

*REDRESS IN TERMS OF THE NATIONAL  
CREDIT ACT AND THE CONSUMER  
PROTECTION ACT FOR DEFECTIVE GOODS  
SOLD AND FINANCED IN TERMS OF AN  
INSTALMENT AGREEMENT*

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## I INTRODUCTION

The scene seems all too familiar, representative of thousands of similar agreements concluded every day in South Africa. The consumer buys a motor vehicle from a motor dealership. He cannot pay the full amount of the purchase price immediately. The motor dealership assists him to apply for finance at a financial institution (for example, a bank). After that, the motor vehicle is financed and an instalment agreement (previously called an instalment sale agreement)<sup>1</sup> is concluded between the consumer and the bank. Within six months after the delivery of the vehicle, the consumer starts to experience problems with it, and it becomes clear that the vehicle is of an unsatisfactory quality, cannot be used for the purposes for which it was bought, and is defective. If the customer attempts to hold the motor dealership responsible, the dealership argues that it no longer owns the vehicle and that the bank should be approached. Indeed, the dealership argues that the bank was the seller of the vehicle — which it often is. Should the consumer attempt to hold the bank responsible, the bank refers to the instalment

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<sup>1</sup> The terms ‘instalment agreement’ and ‘instalment sale agreement’ will be used interchangeably throughout this article.

agreement in which any warranty as to the condition of the vehicle is expressly excluded, and the bank also argues that it only financed the deal. After all, the bank is not a seller of vehicles in the first place.

To make matters worse, it seems that uncertainty over the application of two very important pieces of consumer protection legislation (the National Credit Act 34 of 2005<sup>2</sup> and the Consumer Protection Act 68 of 2008<sup>3</sup>) may leave the consumer without adequate protection.

We will attempt to answer the vexing question that arises in the context of the consumer's remedies where he has been sold defective goods after 31 March 2011 (the date on which the CPA came into general effective operation) under an instalment agreement governed by the NCA. We will therefore also focus on the nature of an instalment sale agreement, and the rights and obligations of all the parties involved in the sale of the vehicle and the eventual conclusion of an instalment agreement in terms of the NCA. Further, we will examine the interplay, if any, between those rights and obligations in terms of the NCA in the case of an instalment agreement, and the rights and obligations of a supplier and a consumer under the CPA as regards the issue of defective goods.

## II COMMENTS ON THE RELATIONSHIP BETWEEN THE PARTIES (CONSUMER, MOTOR DEALERSHIP AND FINANCIAL INSTITUTION)

It is necessary to dissect and discuss all the contractual relationships relevant to financing a motor vehicle, first, under the common law and, secondly, under appropriate legislation (the NCA and the CPA). This analysis is important to establish the nature of the obligations and the parties' true intention. It is particularly important to establish against whom the buyer (the consumer) is entitled to enforce his common-law rights. Only then can it be established whether the NCA and the CPA confirm or amend his common-law position.

### (a) *The initial contractual relationship between the motor dealership and the consumer (the common-law position)*

Before applying for finance in terms of an instalment agreement governed by the NCA, a consumer will usually go to a motor dealership to select and buy a vehicle. The nature of the initial contractual

<sup>2</sup> Hereinafter referred to as the NCA.

<sup>3</sup> Hereinafter referred to as the CPA or the Act.

relationship between the motor dealership (the seller) and the consumer (the buyer) is that the parties clearly conclude a contract of sale. Apart from the requirements for the conclusion of a valid contract,<sup>4</sup> the parties also need to reach consensus on the essentialia of a contract of sale: the intention to buy and sell, the thing sold (*merx*), and the purchase price (*pretium*).<sup>5</sup>

Prima facie the motor dealership and consumer do conclude a valid sale. The parties to the contract have consensus on all the sale essentialia as mentioned directly above. An important result of a valid sale is the *naturalia* that now form part of the sale agreement between the motor dealership and the consumer and that, more importantly, include the common-law rights and duties of the parties.<sup>6</sup> The most important common-law duty of the buyer is to pay the purchase price,<sup>7</sup> and the most important common-law duties of the seller are the safe-keeping of the thing sold; the delivery and transfer of ownership if the seller is the owner; and the warranty against eviction and the warranty against latent defects.<sup>8</sup> The parties may, however, amend or even exclude certain of the *naturalia* to a sale *inter partes* which will form part of the *incidentalia* of that particular sale.<sup>9</sup> For example, the parties may include a *voetstoots* clause in the sale to exclude the seller's liability for latent defects, or they may limit the amount of damages claimable for a breach of the warranty against eviction.<sup>10</sup> The common-law position is dramatically altered, though, where the buyer applies for financial assistance at a financial institution for the payment of the purchase price of the vehicle and in the event of conclusion of an instalment agreement (previously an instalment sale agreement) between the financial institution (the bank) and the buyer (the consumer).

*(b) The contractual relationship between the motor dealership and the financial institution (the bank)*

It could be argued that the relationship between the motor dealership and the bank may differ from case to case and will depend on the procedures and trade usage of each individual financial institution.

<sup>4</sup> Chris J Nagel et al *Commercial Law* 4 ed (2011) para 3.89.

<sup>5</sup> *Idem* para 13.04.

<sup>6</sup> *Ibid.* For a comprehensive discussion, see J Barnard *The Influence of the Consumer Protection Act 68 of 2008 on the Common Law of Sale* (LLD thesis, University of Pretoria, 2013) ch 2.

<sup>7</sup> Nagel et al *op cit* note 4 para 15.01.

<sup>8</sup> *Idem* paras 14.01–14.02.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Idem* paras 14.51–14.53, 14.56–14.74.

Although banks provide the finance of motor vehicles in different ways, we will focus on the provision of finance by way of an instalment agreement governed by the NCA. It thus becomes necessary to determine the contractual relationship between the motor dealership and the bank where the bank and the buyer (the consumer) eventually conclude an instalment sale agreement.

An instalment agreement usually contains a clause in terms of which ownership is reserved on behalf of the bank. The bank cannot conclude a valid instalment sale agreement and include a valid 'ownership reservation clause' in it if the bank does not in fact become the owner of the vehicle. Logically, one cannot include such a clause (a *reservatio dominii*) if one lacks dominium. It is also important to establish the manner in which the bank obtains the right to demand payment of the purchase price in terms of an instalment sale agreement.

Courts<sup>11</sup> and jurists<sup>12</sup> have reasoned that the motor dealership discounts (in Afrikaans, 'verdiskonteer')<sup>13</sup> the sale between itself and the buyer to the bank. The term 'discounts' is no longer used, though, because the definition of a 'discount transaction' in the NCA means something completely different.<sup>14</sup>

'Discounting' ('verdiskontering') of a sale agreement refers to the practice by which the motor dealership transfers all its rights in the vehicle to the bank. The bank pays the motor dealership the full amount of the cash purchase price. The bank then concludes an instalment sale agreement with the buyer in terms of which ownership in the vehicle is reserved and remains vested in the bank until the buyer pays the last instalment. The agreement usually provides that the risk of

<sup>11</sup> *Barclays Western Bank Ltd v Ernst* 1988 (1) SA 243 (A); *Milner v Union Dominions Corporation (SA) Ltd and Another* 1959 (3) SA 674 (C); *Absa Bank Ltd v Myburgh* 2001 (2) SA 462 (W); *Van Zyl v Credit Corporation of SA Ltd* 1960 (4) SA 582 (A).

<sup>12</sup> J M Otto 'Deel V – Huurkoopreg' in S R van Jaarsveld (ed) *Suid-Afrikaanse Handelsreg* (1978) vol I 278–9; J C Sonnekus 'Attornment en constitutum possessorium – verleidelik vreemd maar geen towerstaf nie' 2004 TSAR 185 at 186.

<sup>13</sup> On discounting in the context of shares, see Estelle Hurter 'Enkele aspekte rakende die waardasie van aandele by 'n bevel vir die aankoop van aandele ingevolge artikel 252(3) van die Maatskappywet 61 van 1973' (1998) 10 SA Merc LJ 183. As regards discounting in the sense of selling a right against a discount, see *Tucker v Ginsberg* 1962 (2) SA 58 (W). The National Credit Act does not apply to a discounting contract in the sense of rights being sold at a discount. It is a concept completely different from that of a discount transaction as defined in the National Credit Act. See *Bridgeway Ltd v Markam* 2008 (6) SA 123 (W); *Renier Nel Inc and Another v Cash On Demand (KZN) (Pty) Ltd* 2011 (5) SA 239 (GSJ).

<sup>14</sup> In terms of s 1 of the NCA, 'discount transactions' means an agreement, irrespective of its form, in terms of which goods or services are to be provided to a consumer over a period of time; and more than one price is quoted for the goods or service, the lower price being applicable if the account is paid on or before a determined date, and a higher price or prices being applicable if the price is paid after that date, or is paid periodically during the period.

damage to or destruction of the vehicle will be on the buyer, who is thus compelled to insure the vehicle. The bank is entitled to charge interest and other expenses in terms of the instalment agreement.

How does the bank obtain ownership of the vehicle to be able to reserve this right under the instalment sale agreement concluded with the buyer? Many possibilities exist in practice.<sup>15</sup> The answer to the question becomes important when it needs to be established which person (the motor dealership or the bank) takes responsibility for the duties of the seller of the vehicle. Two possible scenarios may be applicable.

*(i) Motor dealership sells vehicle to bank*

The first possibility (as mentioned directly above) is that the motor dealership *sells*<sup>16</sup> the vehicle to the bank to facilitate the financing of an instalment agreement with the consumer. Ownership is transferred from the motor dealership to the bank by attornment.<sup>17</sup> Attornment is a simulated form of delivery and has been established through the development of commercial transactions and sales.<sup>18</sup> This form of delivery takes place where the object sold (the motor vehicle) is physically in the possession of a third party (the consumer) and delivery takes place through a change of intention between the contracting parties (ownership transferred from the motor dealership to the bank). The bank pays the motor dealership the purchase price as a lump sum. It is submitted that the motor dealership transfers both rights and duties to the bank by a valid sale of the vehicle. The bank now becomes the owner of the vehicle and concludes an instalment agreement with the consumer. The agreement between the bank and the consumer is clearly a sale, and the parties intend to conclude a credit sale with a reservation of ownership where the purchase price is payable in instalments including interest. Consequently, the seller's common-law duties, such as the warranty against latent defects, vest in the bank, not the motor dealer-

<sup>15</sup> For a comprehensive discussion, see Stéfan Renke & Marissha Pillay 'The National Credit Act 34 of 2005: The passing of ownership of the thing sold in terms of an instalment agreement' (2008) 71 *THRHR* 641.

<sup>16</sup> Emphasis supplied.

<sup>17</sup> *Barclays Western Bank Ltd v Ernst* supra note 11; *Absa Bank Ltd v Myburgh* supra note 11. See also J C Sonnekus 'Attornment as leweringsvorm by sekerheidstelling en regsekerheid' (1988) 51 *THRHR* 534.

<sup>18</sup> Nagel et al op cit note 4 para 14.32.

ship. Banks may argue that they are financiers and not dealers, but this view is clearly wrong.

(ii) *Cession of motor dealership's rights to bank*

The second possibility is that the motor dealership *cedes*<sup>19</sup> its sale agreement rights (and only its rights) to the bank by a formal cession. The bank is then entitled to claim the purchase price (with interest) from the buyer. It is settled law that only personal rights, not real rights, may be transferred by way of cession.<sup>20</sup> Cession does not transfer ownership in the vehicle to the bank; transfer of ownership requires a separate form of delivery.<sup>21</sup> Recently, though, in *Page Automation (Pty) Ltd v Profusa Properties CC t/a Homenet OR Tambo and Others*<sup>22</sup> the court held that the law of cession should be developed to accommodate cession of ownership or cession of the right of vindication. But the court distinguished the facts of *Page Automation* (a cession of a rental agreement for movables) from those of *Absa Bank Ltd v Myburgh*<sup>23</sup> (which centred on an instalment sale agreement).

Where the rights of the motor dealership (pertaining to the sale of the vehicle to the consumer) are ceded to the bank, ownership in the vehicle is transferred from the motor dealership to the bank by attornment and not as part of the cession. Delivery of the vehicle to the bank by attornment appears not to establish a transfer of *all*<sup>24</sup> the rights and duties but only a transfer of the right of ownership and the right to payments to the bank. It seems that (at least at common law) the seller's duties under the warranties against eviction and latent defects remain on the dealership. In fact, the bank expressly excludes liability for these types of warranties in many standard instalment agreements.

(iii) *Warranties and indemnities given by motor dealership to bank*

Whether the initial sale agreement between the dealer and the consumer is discounted to the bank by means of a sale accompanied by delivery by means of attornment, or whether it is discounted to the bank by means of a cession of rights accompanied by delivery by means of attornment, it appears to be standard practice that the dealership usually also provides

<sup>19</sup> Emphasis supplied.

<sup>20</sup> P J Badenhorst, Juanita M Pienaar & Hanri Mostert *Silberberg and Schoeman's The Law of Property* 5 ed (2005) 200–1.

<sup>21</sup> *Ibid.*

<sup>22</sup> 2013 (4) SA 37 (GSJ).

<sup>23</sup> *Supra* note 11.

<sup>24</sup> Emphasis supplied. The contract between the parties that provides for the cession will, of course, be the final word on the matter.

the bank with express warranties such as that the goods are not stolen and that they do not contain latent defects.<sup>25</sup> It also appears to be standard practice for the dealership to indemnify the bank against actual losses that it may suffer as a result of any breach of these express warranties by the dealership.

In essence, such an indemnity entails that the bank may recover from the dealer any actual loss or damage that the bank suffers because of the dealer's breach of warranty.<sup>26</sup> The primary meaning of 'indemnify' (to hold harmless) is to pay something to a person who has already paid something out.<sup>27</sup> Thus the bank will be compensated by the dealership only after the bank has provided redress to the consumer. The bank cannot rely on the indemnity at the moment that the consumer complains about the defective vehicle: this implies that a considerable time may elapse from the moment that the consumer approaches the bank for redress until the point at which the bank can enforce the indemnity clause against the dealer. As a result of the principle that the bank will be compensated only after it has provided redress to the consumer, the bank will not be able to rely on the indemnity clause as the basis for refusing redress to the consumer.

### III COMMON-LAW REMEDIES WHERE DEFECTIVE GOODS ARE SOLD

The warranty against latent defects applies automatically by operation of law (*ex lege*) and forms part of every contract of sale as a *naturale*.<sup>28</sup> Where the warranty is given *ex lege*, the remedies available to the buyer will be the *aedilician* remedies (the *actio quanti minoris*<sup>29</sup> and the *actio redhibitoria*<sup>30</sup>).<sup>31</sup> Where the warranty is given contractually, the remedy

<sup>25</sup> For a discussion on the reservation of ownership coupled with floor plan agreements of vehicles, see *Roshcon (Pty) Ltd v Anchor Auto Body Builders CC and Others* 2014 (4) SA 319 (SCA).

<sup>26</sup> Nagel et al op cit note 4 para 25.36. The principle of indemnity entails that the indemnified party can never recover more than its actual loss or damage suffered. See further *First Rand Bank Ltd t/a Wesbank v Dual Discount Wholesalers CC* (2142/2009) [2013] ZAKZDHC 23 (16 May 2013) para 3.

<sup>27</sup> *Collinge v Heywood* (1839) 8 LJQB 98; *Jonnes v Anglo-African Shipping Co* 1972 (2) SA 827 (A).

<sup>28</sup> J Barnard 'The influence of the Consumer Protection Act 68 of 2008 on the warranty against latent defects, *voetstoots* clauses and liability for damages' (2012) 45 *De Jure* 455 at 458–9.

<sup>29</sup> Pro-rata reduction in the purchase price.

<sup>30</sup> Claim for restitution.

<sup>31</sup> Barnard op cit note 28 at 459.

available to the buyer is the *actio empti*.<sup>32</sup> The buyer is entitled to cancel the contract and claim damages in terms of the *actio empti*. The *actio empti* and the claim for consequential loss will be available to the buyer where the seller is a merchant seller professing to have expert knowledge in relation to the thing sold or a manufacturer. Where the seller is a motor dealership, the *actio empti* will clearly be available, because the motor dealership is regarded as a merchant seller.<sup>33</sup>

#### IV THE INSTALMENT AGREEMENT IN TERMS OF THE NATIONAL CREDIT ACT

The concept of the instalment agreement as it is known today originates from the creation of a new credit instrument known as the hire-purchase agreement that was developed in the nineteenth century<sup>34</sup> and subsequently recognised in the Hire-Purchase Act.<sup>35</sup> The essential characteristics of a hire-purchase agreement were described in section 1(1) of this statute in the following terms: ‘Any instalment sale agreement whereby goods are *sold*<sup>36</sup> subject to the condition that ownership of such goods shall not pass merely by the transfer of the possession of such goods, and the *purchase price*<sup>37</sup> is to be paid in instalments, two or more of which are payable after transfer’. In addition, an instalment sale agreement was defined as

‘any agreement of purchase and sale whereby ownership in the goods sold passes upon delivery, and the purchase price is to be paid in instalments, two or more of which are payable after delivery, and under which the seller would be entitled to the return of the goods sold if the buyer should fail to comply with any one or more provisions thereof; and includes any other agreement which has or agreements which together have the same import, whatever form such agreement or agreements may take’.

<sup>32</sup> Ibid.

<sup>33</sup> In terms of the ‘Pothier rule’ where the seller is a merchant and publically professed to have expert knowledge of the thing sold. See also Nagel et al op cit note 4 paras 14.76–14.77.

<sup>34</sup> In general, see J M Otto *Die Regte van 'n Huurkoper tov Beëindiging van die Kontrak* (LLD thesis, University of Pretoria, 1980) (hereinafter referred to as Otto LLD) 6–15; Jannie Otto ‘The history of consumer credit legislation in South Africa’ (2010) 16 *Fundamina* 257 at 262.

<sup>35</sup> M A Diemont & P J Aronstam *The Law of Credit Agreements and Hire Purchase in South Africa* (1982) 33–7.

<sup>36</sup> Emphasis supplied.

<sup>37</sup> Ibid.



The agreement is thus characterised as a contract of purchase and sale.<sup>38</sup> The seller and the buyer under this agreement had the common-law duties of a seller and a buyer as referred to above, with additional rights and duties imposed on them by the Hire-Purchase Act.<sup>39</sup>

It is to be noted that, under section 6(1)(d) of the Hire-Purchase Act, any provision in any contract whereby the liability of the seller in pursuance of any guarantee or warranty which would, but for such provision be implied in any agreement, be excluded or restricted, would be invalid and of no force and effect. An example of such a provision would be where the credit agreement excludes the implied warranty against eviction or the warranty against latent defects by way of a *voetstoots* clause in the agreement.<sup>40</sup>

The Hire-Purchase Act was repealed by the Credit Agreements Act,<sup>41</sup> which introduced the ‘instalment sale transaction’ as a specific form of credit agreement. An instalment sale transaction was defined as ‘a transaction in terms of which inter alia goods are *sold*<sup>42</sup> by the seller to the purchaser against payment of a price’.<sup>43</sup>

The word ‘sale’ in the concept of an instalment sale agreement is significant. It is clear that the parties who conclude this agreement intend to ‘conclude a contract of sale’.<sup>44</sup>

As regards the rights and duties of the parties to an instalment sale, it is also significant that, under section 6(1)(d) of the Credit Agreements Act, a provision in an instalment sale transaction under which the liability of the credit grantor in terms of any guarantee or warranty which would, but for such provision, be implied in a credit agreement, was excluded or restricted was invalid.

The NCA, which repealed the Credit Agreements Act, introduced an expanded variety of credit agreements onto the South African credit market. One of these agreements is the ‘instalment agreement’. The definition of an instalment agreement indicates that it is a *sale*<sup>45</sup> of movable property in terms of which payment of all or part of the price is deferred and is to be paid by periodic payments. Possession and use of the property are transferred to the consumer. Ownership of the property

<sup>38</sup> Diemont & Aronstam op cit note 35 at 35.

<sup>39</sup> For a discussion of these rights and duties, see *idem* at 105.

<sup>40</sup> See, for example, *Jacobs v Abbey Autos* 1957 (2) SA 2 (N).

<sup>41</sup> Act 75 of 1980.

<sup>42</sup> Emphasis supplied.

<sup>43</sup> See s 1 definition of instalment sale agreement of the Credit Agreements Act 78 of 1980 for the full definition.

<sup>44</sup> See the discussion in *Otto LLD* op cit note 34 ch 3.

<sup>45</sup> Emphasis supplied.

passes to the consumer either only when the agreement is fully complied with, or else immediately but subject to the credit provider's right to repossess the property if the consumer does not meet all his financial obligations under the agreement. Interest, fees or other charges are payable to the credit provider in respect of the agreement; or in respect of the amount that has been deferred.

Thus the NCA in essence provides for two types of instalment agreements — one in which ownership is reserved, and one in which it is not. The latter type would be rather rare in commercial practice. But one should note that, although the word 'sale' has been deleted from the title of this type of agreement, it still remains clear from the definition that an instalment agreement involves a 'sale' of movables.

The NCA, which is far more comprehensive than its predecessors, also creates certain statutory rights and duties in addition to the common-law rights and duties conferred on credit providers and consumers under instalment agreements.<sup>46</sup> The provisions of section 90 of the NCA governing unlawful provisions should also be noted. Under section 90(2), any provision excluding or limiting the credit provider's liability for implied guarantees or warranties is unlawful. If the credit agreement is a sale, a *voetstoots* clause or a clause excluding liability for eviction (a *pactum de evictione non praestanda*) will be void in terms of section 90(3) of the NCA.<sup>47</sup> Further, any *voetstoots* clause in a sale governed by the NCA (such as an instalment sale agreement) is taboo.<sup>48</sup>

Having regard to the development of hire-purchase, instalment sale and instalment agreements, it is submitted that these agreements are dualistic: they involve both the sale and the financing of goods. Thus, if a bank enters into an instalment agreement regulated by the NCA with a consumer, the bank wears two hats: that of a seller and that of a financier or credit provider. This also becomes clear when one considers the situation in which a consumer wishing to buy a vehicle that he cannot afford to pay for in cash goes to the bank and takes out a personal loan, which he then uses to pay the motor dealer for the vehicle. Here the bank wears only one hat — a credit provider's. Obviously, the reason that the bank would wish to use the instalment agreement when contracting with a consumer who wishes to buy a vehicle and pay it off in

<sup>46</sup> For a detailed discussion of the applicable provisions of the NCA and the duties imposed upon credit providers, see N Campbell 'The Consumer's Rights and the Credit Provider's Obligations' in J W Scholtz (ed) et al *Guide to the National Credit Act* (2008) ch 6.

<sup>47</sup> J M Otto 'Types of Credit Agreements' in J W Scholtz (ed) et al *Guide to the National Credit Act* (2008) para 8.2.3.4.

<sup>48</sup> J M Otto 'Verborgte gebreke, voetstootsverkope, die Consumer Protection Act en die National Credit Act' (2011) 74(4) *THRHR* 525 at 543.

instalments is that this agreement elevates the bank to the status of a secured creditor, with the vehicle as its security for payment.<sup>49</sup> Of course, the scenario in which the consumer merely takes out a personal loan can also have the rider that the consumer furnishes security for the loan in some form, such as a pledge or suretyship. The point is, however, that under the loan agreement, the bank only provides credit; it does not don the hat of the seller of the vehicle as it does in terms of the instalment agreement.

Despite the many contributions regarding the instalment sale agreement in our law,<sup>50</sup> it is unfortunate that very little has been written on instalment (sale) agreements in relation to the duty to warrant the consumer (buyer) against eviction and latent defects in the vehicle that forms the subject-matter of the instalment sale agreement.

Obviously, the reason that a credit provider would use a cession of rights coupled with delivery in the form of attornment when a sale agreement of a vehicle is discounted to it by a dealership is to rid itself of the obligations which, under the common law, would normally accompany its transition from a mere financier to a seller.

It is submitted, however, that the significance of the express provision in section 90(2) of the NCA, and its predecessors, section 6(1)(d) of the Hire-Purchase Act and section 6(1)(d) of the Credit Agreements Act, should not be overlooked. By repeatedly providing against the exclusion of the common-law warranties for latent defects and eviction, the legislature intended to entrench the protection offered by these warranties also in the context of credit sales governed by the Hire-Purchase Act, the Credit Agreements Act, and now the NCA. Accordingly, the legislature intended that the credit provider should not be able to shirk its common-law obligations as a seller merely because it now becomes a seller in terms of a unique type of contract that encompasses a sale as well as financing.

The practical exercise of these rights is, of course, a different matter. The bank cannot merely rebuff the consumer if a latent defect in the vehicle manifests itself and was present at the time the instalment agreement was concluded. It is the bank who bears the responsibility towards the consumer for redressing the problem of a vehicle with a

<sup>49</sup> See Renke & Pillay op cit note 15 at 650.

<sup>50</sup> Otto op cit note 12 at 254–83; J M Otto ‘Deel V Kredietooreenkomste’ in S R van Jaarsveld *Suid-Afrikaanse Handelsreg* 3 ed (1988) 436; J M Otto *Credit Law Commentary* (2006) paras 18, 69; J M Otto & R-L Otto-Aucamp *The National Credit Act Explained* 3 ed (hereinafter referred to as Otto & Otto-Aucamp); J M Otto ‘Afbetalingskoop- en huurkontrakte van roerende goed: Vanmelewe en nou. Die Nasionale Kredietwet bied interessante leesstof’ (2011) 74(1) *THRHR* 120.

latent defect, and the bank who must make good to the consumer; how the bank does so will be influenced by its agreement with the dealer. The crux, however, is that if the dealer does not assist the consumer, the bank must provide the necessary redress to the consumer and have its (the bank's) recourse against the dealer for the breach of the dealer's obligations towards the bank. It should be emphasised, though, that section 90(2) of the NCA (and previously section 6(1)(d) of the Hire-Purchase Act and section 6(1)(d) of the Credit Agreements Act), in so far as defective goods are concerned, applies with regard to latent defects only and protects the common-law remedies of the buyer in that respect.

## V PROVISIONS OF THE CONSUMER PROTECTION ACT RELEVANT TO INSTALMENT SALE AGREEMENTS GOVERNED BY THE NATIONAL CREDIT ACT

### (a) *General application of the Consumer Protection Act*

Various contributions have been written on the application, purpose and influence of the CPA (which came into general effective operation at the end of March 2011) on commercial transactions and agreements, including sale agreements.<sup>51</sup> So a comprehensive discussion of these aspects is not necessary for this article.

In summary: the CPA applies where goods and services are supplied by a supplier in the ordinary course of the supplier's business to a consumer for consideration.<sup>52</sup> Each of the terms in this terse summary of the application of the CPA has its own important definition. Though a supplier is defined in section 1 of the CPA as a person who markets goods and services ('market' means to promote or supply any goods or services),<sup>53</sup> it is also used as an umbrella term to include producers, importers, dealers, distributors, service providers and retailers who provide goods and services in the ordinary course of business in terms of the CPA. Each of these 'suppliers' is defined in section 1 of the CPA.<sup>54</sup> 'Supply' in relation to goods includes sale, and, in relation to services, means the sale of a service or to perform a service in the ordinary course

<sup>51</sup> Tjakie Naudé 'The consumer's right to safe, good quality goods and the implied warranty of quality under section 55 and 56 of the Consumer Protection Act 68 of 2008' (2011) 23 SA *Merc LJ* 336; Barnard op cit note 28 at 455–84; Otto op cit note 48 at 535–43.

<sup>52</sup> Section 2 read together with ss 4 and 5 of the CPA; Naudé op cit note 51 at 336.

<sup>53</sup> Section 1 of the CPA.

<sup>54</sup> Barnard op cit note 6 at 14, 386.

of business for consideration.<sup>55</sup> ‘Goods’ include movable corporeal things (for example, motor vehicles).<sup>56</sup> ‘Consideration’ includes money.<sup>57</sup> ‘Consumer’ refers to any natural person. The term also includes a company, close corporation, partnership, association trust or body corporate with an asset value or annual turnover of less than R2 million.<sup>58</sup>

(b) *The consumer’s right to fair value, good quality and safety*  
(Chapter 2, Part H of the Consumer Protection Act)

The CPA appears to provide consumers with relief in a wide variety of matters where consumers classically experience problems with suppliers. One such area relates to the supply of defective goods to consumers. As indicated above, before the CPA took effect, the problems relating to the *supply*<sup>59</sup> of defective goods were relegated to the flanks of the common law, which recognises an implied warranty against latent defects that provides for recourse based on the aedilician actions in the event of a material latent defect being present in the goods at the time of sale; alternatively, where an express contractual warranty was provided, recourse could be had to the *actio empti*.<sup>60</sup>

Under the CPA, things seem better for the consumer as a result of Part H of the Act: the consumer is given a right to safe, good quality goods in terms of section 55 backed by an ambitious implied warranty of quality provided for in section 56. More specifically, section 55 provides that every consumer has the right to receive goods that<sup>61</sup>

- (a) are reasonably suitable for the purposes for which they are generally intended;<sup>62</sup>
- (b) are of *good quality*,<sup>63</sup> in *good working order*<sup>64</sup> and free of *any*<sup>65</sup> defects;

<sup>55</sup> Section 1 of the CPA.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*

<sup>58</sup> See the definition of ‘consumer’ read with those of ‘juristic person’ and ‘person’. The limitation of R2 million was prescribed in terms of ss 6 and 5(2)(b). See GN 294 in GG 34181 of 1 April 2011.

<sup>59</sup> Emphasis supplied.

<sup>60</sup> See para IV above.

<sup>61</sup> Section 55(2)(a) to (d).

<sup>62</sup> See Naudé *op cit* note 51 at 339, where the author indicates that under the CPA, the consumer has the right to *receive* goods that comply with the standard of being reasonably suitable for the purposes for which they are generally intended. She interprets the provision to mean that the consumer would not have to prove any longer that the goods were unfit for purpose at the time of the *conclusion* of the contract.

<sup>63</sup> Emphasis supplied.

<sup>64</sup> Emphasis supplied.

- (c) will be usable and *durable for a reasonable period of time*,<sup>66</sup> having regard to the use to which they would normally be put and to all the surrounding circumstances of their supply;<sup>67</sup> and
- (d) comply with any applicable standards set under the Standards Act 29 of 1993, or any other public regulation.

Section 55 thus affords the consumer rights in respect of suitability, quality, and operational ability, lack of defects, usability, durability and safety.<sup>68</sup>

In addition to the right set out in section 55(2)(a), if a consumer has *specifically informed the supplier of the particular purpose*<sup>69</sup> for which the consumer wishes to acquire any goods, or the use to which the consumer intends to apply those goods, and the supplier ordinarily offers to supply such goods, or acts in a manner consistent with being knowledgeable about the use of those goods, the consumer has a right to expect that the goods are reasonably suitable for the specific purpose that the consumer has indicated.<sup>70</sup> In determining whether any particular goods satisfy these requirements, all the circumstances of the supply of those goods must be considered, including but not limited to:

- (a) the manner in which, and the purposes for which, the goods were marketed, packaged and displayed, the use of any trade description or mark, any instructions for, or warnings with respect to the use of the goods;
- (b) the range of things that might reasonably be anticipated to be done with or in relation to the goods; and
- (c) the time when the goods were produced and supplied.<sup>71</sup>

<sup>65</sup> Emphasis supplied. Both latent and patent defects are covered by the right mentioned in s 55(2)(b). See s 55(5)(a). This is a deviation from the common law.

<sup>66</sup> Emphasis supplied.

<sup>67</sup> Naudé op cit note 51 at 340 remarks that, for the first time in South African law, s 55(2)(c) provides the consumer with an ex lege right to continued good quality. She further states that this goes beyond the protection afforded in the EC Consumer Sales Directive, which only grants the consumer remedies for a lack of conformity that existed at the time of delivery but does also recognise that a trader may give a commercial guarantee that the goods will function properly for a certain period. Naudé remarks that suppliers would be well advised to give express guarantees for a stated period, because this would make it somewhat less likely that a court would hold that the goods should have been durable for an even longer period. For the requirement of conformity, see further J M Otto 'Koop van 'n saak vir sy normale of vir 'n bepaalde doel. En die een en ander oor *winkeldochters*' 2013 TSAR 1.

<sup>68</sup> On the effect of the Act upon the warranty against defects, see Otto op cit note 48 at 525.

<sup>69</sup> Emphasis supplied.

<sup>70</sup> Section 55(3). Thus the fact that the supplier ordinarily offers to supply such goods or acts in a manner consistent with being knowledgeable about those goods is a prerequisite for the application of s 55(3) in a specific instance. Naudé op cit note 51 at 341 points out that a similar rule is recognised under the common law of sale. See further Otto op cit note 67.

<sup>71</sup> Section 55(4).

Section 55(5)(a) and (b) further provide that it is irrelevant whether a product failure or defect was latent or patent, or whether it could have been detected by a consumer before taking delivery of the goods; and a product failure or defect may not be inferred in respect of particular goods solely on the grounds that better goods have subsequently become available from the same or any other producer or supplier. But section 55(5)(a) and (b) do not apply to a transaction if the consumer has been expressly informed that particular goods were offered in a specific condition, and has expressly agreed to accept the goods in that condition, or knowingly acted in a manner consistent with accepting the goods in that condition.<sup>72</sup> The implication thus appears to be that a *voetstoots* clause, which is traditionally broad and protects a seller who is unaware of latent defects in goods that he sells, is not valid in an agreement governed by the CPA.<sup>73</sup>

Section 56 controls the remedies of the consumer to whom defective goods have been sold in terms of an agreement or transaction governed by the CPA. In any transaction or agreement pertaining to the supply of goods to a consumer, there is an implied provision that the producer or importer, the distributor and the retailer each warrant that the goods comply with the requirements and standards contemplated in section 55, except to the extent that those goods have been altered contrary to the instructions, or after leaving the control, of the producer or importer, a distributor or the retailer, as the case may be.<sup>74</sup> Within six months after the delivery of any goods to a consumer, the consumer may return the goods to the supplier, without penalty and at the supplier's risk and expense, if the goods fail to satisfy the requirements and standards contemplated in section 55.<sup>75</sup>

The consumer (and not the supplier) then has the choice to direct the supplier to either repair or replace the failed, unsafe or defective goods; or to refund to the consumer the price the latter paid for the goods.<sup>76</sup> If a supplier repairs any particular goods or any component of any such goods, and within three months after that repair, the failure, defect or unsafe feature has not been remedied, or a further failure, defect or unsafe feature is discovered, the supplier must replace the goods, or refund to the consumer the price that the latter paid for the goods.<sup>77</sup>

<sup>72</sup> Section 55(6).

<sup>73</sup> Barnard *op cit* note 28 at 455–84. See also Otto *op cit* note 48 at 535–43.

<sup>74</sup> Section 56(1).

<sup>75</sup> Section 56(2).

<sup>76</sup> Section 56(2)(a) and (b).

<sup>77</sup> Section 56(3).

This implied warranty and the right to return goods are each in addition to any other implied warranty or condition imposed by the common law, the CPA or any other public regulation, and any express warranty or condition stipulated by the producer or importer, distributor or retailer, as the case may be.<sup>78</sup>

To qualify for the redress set out in section 56, the defect should not be trivial.<sup>79</sup> Although this is not expressly borne out by the wording of section 56, the legislature actually intended to mirror the position in other jurisdictions that provide for the presumption that if goods manifest a defect within six months after they were bought, they were already defective at the time of their sale.<sup>80</sup> Therefore, where a defect in goods sold manifests itself within six months after the sale, it is implicitly presumed that those goods were defective at the time of sale, and the seller is obliged to prove that they were not defective at that time; so the common-law onus regarding proof of latent defects is reversed. At common law, the buyer had to prove not only that the defect existed but that it was present at the time of sale.<sup>81</sup> This change of the legal position would also explain the seemingly arbitrary six-month period in section 56.

It is further to be noted that these provisions relating to safe, good quality goods operate in the alternative to the common-law remedies at the consumer's disposal, because under section 2(10), 'no provision of this Act must be interpreted so as to preclude a consumer from exercising any rights afforded in terms of the common law'. Thus a consumer to whom a defective vehicle has been sold after 31 March 2011 has the common-law remedies for latent defects *as well as*<sup>82</sup> the statutory remedies provided for in section 56 (which are apparently not limited to latent defects), and he may choose to pursue his redress in terms of either the common law or section 56 of the CPA if the defect manifests itself during the first six months after the conclusion of the instalment agreement. It is submitted that if the defect manifests itself only after six months from the date on which the instalment agreement is concluded,

<sup>78</sup> Section 56(4).

<sup>79</sup> As is clear from the reference in s 53(a) to a *material* defect or a characteristic which impedes the safety, usefulness or durability of the goods (emphasis supplied).

<sup>80</sup> It is submitted that the South African legislature most probably had regard to the European Directive 1999/44/EC on Certain Aspects of Sale of Consumer Goods and Associated Guarantees, which provides that if a defect in goods becomes apparent within the first six months of the purchase, it will be presumed to have existed at the time of delivery. See Barnard op cit note 6 at 455–70.

<sup>81</sup> Nagel et al op cit note 4 paras 14.56–14.61.

<sup>82</sup> Emphasis supplied.



the consumer cannot rely on section 56 of the CPA but can only have recourse to the common-law remedies.

(c) *The interplay between the CPA and the NCA in the case of an instalment agreement*

The scope of application of the CPA is set out in section 5, with section 5(1) indicating the instances in which the Act will apply and section 5(2) listing transactions to which the Act will not apply. Section 5(2)(d) specifically provides that the CPA does not apply to any ‘transaction’ that constitutes a credit agreement under the NCA, but the goods and services that are the subject of the credit agreement are not excluded from the ambit of the CPA.

In theory, it sounds simple enough: the instalment agreement concluded in terms of the NCA will be regulated by the NCA because it is a credit agreement in terms of the NCA. On the other hand, the motor vehicle that is sold and financed in terms of the instalment agreement is ‘the goods subject to the credit agreement’ and will *ex lege* fall within the ambit of the CPA. The practical application of section 5(2)(d), however, appears to lead to confusion.

Melville and Palmer<sup>83</sup> argue that the definition of ‘transaction’ in section 1 of the CPA indicates three separate aspects:

- (a) the agreement between the parties for the supply of the goods and services;
- (b) the actual supply of the goods; and
- (c) the performance of the services.<sup>84</sup>

The first of these aspects is defined by the CPA as ‘an arrangement or understanding between or among two or more parties that purports to establish a relationship in law between or among them’.<sup>85</sup> Melville and Palmer argue that this definition is identical to that given for ‘agreement’ in terms of the NCA.<sup>86</sup> But they point out that the definition of ‘transaction’ in the CPA does not include the ‘promotion’ of goods and services.<sup>87</sup> They also argue that the term ‘promote’ in the CPA encompasses activities ranging from advertising, displaying and offering to supply goods and services to making representations regarding a

<sup>83</sup> Neville Melville & Robin Palmer ‘The applicability of the Consumer Protection Act 2008 to credit agreements’ (2010) 22 *SA Merc LJ* 272 at 273.

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*

willingness to supply goods and services.<sup>88</sup> It is submitted that the implication of section 5(2)(d) is therefore that the CPA will apply to the promotion of goods and services, as well as the goods and services themselves, even where such goods and services were supplied in terms of a transaction that constitutes a credit agreement in terms of the NCA.

Melville and Palmer conveniently classify the CPA provisions into four categories.<sup>89</sup> The first two categories are most relevant for the purposes of this discussion — provisions that do not apply to credit agreements, and provisions that do apply to goods and services that are the subject of credit agreements.<sup>90</sup>

In relation to the first category, we agree that provisions of the CPA such as the governing of a consumer's cooling-off right,<sup>91</sup> unfair and unreasonable terms and conditions,<sup>92</sup> and the consumer's right to plain language,<sup>93</sup> are CPA sections that relate to an agreement for the purposes of the CPA and would not apply to an NCA transaction.<sup>94</sup> These aspects are already provided for in terms of the NCA.<sup>95</sup>

On the other hand, Melville and Palmer correctly argue that certain provisions of the CPA do apply to the goods and services that are the subject of the credit agreement in terms of the NCA.<sup>96</sup> The sections that relate most directly to the goods and services themselves are sections 54 and 55 of the CPA and by implication also section 56. Section 54 governs the consumer's rights to demand quality service and the right to quality goods associated with the performance of the service.<sup>97</sup>

As indicated, section 55 gives a consumer the right to receive goods that are reasonably fit for their intended purpose, of good quality and free of defects. Although Melville and Palmer argue that the implied warranty of quality in terms of section 56(1) might be problematic because it refers to a warranty 'in the transaction or agreement' and

<sup>88</sup> Ibid. The authors indicate that this aspect broadens the extent to which the CPA 'applies to NCA transactions' but, as argued above, the CPA does not apply to the credit agreement itself but applies ex lege to goods and services to which a credit agreement relates in addition to whatever is provided for in the credit agreement (emphasis supplied).

<sup>89</sup> Idem at 274.

<sup>90</sup> The other two categories discussed by Melville & Palmer (op cit note 83 at 274) but not relevant for the purposes of this discussion are promotional activities and provisions not relating to credit agreements.

<sup>91</sup> Section 16 of the CPA.

<sup>92</sup> Chapter 2, Part G of the CPA.

<sup>93</sup> Section 22 of the CPA.

<sup>94</sup> Melville & Palmer op cit note 83 at 275.

<sup>95</sup> Section 64 of the NCA: Right to information in plain and understandable language; s 121 of the NCA: Consumer's cooling-off right; ss 89–91 of the NCA: Unlawful credit agreements.

<sup>96</sup> Melville & Palmer op cit note 83 at 275.

<sup>97</sup> A discussion of this section is beyond the scope of this article.

possibly falls outside the application of a credit agreement, this is, we suggest, not the appropriate view.<sup>98</sup> The implied warranty of quality is directly related to the goods that form part of the agreement and should be interpreted in the same manner as the rest of section 56. It is correctly stated that sections 56(2) and 56(3), which relate to the consumer's right to return unsatisfactory goods and the repair of defective goods respectively, do pertain to the goods rather than the agreement and should apply even if there is an associated credit agreement.<sup>99</sup>

Otto and Otto-Aucamp correctly state that the rights (mentioned above) are the consumer's rights regarding the goods themselves and that these sections of the CPA are *inter alia* what the legislature intended to be applicable to goods under a credit agreement.<sup>100</sup>

When one considers the NCA, it becomes clear this statute does not specifically deal with aspects such as the quality of goods and services and remedies for defective goods, apart from preserving the consumer's common-law rights with regard to latent defects. Compared to the extensive provision in the CPA for various aspects relating to goods and services, especially the liberal redress that is provided, the NCA affords a lower level of protection than the CPA to consumers specifically directed at the goods and services that are supplied, and that the legislature apparently *inter alia* wanted to address this imbalance by means of section 5(2)(d). It is thus submitted that the legislature intended to extend the augmented rights pertaining to goods and services that are catered for by the CPA to goods and services that are provided under a credit agreement governed by the NCA, in order to ensure that the same level of protection regarding the quality of goods and services is afforded to consumers who enter into credit agreements as that which is afforded to consumers who enter into agreements that fall within the scope of the CPA. So the effect of section 5(2)(d) is to provide a consumer under a credit agreement, and for the purposes of this discussion, specifically an instalment agreement, *ex lege* with the comprehensive rights relating to goods and services that are provided for in the CPA *in addition to*<sup>101</sup> whatever may be provided for in the instalment agreement.

<sup>98</sup> Melville & Palmer *op cit* note 83 at 275.

<sup>99</sup> *Ibid.*

<sup>100</sup> Otto & Otto-Aucamp *op cit* note 50 at 146.

<sup>101</sup> Emphasis supplied.

VI THE CURIOUS CASE OF THE CONSUMER, THE  
MOTOR VEHICLE AND THE INSTALMENT SALE  
AGREEMENT: *MFC (A DIVISION OF NEDBANK LTD) v  
JAJ BOTHA*<sup>102</sup>

The problems occasioned by uncertainty regarding the interplay between the NCA and the CPA in the context of defective goods sold and financed in terms of an instalment agreement governed by the NCA manifested themselves in *MFC (a division of Nedbank Ltd) v JAJ Botha*. This led to an unsatisfactory situation for both the credit provider and the consumer.

(a) *The facts of MFC (a division of Nedbank Ltd) v JAJ Botha*

The applicant, MFC, a registered bank, sought orders authorising it to sell a motor vehicle and deal with the proceeds of the sale in accordance with section 127 of the NCA and the equivalent terms of an instalment sale agreement concluded on 24 July 2012 (after the CPA came into general effective operation) between the applicant and the respondent, Botha.<sup>103</sup> The applicant also sought confirmation of the cancellation of the agreement.<sup>104</sup> The applicant had purchased the vehicle in question from a motor dealership (Keitzman Finance) at the instance of the respondent for the purpose of being able to sell it on to the respondent in terms of the instalment sale agreement governed by the NCA.<sup>105</sup> The agreement between the applicant and respondent expressly excluded any warranty by the applicant as to the condition of the vehicle selected by the respondent.<sup>106</sup> Nevertheless, the respondent had returned the vehicle to the applicant on or about 30 August 2012 because he had become dissatisfied with its allegedly defective condition.<sup>107</sup>

The applicant sought to deal with the vehicle on the basis of a voluntary surrender in terms of section 127 of the NCA. This would have the effect that the vehicle would be sold and the proceeds credited in reduction of the amount owed by the respondent to the applicant in terms of the instalment agreement.<sup>108</sup> But the respondent was opposed to the return of the vehicle being dealt with as a 'surrender' in terms of section 127 of the NCA, as it would compromise what he

<sup>102</sup> (6981/13) [2013] ZAWCHC 107 (15 August 2013).

<sup>103</sup> *Idem* para 1.

<sup>104</sup> *Ibid.*

<sup>105</sup> *Idem* para 2.

<sup>106</sup> *Ibid.*

<sup>107</sup> *Ibid.*

<sup>108</sup> *Idem* para 3.

considered to be his rights under Part H of Chapter 2 of the CPA.<sup>109</sup> He maintained that he had returned the vehicle in the exercise of his rights in terms of section 56(2) of the CPA.<sup>110</sup>

(b) *The decision of the Western Cape High Court*

(i) *Provisions of the CPA pertaining to credit agreements and the consumer's right to fair value, good quality and safety (Chapter 2, Part H)*

When the court (per Binns-Ward J) stated the facts of the matter, it remarked that, with regard to the instalment sale agreement, the applicant's real role in the sale of the vehicle was one of credit provider and not supplier of the vehicle.<sup>111</sup> The court began by examining the wording of section 127 of the NCA and section 56(2) of the CPA.<sup>112</sup> It considered the definition of 'supplier' and concluded that MFC did not market the vehicle but only financed it.<sup>113</sup> The court indicated that the supplier of the vehicle was another entity, Keitzman Finance, identified in the contract as the 'supplier' or 'dealer'; this was also apparent from the 'acknowledgement of delivery' signed by the respondent.<sup>114</sup>

The court then considered the word 'consumer' and indicated that it included 'a person to whom those particular goods or services are marketed in the ordinary course of the supplier's business'.<sup>115</sup> So the court concluded that both MFC and Botha qualified as consumers under the CPA.

The court then considered section 5(2)(d) of the CPA.<sup>116</sup> It commented that the practical import of section 5(2)(d) in a case such as the present was far from clear.<sup>117</sup> The court indicated that the apparent object of section 5(2)(d) is to distinguish the position of a credit provider from that of a supplier and to protect the contractual rights of a credit provider that has financed the supply of goods by a supplier to a consumer, while seeking at the same time to preserve the consumer's

<sup>109</sup> Ibid.

<sup>110</sup> Ibid.

<sup>111</sup> Idem para 1.

<sup>112</sup> Idem paras 4 and 5 respectively.

<sup>113</sup> Idem para 6.

<sup>114</sup> Ibid.

<sup>115</sup> Ibid.

<sup>116</sup> Idem para 7.

<sup>117</sup> Ibid. The court stated: 'While it is plain that the instalment sale agreement between the applicant and respondent is excluded from the operation of the CPA, the effect of the qualification retaining the subject matter within the ambit of the Act is far from obvious.'

statutory position against the supplier.<sup>118</sup> But the court pointed out that neither it nor counsel could identify any provision in the CPA that facilitated the achievement of the second of these objectives in the readily conceivable facts of the case before it.<sup>119</sup> The court remarked that it was not obvious how a consumer in the respondent's position could avail itself of the protection offered in terms of section 56(2) of the CPA.<sup>120</sup> The court stated that the respondent could not return the vehicle to the supplier against a refund of the purchase price, because ownership of the motor vehicle vested in the credit provider and it was the credit provider and not the respondent that had paid the purchase price.<sup>121</sup>

Counsel also appeared to agree that, in these circumstances, the only practical manner in which effect could be given to the legislative object would be 'either for the bank to cede its rights as "consumer" against the supplier in terms of the CPA to the respondent', thus permitting the latter to return the vehicle to the dealer against a refund of the purchase price, 'or for the bank, at the instance and request of the respondent, to exercise its rights as "consumer" directly against the supplier and to give the respondent the benefit of the refund of the purchase price in satisfaction or reduction of the latter's liability to it under the instalment sale agreement'.<sup>122</sup>

The court then remarked that 'unfortunately, and no doubt due to the lack of clarity in the relevant provision and the absence of any reported judicial interpretation thereof', neither of these courses was followed, and the six-month window of opportunity (under section 56 of the CPA) for appropriate action to be taken had passed.<sup>123</sup> The court then remarked:

'Instead both parties proceeded under a misapprehension as to the legal effect of the respondent's surrender of the vehicle to the applicant.'<sup>124</sup>

<sup>118</sup> *Idem* para 8.

<sup>119</sup> *Ibid.*

<sup>120</sup> *Idem* para 9.

<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid.*

<sup>123</sup> *Idem* para 10.

<sup>124</sup> *Ibid.* It pointed out that the applicant treated the return of the vehicle as a surrender within the meaning of s 127 of the NCA whereas the respondent 'considered that he had no liability to the applicant because he thought that he had been relieved of any further obligation in respect of the purchase of the vehicle because of the protection he believed he was afforded in terms of s 56 of the CPA'.

(ii) *Surrender of goods in terms of section 127 and notice of enforcement in terms of section 129(1)*

The court held that the applicant was misdirected in characterising the return of the vehicle as having been the surrender thereof in terms of section 127 of the NCA.<sup>125</sup> The court pointed out that section 127 applies in the case of the surrender of goods by a consumer who wishes voluntarily to terminate a credit agreement on the basis of the further provisions of the section, namely, that the goods will be realised by the credit provider and the proceeds applied in reduction of the consumer's outstanding liability under the contract.<sup>126</sup> The court remarked that section 127 is in no way equivalent to section 56 of the CPA, because section 56 contemplates a return of *defective*<sup>127</sup> goods, with a consequent termination of any pertinent contractual relationship between the supplier and the consumer; effectively, on the basis of *restitutio in integrum*.<sup>128</sup> However, section 127 provides for a regulated basis for a credit provider to recover contractual damages upon the statutorily permitted voluntary termination of a credit agreement by a consumer.<sup>129</sup> The court further held that the respondent did not give the applicant notice in terms of section 127(1)(a) of the NCA when he surrendered the vehicle and that the procedures contemplated by the further subsections in the provision therefore did not apply.<sup>130</sup> One may add to the court's reasoning that a surrender in terms of section 127 of the NCA must be accompanied by the necessary intention by the consumer as envisaged in section 127 as well as a written notice 'to terminate the agreement'.<sup>131</sup>

The court also pointed out that the respondent was equally misdirected in conceiving that he was covered by section 56 of the CPA, because his contract with the applicant, being a credit agreement within

<sup>125</sup> *Idem* para 11.

<sup>126</sup> *Ibid.*

<sup>127</sup> Emphasis supplied.

<sup>128</sup> *MFC v Botha* supra note 102 para 11.

<sup>129</sup> *Ibid.* The court pointed out that the consumer is able to effect such a voluntary termination in terms of s 127(1)(a) of the NCA.

<sup>130</sup> *MFC v Botha* supra note 102 para 12. The applicant's counsel endeavoured to have the following sentence in an email sent by the respondent's legal advisors to the applicant and the supplier of the vehicle on 15 November 2012 be regarded as a notice in terms of s 127(1)(a): 'Our client has been advised to cancel all debit order instructions in this regard, and we confirm that same has been done.' The court, however, found the argument to be misplaced. The email in question fell to be read in the context of the earlier correspondence referred to in it, which included a letter addressed on behalf of the respondent to the supplier, dated 30 August 2012, which made it plain that the respondent's return of the vehicle purported to have been in terms of s 56 of the CPA and not in terms of s 127 of the NCA.

<sup>131</sup> The words used in s 127(1)(a) of the NCA.

the meaning of the NCA, was excluded in terms of section 5(2)(a) from the application of the CPA.<sup>132</sup> The court remarked that '[m]oreover, the applicant was in any event not the supplier of the vehicle within the definition of that term in the CPA'.<sup>133</sup>

The court further pointed out that the applicant's counsel, when confronted with the applicant's difficulties in purporting to rely on section 127 of the NCA, argued in the alternative that, on any approach, the respondent had repudiated the agreement and that the applicant by accepting the repudiation had terminated the contract and should thus be entitled to sell the vehicle. Counsel for the applicant further submitted that the claim against the respondent for any shortfall that might thereafter exist should not be a matter to concern the court at the time of the proceedings in the present case.<sup>134</sup> But the court decided that, apart from the consideration that this argument ran counter to the relief sought in terms of paragraph 2 of the applicant's notice of motion, it also overlooked the statutory formalities applicable in terms of the debt enforcement provisions in the NCA, notably those in section 129(1).<sup>135</sup> The court also referred to *Absa Bank Ltd v De Villiers and Another*,<sup>136</sup> in which it was decided that proceedings to confirm the cancellation of a credit agreement, or to claim relief consequent upon such cancellation are 'enforcement' proceedings within the meaning of section 129(1) of the NCA.<sup>137</sup> However, the court held that the applicant had not complied with section 129(1) of the NCA.<sup>138</sup>

<sup>132</sup> *MFC v Botha* supra note 102 para 13.

<sup>133</sup> *Ibid.*

<sup>134</sup> *Idem* para 14.

<sup>135</sup> *Ibid.* Section 129(1) of the NCA states:

- 'If the consumer is in default under a credit agreement, the credit provider—
- (a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and
  - (b) subject to section 130 (2), may not commence any legal proceedings to enforce the agreement before—
    - (i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86 (10), as the case may be; and
    - (ii) meeting any further requirements set out in section 130.'

<sup>136</sup> 2009 (5) SA 40 (C).

<sup>137</sup> On the meaning of 'enforce', see *Otto & Otto-Aucamp* op cit note 50 at 113. The authors consider that the word 'enforce' in s 129(1)(b) of the NCA includes a claim for performance as well as one for cancellation of the contract. It is, of course, contrary to the ordinary meaning of 'enforce' in ordinary legal parlance to include cancellation of the contract under 'enforce'. However, this conclusion is inevitable if the NCA is interpreted as a whole. This view, as expressed in *Otto & Otto-Aucamp* (in the first edition of the book in 2006), and by C M van



In its order, the court dismissed the application for relief in terms of paragraphs 1 and 2 of the notice of motion. In addition, the court adjourned the notice of motion sine die and directed that the proceedings might be resumed on notice to the respondent only after the applicant had complied with section 129(1) of the NCA and the period of at least ten business days provided in terms of section 130(1)(a) of NCA had elapsed. The applicant was ordered to pay the respondent's costs of suit incurred in respect of the hearing dated 14 August 2013 as well as the noting of the judgment on 15 August 2013.

(c) *Comments on MFC (a division of Nedbank Ltd) v Botha*

(i) *General application of the CPA: Supplier who supplies goods and services*

The general application of the CPA has been explained in detail above.<sup>139</sup> The term 'supplier' is used as an umbrella term and the term 'supply' is given a very broad meaning to include the sale of goods and the supply of services in relation to those goods.<sup>140</sup> 'Market' is also given a broad meaning and includes the *supply*<sup>141</sup> of goods.<sup>142</sup> We suggest that the court's interpretation of 'supplier' is too narrow if it is read with the definitions of 'market' and 'promote' in the CPA. It is therefore submitted that the court erred by declaring that the bank's 'real role in the sale of the vehicle was that of credit provider, and not one of supplier of the goods in question'. As pointed out above,<sup>143</sup> the bank under an instalment agreement wears two hats — a seller's and a credit provider's. In so far as the bank sold the goods under the instalment agreement to the consumer, it can be regarded as a supplier of goods for the purposes of the CPA (given that the term 'supply' includes 'to sell'). Had the court recognised this point, it would have realised that the consumer was

Heerden and J M Otto 'Debt enforcement in terms of the National Credit Act 34 of 2005' 2007 *TSAR* 655, was carefully considered and endorsed by a Full Bench in *Absa Bank Ltd v De Villiers* supra note 136.

<sup>138</sup> *MFC v Botha* supra note 102 para 16.

<sup>139</sup> See para V(a) above.

<sup>140</sup> See also P N Stoop 'The overlap between the Consumer Protection Act 68 of 2008 and the National Credit Act 34 of 2005: A comparison with Australian law' (2014) 77(1) *THRHR* 135 at 138.

<sup>141</sup> Emphasis supplied.

<sup>142</sup> Section 1 of the CPA.

<sup>143</sup> Paragraph V above.

entitled to approach the bank for redress under section 56 of the CPA within the six months after the instalment agreement was concluded.

*(ii) Bank is credit provider and supplier but not consumer*

Perhaps one of the most concerning aspects of the judgment pertains to the concept and definition of ‘consumer’ in terms of the CPA. In paragraph 6 of the judgment, the court states that *both*<sup>144</sup> the applicant (bank) and the respondent (the buyer who is a natural person) qualify as consumers under the CPA in respect of the motor vehicle. In paragraph 9 the court goes further and seems to agree (*with counsel for both the applicant and the respondent*)<sup>145</sup> that the practical solution for the applicant (the bank) is to ‘cede’ its rights as consumer against the supplier (motor dealership) to the respondent (buyer), thus permitting the latter to return the vehicle to the dealership against a refund of the purchase price, *or*<sup>146</sup> for the bank to exercise its rights as ‘consumer’ *directly*<sup>147</sup> against the supplier, thereby giving the respondent the benefit of the refund of the purchase price in satisfaction or reduction of the latter’s liability to it under the instalment sale agreement.<sup>148</sup>

It seems that both the court and the counsel for both parties omitted to take the very important provisions of sections 6 and 5(2)(b) of the CPA into account. The bank is clearly a juristic person whose asset value or annual turnover, at the time of conclusion of the instalment agreement, equals or exceeds the threshold value determined by the Minister (R2 million).<sup>149</sup> The CPA, as indicated, excludes protection of any juristic person in the form of a ‘consumer’ that equals or exceeds the threshold determination of section 6. This approach also accords with the preamble to and purpose of the CPA, in that it is specifically aimed at protecting ‘vulnerable consumers’.<sup>150</sup> It would be difficult to imagine a bank being regarded as a ‘vulnerable consumer’. But in any event, no bank, or for that matter, very few suppliers and sellers that are juristic persons for the purposes of the CPA, will fall within the threshold of R2 million.

It is submitted that the argument that the bank could possibly have

<sup>144</sup> Emphasis supplied.

<sup>145</sup> *MFC v Botha* supra note 102 para 9 (emphasis supplied).

<sup>146</sup> *Ibid* (emphasis supplied).

<sup>147</sup> *Ibid* (emphasis supplied).

<sup>148</sup> *Ibid*.

<sup>149</sup> Section 6 read together with s 5(2)(b) of the CPA, read with the threshold determination published by the Minister of the Department of Trade and Industry in GN 294 in GG 34181 of 1 April 2011.

<sup>150</sup> Section 3(1)(b) of the CPA.

ceded its rights as consumer vis-à-vis the dealership as supplier was essentially based on the incorrect conclusion that the bank was not a supplier for the purposes of redress in terms of section 56 of the CPA. Should the court have recognised, however, that the bank was indeed such a supplier, the recourse of the bank against the dealer would not have been problematic, even though the bank would not have been a consumer in terms of the CPA. This is so because it is very likely that the dealership would have indemnified the bank against actual losses as standard practice when discounting the initial sale of the vehicle. Covering agreements between financial institutions and dealers under which the dealer indemnifies the financier against claims by clients for, among other things, defects in goods sold are quite common.

*(iii) Incorrect application by the bank of section 127 of the NCA*

Section 127 of the NCA provides for the termination of a credit agreement by means of the consumer's voluntarily surrendering the financed item to the credit provider.<sup>151</sup> The effect of this step is that the agreement is terminated and that the credit provider may sell the vehicle and recover the shortfall on the credit agreement from the consumer. Surrender of goods in accordance with section 127 is limited to specific agreements and can validly occur only if two prerequisites are met:

- (a) the NCA must apply to the agreement; and
- (b) the agreement must be an instalment agreement or a secured loan or a lease agreement.<sup>152</sup>

Two situations are envisaged. The first is where a consumer who is in default under the relevant credit agreement surrenders the vehicle. The second is where a consumer who is not in default under a credit

<sup>151</sup> For a detailed discussion, see J W Scholtz et al *Guide to the National Credit Act* (2008) para 9.5.4; Michelle Kelly-Louw & Philip N Stoop *Consumer Credit Regulation in South Africa* (2012) 282; Hermie Coetzee 'Voluntary surrender, repossession and reinstatement in terms of the National Credit Act 34 of 2005' (2010) 73(4) *THRHR* 569.

<sup>152</sup> Thus, where a credit agreement falls outside the scope of the NCA, s 127 cannot apply, even if such agreement is an instalment agreement or a secured loan or a lease agreement. Similarly, where a credit agreement is governed by the NCA but is not an instalment agreement, lease or secured loan, s 127 will also not apply. It is important to note that where s 127 does apply to the surrender of a vehicle financed by the bank, the section requires compliance with specific processes as indicated below. If these processes are not observed, a court will not determine the matter (for example, give judgment for the outstanding balance), because s 130(3)(a) of the NCA provides that the court may determine a matter regarding a credit agreement only if it is satisfied, where s 127 applies to proceedings, that the procedures required by s 127 have been complied with. Note should also be taken of s 127(10), which provides that a credit provider who acts contrary to s 127 is guilty of an offence. This is one of the few offences created by the NCA.

agreement decides that he does not wish to continue with the agreement and surrenders the vehicle.<sup>153</sup> No period is prescribed within which a consumer may surrender a vehicle in accordance with section 127. But this surrender should not be confused with the exercise of a cooling-off right in accordance with section 121 of the NCA as discussed below. The surrender in terms of section 127 occurs after any applicable cooling-off period and the consumer gives written notice to the credit provider to terminate the agreement. Thus surrender will usually occur in respect of an agreement where the consumer has made certain payments over a specific period and then either decides that he does not wish to continue with the agreement (even though he has not defaulted on his payments) or he falls into arrears with his payments and decides to 'cut his losses' by surrendering the vehicle to the credit provider. In practice, surrender in accordance with section 127 occurs almost exclusively where the consumer defaults with his payments under the agreement.

When surrendering a vehicle to the credit provider in accordance with section 127, the consumer is required to:<sup>154</sup>

- (a) give written notice to the credit provider (such as a bank) of termination of the agreement; and
- (b) if the vehicle is in the bank's possession, require it to sell the vehicle; or
- (c) otherwise return the vehicle to the bank's place of business within five business days after the date of the notice during ordinary business hours or within such other period or at such time or place as arranged with the bank.

Within ten business days after the later of receiving a notice in terms of section 127(1)(b)(i) (that is, a notice to sell the goods that are already in the credit provider's possession) or receiving the goods tendered in terms of section 127(1)(b)(ii), the credit provider must give the consumer written notice setting out the estimated value of the goods and any other prescribed information.<sup>155</sup> A consumer who is in default

<sup>153</sup> It is to be noted that the NCA does not define 'default'. Section 127 also gives no indication as to the meaning of 'default'. It is thus submitted that 'default' can refer to any conduct by the consumer that constitutes breach of the terms of the credit agreement and is not necessarily limited to default by non-payment of instalments but can also, for example, refer to default by not keeping the vehicle insured or surrendering possession of the vehicle to a third party.

<sup>154</sup> Sections 127(1)(a) and (b) of the NCA.

<sup>155</sup> The period allowed for obtaining a valuation is understandably short, because the legislature wishes to avoid a situation in which a credit provider is tardy in obtaining a valuation, with the result that by the time that the valuation is eventually obtained, the vehicle is valued at a much lower value that impacts negatively on the consumer's further

(and thus in breach of contract) and who has given a notice in terms of section 127(1)(a) to the credit provider is not entitled to unconditionally withdraw the notice to terminate the agreement.<sup>156</sup>

After selling any goods in terms of section 127, a credit provider must credit or debit the consumer with a payment or charge equivalent to the proceeds of the sale less any expenses reasonably incurred by the credit provider, and give the consumer a written notice stating the settlement value of the agreement immediately before the sale.

Where the amount credited to the consumer's account exceeds the settlement value in terms of the credit agreement immediately before the sale, then, if another credit provider has a registered credit agreement with the same consumer in respect of the *same*<sup>157</sup> goods, the credit provider must remit that amount to the National Consumer Tribunal, which may make an order for the distribution of the amount in a manner that is just and reasonable.<sup>158</sup> But if no other credit provider has a registered credit agreement with the same consumer in respect of the *same*<sup>159</sup> goods, the credit provider must remit the excess amount to the consumer together with the notice required in terms of section 127(5)(b); and the agreement is terminated upon the remittance of that amount.<sup>160</sup>

If an amount is credited to the consumer's account and it is less than the settlement value immediately before the sale, thus leaving an outstanding balance under the credit agreement, or if an amount is debited to the consumer's account, the credit provider may demand payment from the consumer of the remaining settlement value, when issuing the notice required by section 127(5)(b) as indicated above.<sup>161</sup> Section 127(8)(b) provides that if the consumer pays the amount demanded at any time before the judgment is obtained under section 127(8)(a), the agreement is terminated<sup>162</sup> upon remittance of that amount. If a consumer fails to pay an amount demanded in terms of

responsibilities regarding payment to the credit provider than would have been the case had the goods been valued upon surrender.

<sup>156</sup> Section 127(4)(a) of the NCA states that where the non-defaulting consumer withdraws the surrender, the credit provider is obliged to return the goods to the consumer.

<sup>157</sup> Emphasis supplied.

<sup>158</sup> Section 127(6)(a) of the NCA.

<sup>159</sup> Emphasis supplied.

<sup>160</sup> Section 127(6)(b) of the NCA.

<sup>161</sup> Section 127(7) of the NCA. This means that the s 127(5)(b) notice must set out the information as prescribed by s 127(5)(b) but can also include a demand for payment, thereby obviating the necessity of sending a separate demand letter to the consumer.

<sup>162</sup> It must be noted that the agreement has in fact already been terminated by the consumer himself by virtue of the notice of surrender. See s 127(1)(a) of the NCA.

section 127(7) within ten business<sup>163</sup> days after receiving a demand notice, the credit provider may commence enforcement proceedings in terms of the Magistrates' Courts Act 32 of 1944 for judgment enforcing the credit agreement.<sup>164</sup>

Accordingly, it is clear that it is not appropriate to deal with the situation in which a consumer returns a vehicle financed under an instalment agreement to the bank on the basis that the vehicle is defective as constituting a voluntary surrender in terms of section 127 of the NCA. The court was correct in making this finding. The rationale for and the redress offered by section 127 differ materially from the rationale for returning a defective vehicle and the redress afforded in respect of defective goods under section 56 of the CPA or, where the return occurs more than six months after the vehicle was sold and financed, from the redress provided in terms of the common law. It is submitted, however, that, technically, a consumer may also be able to terminate an instalment agreement in respect of a defective motor vehicle without providing any reason for the termination by virtue of section 121 of the NCA if this return occurs within five business days after the agreement was signed and subject to the requirements of section 121.<sup>165</sup> Although this termination will rid him of the defective vehicle and the credit agreement against a refund of his payments, if any, it has the drawback that the period within which to exercise such right of termination is extremely limited and may possibly give rise to a dispute about the costs of the 'use' of the vehicle.<sup>166</sup>

<sup>163</sup> See s 2(5) of the NCA for the calculation of business days.

<sup>164</sup> Section 127(8) of the NCA. Note s 127(9), which provides that in either event contemplated in s 127(8), interest is payable by the consumer at the rate applicable to the credit agreement on any outstanding amount demanded by the credit provider in terms of s 127(7) from the date of the demand until the date on which the outstanding amount is paid.

<sup>165</sup> Section 121(1) of the NCA applies only in respect of a lease or an instalment agreement entered into at any location other than the registered business premises of the credit provider. In terms of s 121(2), a consumer may terminate a credit agreement within five business days after the date on which the agreement was signed by the consumer, by delivering a notice in the prescribed manner to the credit provider, and tendering the return of any money or goods, or paying in full for any services received by the consumer in respect of the agreement. Section 121(3) further provides that when a credit agreement is terminated in terms of this section, the credit provider must refund any money that the consumer has paid under the agreement within seven business days after the delivery of the notice to terminate; and may require payment from the consumer for the reasonable cost of having any goods returned to the credit provider and restored to saleable condition, and a reasonable rent for the use of those goods for the time that the goods were in the consumer's possession, unless those goods are in their original packaging and it is apparent that they have remained unused.

<sup>166</sup> For a full discussion of this so-called cooling-off right contained in s 121, see J M Otto 'Die afkoelreg in die Nasionale Kredietwet en die Wet op Verbruikersbeskerming' *LitNet Akademies* 9(1) March (2012) 23, available at [bit.ly/1fMzcsq](http://bit.ly/1fMzcsq), accessed on 2 April 2014.

## VII CONCLUSION AND RECOMMENDATIONS

‘Nothing is more expensive than a missed opportunity’.<sup>167</sup>

It is regrettable that the court in the *MFC* case did not seize the opportunity to clarify many of the core issues pertaining to the application and interpretation of the CPA, the interplay between the CPA and the NCA and issues regarding the proper interpretation of the consumer’s rights in the case of defective goods in instalment agreements. It would also have been helpful if the court could have commented on the exclusion of warranties in the instalment agreement as to the condition of the goods, considering the provisions of section 90(2) and section 90(3) of the NCA.

As many writers<sup>168</sup> (and the court in the *MFC* case)<sup>169</sup> correctly reason, there are issues of interpretation and of application where both the NCA and CPA are applicable. In the case of an instalment agreement, however, the issues should not be made excessively complicated.

According to the arguments above,<sup>170</sup> the bank as seller and credit provider in terms of an instalment agreement (governed by the NCA) and concluded after 31 March 2011 is in fact also a supplier who supplies goods and services in terms of the CPA. In terms of section 5(2)(d), the CPA will apply *ex lege* to the goods sold and financed in terms of an instalment agreement under the NCA. This protection offered by the CPA operates in addition to whatever may be provided for under the NCA and in terms of the credit agreement itself. By virtue of section 2(10) of the CPA, the consumer’s common-law rights are also preserved.

As indicated, should a defect in a vehicle financed under an instalment agreement manifest itself within six months from the date of conclusion of the instalment agreement, the consumer can choose to have its recourse against any of the suppliers in the supply chain by virtue of the implied warranty of quality in section 56 of the CPA. This warranty is (according to section 56(4)) *additional*<sup>171</sup> to any other implied warranty imposed by the common law and any express warranty. The warranty against eviction and the warranty against latent defects are implied warranties in terms of the common law of sale.<sup>172</sup> These warranties may not be excluded and the vehicle may not be sold *voetstoots* by the motor dealership, because section 55(6) appears to

<sup>167</sup> H Jackson Brown, available at [bit.ly/1pOF3SP](http://bit.ly/1pOF3SP), accessed on 2 April 2014.

<sup>168</sup> Melville & Palmer *op cit* note 83 at 273; Stoop *op cit* note 140 at 138; Otto & Otto-Aucamp *op cit* note 50 at 145.

<sup>169</sup> *MFC v Botha* *supra* note 102 para 7.

<sup>170</sup> See para V(a)(ii) above.

<sup>171</sup> Emphasis supplied.

<sup>172</sup> Nagel *et al op cit* note 4 para 15.02.

prohibit this step and section 2(10) in any event provides that the dealership as supplier may not preclude a consumer from exercising any right afforded to it in terms of the common law.<sup>173</sup> Nor will a supplier be able to contract out of the implied warranty contained in section 56 of the CPA, because section 51 of the Act prohibits any term in an agreement that directly or indirectly purports to waive or deprive a consumer of a right in terms of the CPA.<sup>174</sup>

Where it turns out within six months after the conclusion of an instalment agreement that the vehicle sold and financed is materially defective to the extent envisaged in section 53(a) read with section 55 of the CPA, the consumer can approach any of the suppliers in the supply chain<sup>175</sup> for redress. In practice, however, the consumer's recourse will usually be had against either the bank or the dealership. If recourse is had against the bank in terms of the CPA, the bank will be obliged to provide redress, even though this would on a practical level mean that the bank will have to call upon the dealer to assist it in providing such redress. Even though section 56 mentions nothing about the period within which this redress must be provided, clearly it will have to occur within a reasonable time, which may be a relatively short time in the case of a defective motor vehicle that is unable to be used for the purpose for which it is generally intended,<sup>176</sup> namely, to be driven in order to transport the consumer from point A to point B.

The point is that, in many instances, a consumer who has bought a defective vehicle and who is not afforded timely redress will at some stage cease to pay the instalments in terms of an instalment agreement. If the defects in the motor vehicle are material and he cannot use the vehicle for the purpose for which it is generally intended and the situation is not redressed, it is submitted that the effect will be that the bank, as seller in terms of an instalment agreement (which is generally regarded as an agreement in terms of which *inter alia* possession *and use* of the property is

<sup>173</sup> See also Barnard op cit note 28 at 471–3.

<sup>174</sup> Apart from the more liberal redress that it offers, it is submitted that a consumer who seeks redress under s 56 will also probably not have to prove the existence of the defect *at the time of entering into the agreement*, because reference to the six-month period in s 56 will possibly be construed to create an implied presumption that if the defectiveness of the goods is proved, this defect already existed when the agreement was concluded (emphasis supplied). Of course, this onus differs from the onerous obligation under the common law not only to prove the existence of a defect but also that the defect was present when the agreement was concluded.

<sup>175</sup> See s 56, which renders the producer, importer, distributor and retailer responsible for the warranties listed in s 55.

<sup>176</sup> Section 55(2)(a) states that a consumer has a right to receive goods that are reasonably suitable for the purposes for which they are generally intended.



transferred to the consumer)<sup>177</sup> will be in material breach of his duties under the agreement, entitling the consumer to cancel the agreement.

Where the six-month 'window of opportunity' mentioned in section 56 has lapsed by the time that a defect in a financed vehicle manifests itself, the consumer's redress will be founded in the common law and limited to latent defects that existed when the sale was concluded.<sup>178</sup> In terms of the common law, the consumer will not be able to 'take his pick' from a chain of suppliers but will be entitled to seek redress from the bank as the seller of the vehicle in terms of the instalment agreement and which is, as indicated by virtue of section 90(2)(g)(ii) of the NCA, primarily obliged to provide such redress to the consumer.

Would it be unreasonable for banks to take responsibility for defective goods (vehicles) in terms of the CPA where they did not have the opportunity of determining the condition of the goods prior to the instalment sale agreement? This answer is debatable, especially because banks have developed a practice of appointing the consumer to act as their 'agent' when inspecting and taking delivery of the vehicle. The fact remains, however, that, regardless of how much sympathy one may feel for a bank that has taken on the headache of defective vehicles financed in terms of instalment agreements, the bank in terms of an instalment agreement is also a seller with common-law duties, and also a 'supplier' for the purposes of section 56 of the CPA, and that, unfortunately, no amount of sympathy can override the clear dictates of the NCA and the CPA regarding the bank's obligation to provide redress to the consumer.

However good the solution that the bank is obliged to provide redress to the consumer looks on paper, the practical reality is that the bank does not have a vehicle repair shop, nor a fleet of vehicles from which it can merely select a new one to give to the consumer. In essence, the bank will have to have the support and assistance of the motor dealership in order to provide appropriate redress to the consumer, without which, redress for consumers who have bought defective financed goods may become a lengthy saga probably resulting in the unsatisfactory situation of the *MFC* case discussed above. The relationship between a bank and a motor dealership is, to say the least, delicate; contrary to what may generally be assumed, it is not necessarily the bank that has the upper hand in this relationship, because it needs the business of the motor dealership in order to conduct its own business. As banks are at the 'front line' of the

<sup>177</sup> See, for instance, the definition of instalment agreement in s 1 of the NCA. Instalment agreement as such is not defined in the CPA.

<sup>178</sup> Nagel et al op cit note 4 para 14.61.

supply chain and the common law, they should be very careful in choosing which dealerships with which to conduct business.

It would thus be prudent for the bank to address the problem of defective goods as soon as it is raised, because merely treating a return of a defective vehicle as a purported voluntary surrender in terms of section 127 of the NCA will not suffice, unless possibly if it is abundantly clear that the defect is of a trivial nature that does not impede the use of the vehicle and the consumer is actually just seeking to rid himself of the instalment agreement. Even then, the formal steps laid down by section 127 will serve as prerequisites before a conclusion can be drawn that a genuine surrender has taken place. The sooner the bank responds to the consumer's legitimate call for redress, the sooner it can have its recourse against the dealership if needs be and minimise the risk of eventually, after a long, costly and unsatisfactory delay, finding that the dealership has suffered financial ruin as sometimes happens in practice.

It is true that the eventual course of recourse for defective goods implies that a dealer will have to face the music at some stage, but from the bank's perspective it would be better if the dealership were to co-operate from the beginning, as this would ensure that banks were seen to take the rights of consumers to heart. Prevention being better than cure, it would therefore be good practice for banks to revisit their discounting agreements with dealers. This should be done to ensure that the moment that a consumer raises the issue of defective goods (whether to the bank or to the dealer), the dealer rises to the occasion and assists the bank to provide the necessary redress for which the dealer can then have recourse against its immediate provider (seller) of the vehicle under the common law or in terms of the contract between them.<sup>179</sup>

From the perspective of the consumer, things in fact do look up — that is, if practice meets theory and redress under the CPA or the common law is provided promptly, as it should be. The court noted in passing in *Standard Bank of South Africa Limited v Dlamini*<sup>180</sup> that institutions such as banks should welcome the framework proffered by the NCA and the CPA for bridging the socioeconomic inequalities substantively and for reforming the credit industry, if for no reason

<sup>179</sup> The dealer will often be disqualified as a consumer itself for the purposes of the CPA simply because it will usually be a juristic person with an annual turnover or asset value which equals or exceeds R2 million.

<sup>180</sup> 2013 (1) SA 219 (KZD).

other than that sustained inequalities and need lead to unrest and social instability, which are not good for business.<sup>181</sup>

Though Stoop correctly argues that it is not the duty of the court to make sense of the confusion<sup>182</sup> created by the legislature, the court does have a duty in terms of section 4(2)(a) of the CPA to ‘develop the common law necessary to improve the realisation and enjoyment of consumer rights’. The court must also promote the spirit and purpose of the CPA,<sup>183</sup> and make appropriate orders to give practical effect to the consumer’s right of access to redress,<sup>184</sup> including any innovative order that better advances, protects, promotes and assures the realisation by consumers of their rights in terms of the CPA.<sup>185</sup> The court should therefore comply with the duties stated in section 4 of the CPA as set out above. If the court fails to do so, it will amount to a missed opportunity at the very expensive cost of the consumer; the consumer ironically being the person at which the protection in terms of the NCA and CPA is aimed.

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<sup>181</sup> *Idem* para 78. The vehicle in this case was sold by the bank to the consumer by way of an instalment agreement and was seriously defective. The crux of the case pertained to the consumer’s right to plain language and the consumer’s cooling-off right in terms of ss 64 and 121 of the NCA respectively. However, the case is relevant, because the court makes a valuable statement in para 78 regarding the interplay between the NCA and CPA. The court notes that even though the CPA was not in effect when the bank sold the vehicle by way of an instalment agreement to the consumer, the bank ‘*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*’. The court remarked that ‘*it should have been clear when the Bank issued summons on 3 March 2011 that consumer relations were no longer business as usually practised over its 150-year history in South Africa*’ (emphasis supplied).

<sup>182</sup> Stoop *op cit* note 140 at 139.

<sup>183</sup> Section 4(2)(b)(i) of the CPA.

<sup>184</sup> Section 4(2)(b)(ii) of the CPA.

<sup>185</sup> *Ibid.*