination of the agreement is determined in this action. Hence delivery of its notice in terms of s 129 the NCA demanding

23 Section 90 (2) (a) (i) & (ii) of the NCA.
24 Section 90 (2) (b) (i) & (iii) of the NCA.
25 Section 90 (3) of the NCA.
26 Section 90 (4) (a) of the NCA.

payment in terms of the agreement was not a prerequisite for this application. So Mr Broster submitted.

[69] The clearest evidence that the Bank intended to enforce the agreement is its despatching of the s 129 notice, incorrectly addressed as it was. The fact that Mr Dlamini did not receive it does not negate the Bank's intention. That the remedies claimed in this action is not for payment in terms of the agreement does not strip it of its character and effect as enforcement proceedings. Determining the basis of the termination of the agreement would be academic unless it was to enforce the agreement. There would be no purpose in issuing a s 129 notice and instituting this action if recovery of the debt was not the Bank's goal. As a tactic instituting action could intimidate a consumer into complying with the Bank's demand. This action merely separated liability from quantum. Confirmation of the Bank's intention to separate this action from determining quantum emerged on the morning of the hearing when the parties informed the court that the quantum of damages was being held over pending this action. Non-service of the notice means that the Bank has failed to comply with a jurisdictional prerequisite. For this reason alone the Bank should fail.

[70] An aspect of jurisdiction that the court raised and which the parties now concede is that this action falls within the jurisdiction of the civil regional court as the underlying amount is less than R300 000. Section 127(8)(a) of the NCA relied on by the Bank as the basis for this action specifically directs the Bank to commence proceedings in the Magistrates' Courts. It remains unexplained why the Bank instituted proceedings in this court. The lack of jurisdiction on this ground can be remedied by an appropriate order for costs if necessary and by alerting the litigants that they do not have to pay attorney-client costs on the High Court scale.

[71] The relief the Bank claimed in this action is strange considering the circumstances. Mr Dlamini unequivocally terminated the agreement orally and in writing. He ended the agreement orally within four days of purchasing the vehicle and in writing in October after he secured legal assistance. He informed Starlight that the reason for returning the vehicle was that it could not be driven.

[72] On 16 September 2010 the Bank's debt collector and tracing agent, Mr Leon William van den Burgh, repossessed the vehicle from Starlight. He attested to an affidavit from which the Bank would have known that the vehicle had been left with Starlight by September 2010. The Bank might not have known the reasons but it must have known of the termination or anticipated it before Mr van den Burgh's report because since June, Mr Dlamini paid nothing towards his purchase. The report recorded other reasons Mr Dlamini allegedly gave for the termination than those he gave at the trial. But as Mr van den Burgh did not testify none of those reasons count. So by the time the Bank issued summons on 3 March 2011 it was well aware that the agreement had been terminated and the vehicle repossessed. Consequently, this action for confirmation of the termination and the return of the vehicle was wholly unnecessary. Why the Bank framed its relief in these terms remains unexplained. Penalising and intimidating Mr Dlamini are aims that cannot be excluded.

[73] Once the agreement was terminated for whatever reason, the Bank had to sell the vehicle to mitigate losses. Its decision not to sell the vehicle pending this action is also unexplained. If the losses were for Mr Dlamini's account the Bank would have seriously prejudiced him by not reselling the vehicle for more than two years.

[74] The way in which the Bank conducted this litigation is equally puzzling. It was only at the pre-trial that the Bank conceded that the vehicle had been returned. Only after discussions on the morning of the trial did it become apparent that what the Bank actually wanted was a determination as to whether the termination was a rescission or voluntary surrender. This clarification seems to be an afterthought to rescue the action from being dismissed with costs. Mr Luthuli graciously acquiesced in the trial proceeding for this determination in the interest of finality. Mr Dlamini had already incurred trial costs including the costs of an interpreter.

[75] Pre-trial preparation was also inadequate. Rescission as the reason for the termination should have been obvious to the Bank at the pre-trial conference.

At the conference, the parties were expected to discuss the witnesses they would call and ways of curtailing the proceedings. Apart from admitting that the Bank had regained possession of the vehicle no other material admissions were recorded. Mr Luthuli requested further particulars for trial. In response, the Bank denied knowing who assisted Mr Dlamini. It refused to admit that Mr Mthetwa assisted Mr Dlamini to enter into the agreement; that the agreement was in English which Mr Dlamini did not understand; and that Mr Mthetwa did not read and interpret the agreement to Mr Dlamini. The Bank denied any knowledge of the date on which the vehicle was returned or how it was returned to Starlight. As the Bank did not know who assisted Mr Dlamini and as it could not make the admissions sought, it should have been clear that it would not be able to discharge its onus under the NCA of informing Mr Dlamini of the terms of the agreement.

[76] Cumulatively considering the unexplained tactics the Bank employed, this action is heavy handed intimidation in response to Mr Dlamini seeking to enforce his right to rescind the agreement and claim a refund. The Bank's conduct in initiating and pursuing this action is unlawful for the further reason that it is irrational. The unlawfulness on all the grounds established above is a breach of the right to equality in s 9(1) of the Constitution. The Bank conducted this transaction oblivious of the purposes of the NCA. Notwithstanding the manifest inequality in its relationship with its bargaining counterpart it sought to snatch an advantage.

[77] In passing I note that the CPA assented to on 24 April 2009 commenced on 31 March 2011. Although the agreement in this case was terminated before the general effective date of the CPA, i.e. 31 March 2011 the Bank, like most large corporations that invest in corporate social responsibility projects, had to be aware of the purposes of the CPA which was already in the public domain. The purposes of the CPA are:

> '. . . to promote and advance the social and economic welfare of consumers in South Africa by—

. . .

(c) promoting fair business practices;

(*d*) protecting consumers from—

i) unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices; and

ii) deceptive, misleading, unfair or fraudulent conduct;

(*e*) improving consumer awareness and information and encouraging responsible and informed consumer choice and behaviour;…'[27]

[78] Institutions such as the Bank should welcome the framework proffered by the NCA and the CPA for bridging the socio-economic inequalities substantively and for reforming the credit industry, if for no reason but that sustained inequalities and need lead to unrest and social instability which is not good for business. Even though the CPA was not effective when the Bank sold the vehicle to Mr Dlamini it should have voluntarily acknowledged that as goods sold in terms of a credit agreement, s 5(2)(d) of the CPA would have applied to the sale. It should have been clear when the Bank issued summons on 3 March 2012 that consumer relations was no longer business as usually practised over its 150 year history in South Africa. Disappointingly, the Bank remained unresponsive to the CPA and its aspirations before it became enforceable. My interpretation and application of the provisions of the NCA above are fortified by the CPA.

[79] In conclusion, if the parties had applied themselves properly at the rule 37 pre-trial conference, the trial time could have been shortened by at least a day. As stated above, Ms Ndlela's evidence could easily have been dispensed with altogether. At the conference they could have exhausted settlement negotiations and avoided wasting three hours of court time on the morning of the trial resulting in the trial commencing only at 13h00. As a result of the parties' poor pre-trial preparation this matter which was set down on the expedited roll for one day had to be adjourned to continue the following week, at great inconvenience to the court.

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27 Section 3 (1) of the CPA.

[80] The order I grant is the following:

a. The defendant Mr Dlamini rescinded the credit agreement with the plaintiff Standard Bank.

Standard Bank shall pay the costs of the action.

b.

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D.PILLAY J

Date of Hearing: 06 August 2012 and
14 August 2012

Date of Judgment: 23 October 2012

APPEARANCES

Counsel for the Applicant: Adv J. P. Broster
Instructed by: Easton-Berry Incorporated
4TH Floor Corporate Place
9 Gardiner Street
Durban

Counsel for the Defendant: Mr Luthuli
Instructed by: A P Shangase and Associates
Suite 501
5th Floor
397 Anton Lembede
Durban
4000