THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case No: 1048/17

In the matter between:

FOUR WHEEL DRIVE ACCESSORY DISTRIBUTORS CC **APPELLANT**

and

LESHNI RATTAN N O **RESPONDENT**

Neutral citation: *Four Wheel Drive CC v Leshni Rattan NO* (1048/17) [2018] ZASCA 124 (26 September 2018)

Coram: Lewis, Zondi, Molemela and Schippers JJA and Mokgohloa AJA

Heard: 27 August 2018

Delivered: 26 September 2018

Summary: *Locus standi in judicio* – appellant claimed that it bore the risk of damage to a courtesy vehicle damaged when user fatally shot by assailants – *locus standi* to sue for cost of repairs not established – alleged lease between appellant and user not proved – appeal dismissed – judgment must be confined to issues raised by the parties – court should not decide issues irrelevant to outcome of the case.

ORDER

On appeal from: KwaZulu-Natal Local Division of the High Court, Durban (D Pillay J sitting as court of first instance): judgment reported *sub nom Four Wheel Drive Accessory Distribution CC v Rattan NO* 2018 (3) SA 204 (KZD).

The appeal is dismissed with costs

JUDGMENT

Schippers JA (Lewis, Zondi and Molemela JJA and Mokgohloa AJA concurring):

[1] The rule that a party who asserts a claim must prove it lies at the heart of this appeal. The appellant, Four Wheel Drive Accessory Distributors CC, (plaintiff) sued the respondent (defendant), the executrix of the estate of the late Mr Ivin Rattan (the deceased), in the KwaZulu-Natal Local Division of the High Court, Durban, for R559 817.45 arising from the breach of a written agreement relating to the use of a courtesy vehicle, which the deceased allegedly concluded with Land Rover Experience Rentals CC, a non-existent entity. In terms of the agreement the deceased was obliged to return the courtesy vehicle in the same condition that he received it. He did not comply with this obligation. He was shot and fatally wounded by unknown persons whilst travelling in the vehicle, which was riddled with bullet holes. The amount claimed was the cost of repairs to the vehicle.

[2] The court a quo dismissed the plaintiff's claim on the following grounds. It failed to establish *locus standi* as it did not prove its interest in the litigation. The deceased signed an incomplete agreement without reading it, and there was no consensus about the contents of the agreement upon which the plaintiff based its claim. The claim was unsustainable 'for want of good faith on the part of the plaintiff'. The agreement relating to the use of the courtesy vehicle was against public policy and violated the Consumer Protection Act 68 of 2008 (the Act). The appeal is with the leave of the court a quo.

[3] The basic facts are largely common ground. On 26 November 2012 the deceased delivered his Land Rover Range Rover Sport motor vehicle to the Land Rover dealership in Umhlanga for repairs. That day Mr Chase Murton, who said that he was the plaintiff's 'assistant manager' responsible for the day-to-day running of the business (Mrs Jane Brown, the plaintiff's sole member, said that he was employed as a driver), delivered a courtesy vehicle, a Land Rover Freelander (the Freelander) to the deceased at the Umhlanga dealership. The deceased signed a written document, purportedly an agreement between Land Rover Experience Rentals CC and him, in the presence of Mr Murton. This document, entitled, terms & conditions, comprised a single page with nothing appearing overleaf, contrary to what was stated therein. It contained no provision for payment of rental by the deceased.

[4] Two days later, on 28 November 2012, another courtesy vehicle, a Land Rover Discovery 4 SE (the Discovery), became available. Mr Murton delivered it to the business address of the deceased who signed a document with identical terms and conditions as the one he signed in respect of the Freelander. The particulars of the vehicle (the make, model, registration number and mileage) and those of the deceased (his address and identity number) were written by hand on the document by Mr Murton.

[5] The relevant terms of the agreement relating to the Discovery were these:

'In these terms and conditions (a) "the Company" means Land Rover Experience Rentals cc (b) "the Customer" means the person, firm or organisation by or on behalf of whom vehicles are rented under these Terms and Conditions . . . (d) "Vehicle" means the vehicle described overleaf (e) "Own Damage Insurance ('ODI')" means insurance against damage caused to the Vehicle, including theft …

1. The Company agrees to rent and the Customer agrees to take the Vehicle on the Terms and Conditions as set out herein.
2. The Customer will pay the Company on demand all charges due hereunder including where relevant, sums in respect of ODI, surcharges, additional charges and VAT or other taxes thereon.
3. ODI and TPI [third party insurance] are available through the Company. There will be an additional charge, subject to the terms of issue, for ODI and TPI . . . If ODI is not taken out by the Customer for any reason whatsoever, the Customer will be liable for the full cost of any damage sustained by the Vehicle.
4. If the Customer has opted to arrange his own insurance on the Vehicle, the cover must be comprehensive. Any excess on the policy is the responsibility of the Customer. The Company reserves the right to ask for satisfactory proof of the Customer's own insurance prior to the commencement of rental. The Customer is responsible for ensuring the Vehicle is properly insured from the time of delivery until 12.00 hours on the first working day following termination of the rental and indemnifies the Company against the loss incurred or damage to the Vehicle in the event that such cover fails to be effective. If the Customer becomes aware of any changes in his insurance cover during the period of the rental the Company's Insurance Department (*insert detail* _____) must be notified immediately in writing. In the event of accident/loss or damage to the Vehicle the Company will undertake repairs or select a repairer if applicable and will invoice the Customer for such repairs and any associated costs. Such invoice will be subject to payment on demand. The Company may at its discretion accept payment from the Customer's insurer, however ultimate responsibility is with the Customer. …

5. The Customer acknowledges that notwithstanding the provisions of (3) and (4) above he has a duty to ensure that all reasonable care is taken of the Vehicle against damage or loss throughout the rental period. The Customer accepts responsibility for any loss or damage to the vehicle caused by his wilful act or negligence. This includes but is not restricted to responsibility for any loss or damage to the Vehicle or its accessories as a result of theft occurring when the Customer or his servant or agent has left the keys in or with the Vehicle and the Customer hereby indemnifies the Company against such loss or damage
6. …
7. The Customer undertakes to return the Vehicle with all satellite navigation, tyres, tools, audio equipment and other accessories in the same condition as when received to the place and on the date set down overleaf.
8. The Company undertakes to provide a Vehicle to the customer which is in good working order and which functions satisfactorily throughout the rental period. . . .'

[6] As in the case of the Freelander, the document consisted of a single page, did not provide for rental payable by the deceased and did not describe the vehicle overleaf, nor the place to, or date on which, the Discovery had to be returned. In what follows, I refer to this document as 'the agreement'. The deceased did not take out own damage insurance in respect of the Discovery and, as already stated, did not return it due to his tragic demise. The plaintiff obtained the Discovery from the police.

[7] The logical starting point is *locus standi* – whether in the circumstances the plaintiff had an interest in the relief claimed, which entitled it to bring the action. Generally, the requirements for *locus standi* are these. The plaintiff must have an adequate interest in the subject matter of the litigation, usually described as a direct interest in the relief sought; the interest must not be too remote; the interest must be actual, not abstract or academic; and it must be a current interest and not

a hypothetical one.[1] The duty to allege and prove *locus standi* rests on the party instituting the proceedings.[2]

[8] The rule that only a person who has a direct interest in the relief sought can claim a remedy, is no more clearly expressed than in the judgment of Innes CJ in *Dalrymple*:[3]

'The general rule of our law is that no man can sue in respect of a wrongful act, unless it constitutes a breach of a duty owed to him by the wrongdoer, or unless it causes him some damage in law.'

[9] The claim as pleaded, in sum, was this. The plaintiff leased the Discovery from its owner and in terms of that agreement bore the risk of loss or damage to it. On 28 November 2012 the deceased concluded the agreement in terms of which he hired the Discovery until his vehicle was repaired. He undertook to return the Discovery in the same condition that he received it, and accepted responsibility for the full cost of any damage to the vehicle if he did not take out own damage insurance. He did not obtain such insurance. The plaintiff retrieved the Discovery from the police in a damaged condition and therefore the deceased was liable for the costs of the repairs to it.

[10] In the plea and a reply to a notice in terms of rule 37 of the Uniform Rules of Court, the defendant denied that the plaintiff had leased the Discovery from its owner or that it bore the risk of loss or damage to it under such agreement. She also declined to admit the plaintiff's identity and that it formerly traded under the style of Land Rover Experience Rentals. The defendant further denied that the deceased hired the Discovery from the plaintiff as a replacement for his own vehicle. She alleged that the Discovery was a courtesy car (provided by Land

[1] D E van Loggerenberg and E Bertelsmann *Erasmus: Superior Court Practice* 2 ed vol 1 (loose-leaf) at D1-186.
[2] *Mars Incorporated v Candy World (Pty) Ltd* 1991 (1) SA 567 (A) at 575H–I; *Kommissaris van Binnelandse Inkomste v Van der Heever* 1999 (3) SA 1051 (SCA) at 1057G–H.
[3] *Dalrymple & others v Colonial Treasurer* 1910 TS 372 at 379.

Rover, Umhlanga, to the deceased); that she had no knowledge of the circumstances surrounding the agreement; that the Discovery was damaged when unknown persons shot and fatally wounded the deceased whilst he was inside it; and that the police had taken possession of the Discovery. The plaintiff's *locus standi* was thus squarely in issue.

[11] The plaintiff's case that it suffered damage when the Discovery was not returned in the condition in which it was given to the deceased, was not established in evidence. Put differently, the plaintiff did not establish an interest in the Discovery entitling it to claim damages from the defendant. Mrs Brown, in her evidence-in-chief, said nothing about the plaintiff's lease agreement with the owner of the Discovery or that it bore the risk of damage to the vehicle under that agreement, as alleged in the particulars of claim. In cross-examination she said that Land Rover South Africa (SA) owned the vehicle; that it had leased the vehicle to her and then leased it back from her.

[12] In this regard Mrs Brown testified as follows:

'[MR McINTOSH, counsel for the defendant] The agreement between the plaintiff and Land Rover is that a written agreement? --- No …

Is it just done orally? --- Yes …

And so how much rental was paid to your company for the hiring of these vehicles by Land Rover South Africa? --- I think at that stage for the Freelander it was . . . round about R800 per day and I think the Discovery is slightly higher by about another R200 per day …

…

And who is the owner of the vehicle that got damaged? --- The owner of the vehicle that got damaged was Land Rover South Africa.

So your evidence is now Land Rover South Africa owns the vehicle that they . . . lease to you? --- That is correct.

That they then [lease] back from you? --- That is correct.

So where are the documents that show that agreement? --- There was no contract it was an agreement.

PILLAY J oral agreement? --- Yes, an oral agreement.

MR McINTOSH Where is the agreement of lease between you and Land Rover, surely there must be something in writing? --- No …

Mrs Brown, I find that astounding. What gives you the right to sue on this case if the vehicle belongs to Land Rover South Africa? … we in effect lease the vehicle from them.

Is that all you know about that? --- Yes ….'

[13] That was the sum total of the plaintiff's evidence on its interest in the Discovery and its entitlement to institute proceedings. It was as clear as mud. Mrs Brown's evidence that the plaintiff 'in effect' leased the Discovery from Land Rover SA makes no sense. Why would Land Rover SA, the owner of the Discovery, lease it to the plaintiff, only to rehire it again? This, when it was a courtesy vehicle made available to Land Rover SA's customers at no cost. And if Land Rover SA rehired the Discovery, how then did the deceased become a 'lessee' of the Discovery? On the plaintiff's case there was no *vinculum iuris* between him and Land Rover SA. Mrs Brown's evidence also cannot be correct because it is unclear which entity in the alleged arrangement between the plaintiff and Land Rover SA is the lessor, and which the lessee. Further, it is highly improbable that Land Rover SA, a national motor dealership, would have concluded an oral contract with the plaintiff, a close corporation. And it is equally improbable that as owner, Land Rover SA would not have insured the Discovery against loss or damage. The vehicle was virtually brand new – it had covered only 5 588 km.

[14] Mrs Brown's evidence regarding the alleged agreement between Land Rover SA and the plaintiff was more confusing in the light of her earlier testimony, which was at odds with the alleged agreement with Land Rover SA. She referred to a document entitled, 'Car Hire Request', apparently prepared by Lazarus Car Hire (a name under which Mrs Brown formerly traded), on which the deceased's name appeared, but which reflected Europe-Assist – a wholly different entity – as the 'client' (of Lazarus Car Hire) regarding the hire of the Freelander. Even more confusingly, she testified that the deceased was the 'client' and that the instruction came from Europe-Assist which provided the Freelander for use by the client. Then she said that when the Land Rover dealership did not repair the deceased's vehicle within 72 hours, it approached Europe-Assist directly (and not the plaintiff) for an extension of the hire of the Freelander for an extra day, which was granted.

[15] So, the relationship between Land Rover SA, the owner of the Discovery, and the plaintiff, was not at all clear from Mrs Brown's evidence. And the role of Europe-Assist in the provision of courtesy vehicles to customers of Land Rover SA only added to the obscurity. It is thus hardly surprising that counsel for the appellant glossed over the plaintiff's interest in the Discovery which entitled it to sue for damages. It was merely submitted (without any reference to the record) that the plaintiff supplied courtesy vehicles to customers of Land Rover SA 'in terms of a contract it has with Europe-Assist and Land Rover South Africa'. However, there was no evidence of any contract between the plaintiff and Europe-Assist.

[16] Apart from this, the agreement itself was not proved. Contrary to the plaintiff's assertion, it was not a lease. It is trite that the essential terms of such a contract are an undertaking by the lessor that the lessee shall have the use and enjoyment of the thing leased for a limited period of time, in consideration for the

payment of a certain or ascertainable rental amount.[4] The agreement did not provide for any rental payable by the deceased. Mr Murton conceded that the client paid no rental for the vehicle, but nonetheless insisted that the agreement was a rental agreement between the deceased and the plaintiff. The allegation in the particulars of claim that the deceased 'hired the … Discovery from the plaintiff as a replacement for his vehicle', was simply not proved. It is accordingly unnecessary to decide what kind of agreement was concluded between the plaintiff and the deceased. If anything, it was a contract of loan for use.

[17] Further, the evidence disclosed that the agreement was incomplete; that its terms were not discussed with the deceased; and that he did not appreciate that he was concluding a contract with the plaintiff for the hire of the Discovery. Mrs Brown conceded that the agreement was incomplete. Mr Murton testified that he became aware for the first time during the trial that the word 'overleaf' appeared in the agreement, and that he did not notice that there was a reference to a close corporation in it. He said that usually when he delivered a vehicle, he would 'go through the handover period, explain to the client the insurance excess and get the client to sign the document'. He conceded that when he went through the agreement he did not notice that it referred to Land Rover Experience Rentals CC, and that it would appear to a third person reading the document that the said corporation was a party to it; and further that when concluding such agreements he had used the wrong documentation without noticing it. Mrs Brown testified that Land Rover Experience Rentals was a former trading name, that it was not a close corporation and that the agreement referred to the wrong entity. In the light of this evidence it cannot be suggested that at the relevant time, the deceased appreciated that he was concluding an agreement with *the plaintiff*.

[4] P J Badenhorst, J M Pienaar and H Mostert *Silberberg and Schoeman's: The Law of Property* 5 ed at 430 para 18.1; *Southernport Developments (Pty) Ltd v Transnet Ltd* [2005] 2 All SA 16 (SCA); 2005 (2) SA 202 (SCA) para 6.

[18] In addition, when asked whether the deceased had read the agreement, Mr Murton replied that the deceased 'scanned over' the agreement, as he did not have much time.Mr Murton said that he delivered between five and ten vehicles a day, and could not explain the whole document to a customer. He said that he explained to the deceased the 'insurance process and fuel and where to return the vehicle', and that the deceased signed the agreement. Later in his testimony however, Mr Murton could not explain how the insurance worked, referred to in clause 3 of the agreement. He said that the agreement was in a flip folder, which the deceased merely held and signed in his presence. The evidence and probabilities point overwhelmingly to the conclusion that the deceased did not enter into any agreement for the hire of the Discovery – he simply acknowledged receipt of a courtesy car.

[19] The court a quo was thus correct in holding that the plaintiff did not prove that it bore any risk in respect of the Discovery. It did not prove an interest in the litigation and consequently failed to establish *locus standi*. The court also rightly found that no contract came into being because there was no consensus regarding the terms (and nature) of the agreement. That should have been the end of the matter. Indeed, the court a quo held that the failure to prove *locus standi* was 'dispositive of the entire action'.

[20] But then the court embarked on an analysis of the common law duty to act in good faith, and, with extensive reference to *Barkhuizen*,[5] concluded that the agreement was against public policy and therefore invalid. This, after it had scarcely found that no agreement had been concluded between the plaintiff and the defendant. The court stated that the public policy concerns discussed in *Barkhuizen* found expression in the Act and went on to find that the agreement

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

violated the Act in numerous respects. Neither of these issues was raised in the pleadings; they were introduced by the court a quo of its own accord.

[21] On first principles, a judgment must be confined to the issues before the court.[6] In *Slabbert*,[7] this court said:

'A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case.'

[22] Our adversarial system of determining legal disputes is a procedural system in which parties actively and unhindered may put forward a case before an independent decision-maker. An important component of the system is the rule that the parties must frame the issues for decision and present their case, and assign to the court the role of neutral arbiter of the case presented. In *Fischer*,[8] this court stated the rule as follows:

'Turning then to the nature of civil litigation in our adversarial system, it is for the parties, either in the pleadings or affidavits (which serve the function of both pleadings and evidence), to set out and define the nature of the dispute, and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for "(i)t is impermissible for a party to rely on a constitutional complaint that was not pleaded." There are cases where the parties may expand those issues by the way in which they conduct the proceedings. There may also be instances where the court may mero motu raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to

[6] *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA); 2009 (1) SACR 361 (SCA) paras 15 and 19.
[7] *Minister of Safety and Security v Slabbert* [2009] ZASCA 163; [2010] 2 All SA 474 (SCA) para 11.
[8] *Fischer & another v Ramahlele & others* 2014 (4) SA 614 (SCA) para 13, affirmed by the Constitutional Court in *South African Police Service v Solidarity obo Barnard* [2014] ZACC 23; 2014 (6) SA 123 (CC) para 210, and *Molusi & others v Voges NO & others* [2016] ZACC 6; 2016 (3) SA 370 (CC) para 28.

any party by its being decided. Beyond that *it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone*.'[9]

[23] In my view, a fundamental reason for maintaining the adversarial system in which the parties identify the dispute, is to ensure that judicial officers remain independent and impartial and are seen to be so. This is a cornerstone of any fair and just legal system.[10] When a judge intervenes in a case and has recourse to issues falling outside the pleadings which are unnecessary for the decision of the case and departs from the rule of party presentation, there is a risk that such intervention could create an apprehension of bias. The court could then be seen to be intervening on behalf of one of the parties, which would imperil its impartiality.

[24] As already stated, a defence that the agreement was contrary to public policy or that it violated the Act was neither pleaded, nor canvassed in evidence in the sense that the court was expected to decide it as an issue.[11] The court a quo erred in raising and pronouncing upon these issues: they did not impact on the decision. Whether the agreement was against public policy or violated the Act was not material, and the outcome of the case would not have been different had the court not considered these issues. Thus the statement by the court a quo that the Act could have influenced its decision, is incorrect.

[25] Moreover, the court a quo incorrectly applied *Barkhuizen*[12] and the provisions of the Act which, if left undisturbed, may be followed as precedents, particularly given that the judgment has been reported. The court concluded,

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[9] Emphasis added, footnotes omitted.
[10] *President of the Republic of South Africa & others v South African Rugby Football Union & others* 1999 (4) SA 147 (CC) para 35.
[11] *South British Insurance Co Ltd v Unicorn Shipping Lines (Pty) Ltd* 1976 (1) SA 708 (A) at 714G.
[12] Footnote 5 above.

apparently on the authority of *Barkhuizen*,[13] that the duty to act in good faith was a common law principle that applied to the plaintiff's assertion that the deceased had to insure the Discovery or return it within 72 hours. It found that the lack of an explanation why Land Rover SA did not sue the defendant; the non-disclosure as to whether any insurer paid for the damages in the action; and the convoluted arrangements amongst the plaintiff, Land Rover SA, Land Rover Experience Rentals, Lazarus Car Hire and Europe-Assist, 'simply fortifies the finding of bad faith against the plaintiff' and dismissed its claim for that reason. Then the court stated that the agreement 'was impractical to decipher without costs and inconvenience to those who had to read and understand it'; and concluded, on the authority of *Barkhuizen*, that the agreement was against public policy and therefore invalid because it was 'offensive as it impairs the dignity of the deceased and all those who have to work with it'.

[26] *Barkhuizen* concerned the constitutionality of a time-limitation clause in an insurance contract alleged to have infringed the right of access to court under s 34 of the Constitution. Ngcobo J, writing for the majority, held that s 34 not only reflects the foundational values that underlie our constitutional order, it also constitutes public policy. A court could decline enforcement of a time-limitation clause if a litigant was able to demonstrate that its enforcement would result in unfairness or would be unreasonable. A court would declare the clause contrary to public policy and thus invalid, if it does not afford a contracting party fair and reasonable access to court.

[27] In this case, not only was there no complaint that the agreement was contrary to public policy, there was no constitutional value implicated in the provision requiring the deceased to take out insurance or return the Discovery

[13] Footnote 5 paras 79-82.

within 72 hours. As was said in *Bredenkamp*,[14] the court in *Barkhuizen* did not hold that 'the enforcement of a valid contractual term must be fair and reasonable, even if no public policy consideration found in the Constitution or elsewhere is implicated'. How a difficulty in interpreting an agreement without costs and inconvenience constitutes an infringement of the right to dignity, has not been explained. In addition, and contrary to the finding by the court a quo, the Constitutional Court in *Barkhuizen* expressly endorsed this court's holding in *Brisley*,[15] that good faith is not a self-standing rule to avoid performance under a contract, 'but an underlying value that is given expression through existing rules of law'.[16]

[28] In *South African Forestry Co*,[17] Brand JA put it this way:

'. . . although abstract values such as good faith, reasonableness and fairness are fundamental to our law of contract, they do not constitute independent substantive rules that courts can employ to intervene in contractual relationships. These abstract values perform creative, informative and controlling functions through established rules of the law of contract. They cannot be acted upon by the courts directly. Acceptance of the notion that judges can refuse to enforce a contractual provision merely because it offends their personal sense of fairness and equity will give rise to legal and commercial uncertainty.'

[29] It is not clear from the court a quo's judgment what rules of contract were applied in coming to the conclusion that the agreement was invalid due to bad faith on the part of the plaintiff. More specifically, a requirement obliging a contracting party to obtain insurance, a failure to explain why an owner does not sue, non-disclosure as to whether an insurer paid damages and convoluted

[14] *Bredenkamp & others v Standard Bank of South Africa Limited* [2010] ZASCA 75; 2010 (4) SA 468 (SCA) para 50.
[15] *Brisley v Drotsky* 2002 (4) SA 1 (SCA) paras 31-32.
[16] Footnote 5 para 82.
[17] *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) para 27, affirmed in *Potgieter & another v Potgieter N O & others* [2011] ZASCA 181; 2012 (1) SA 637 (SCA) para 32.

business arrangements between entities, are neither indicative of bad faith, nor contrary to public policy.

[30] The Act may be dealt with briefly. It is settled that when interpreting legislation, what must be considered is the language used; the context in which the relevant provision appears; and the apparent purpose to which it is directed.[18] The preamble to the Act states that it was passed in order, inter alia, to promote and protect the economic interests of consumers; to improve access to information so that they are able to make informed choices; to protect them from hazards to their well-being and safety; to develop effective means of redress for consumers; and to promote consumer education. Section 2 provides that the Act must be interpreted in a manner that gives effect to the purposes set out in s 3. In terms of s 3, the essential purposes of the Act are to promote and advance the social and economic welfare of consumers in South Africa.

[31] The court a quo dealt with the Act in some detail in its judgment. It found that because Mr Murton could not explain the terms of the agreement, consumers could not be expected to understand the content, significance and import thereof. The court then found that it was impossible to interpret the agreement as required by s 22(2) of the Act, because it was not in plain language and was therefore invalid – a finding also unsustainable on the evidence.[19] The court a quo went further and concluded that the agreement violated s 4(5)*(a)* and *(b)* of the Act, since deciphering the agreement was 'possible only at great costs and

[18] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.

[19] Section 22(2) provides, inter alia:

'For the purposes of this Act, a notice, document . . . is in plain language if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the notice, document … is intended, with average literacy skills and minimal experience as a consumer of the relevant goods or services, could be expected to understand the content, significance and import of the notice, document … without undue effort having regard to–

(a) the context, comprehensiveness and consistency of the notice, document . . . .
(b) the organisation, form and style of the notice, document . . . ;
(c) the vocabulary, usage and sentence structure of the notice, document . . . ; and
(d) the use of any illustrations, examples, headings or other aids to reading and understanding.'

inconvenience to its readers', it was incomplete, the other party was represented as a close corporation and material insurance arrangements were not disclosed.[20] Finally, the court a quo found that the failure to include in the agreement, the obligation to insure the Discovery after 72 hours or return it before expiry of that period, and then enforcing that provision, was unfair, unreasonable and unjust as contemplated in s 48(2) of the Act.[21]

[32] The short answer to the point that the agreement violated the Act, is that it was not a transaction as contemplated in s 5(1)*(a)*, which provides inter alia, that the Act applies to every transaction occurring within the Republic. A 'transaction' is defined as,

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

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

(ii) the supply by that person of any goods to or at the direction of a consumer for consideration; or

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

(b) an interaction contemplated in section 5(6), irrespective of whether it falls within paragraph *(a).*'

In terms of the Act,

'"consideration" means anything of value given and accepted in exchange for goods or services, including–

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[20] Sections 4(5)*(a)* and *(b)* provide:
'In any dealings with a consumer in the ordinary course of business, a person must not–
(a) engage in any conduct contrary to, or calculated to frustrate or defeat the purposes and policy of, this Act;
(b) engage in any conduct that is unconscionable, misleading or deceptive, or that is reasonably likely to mislead or deceive . . . .'

[21] Section 48(2) of the Act provides inter alia:
'… a transaction or agreement . . . is unfair, unreasonable or unjust if-
(a) it is excessively one-sided in favour of any person other than the consumer . . . ;
(b) the terms of the transaction or agreement are so adverse to the consumer as to be inequitable;
(c) the consumer relied upon a false, misleading or deceptive representation . . . ;
(d) the transaction or agreement was subject to a term or condition . . . , and–
(i) the term, condition or notice is unfair, unreasonable, unjust or unconscionable . . . .'

(a) money, property, a cheque or other negotiable instrument, a token, a ticket, electronic credit, credit, debit or electronic chip or similar object;

(b) Labour, barter or other goods or services;

(c) loyalty credit or award, coupon or other right to assert a claim; or

(d) any other thing, undertaking, promise, agreement or assurance, irrespective of its apparent or intrinsic value, or whether it is transferred directly or indirectly, or involves only the supplier and consumer or other parties in addition to the supply and consumer.'

[33] The provision of a courtesy car to the deceased was not an agreement for, or the supply of, goods or services; or the performance of services at the direction of a consumer. The agreement did not constitute a transaction between a supplier and consumer as contemplated in s 5(6) of the Act.[22] The deceased gave nothing of value and the plaintiff accepted nothing in exchange for the use of the Discovery. So on the plain wording of the relevant provisions, there was no consideration and thus no transaction as envisaged in the Act.

[34] There is a further principle that the court a quo seems to have overlooked – leave to appeal should be granted only when there is 'a sound, rational basis for the conclusion that there are prospects of success on appeal'.[23] In the light of its findings that the plaintiff failed to prove *locus standi* or the conclusion of the agreement, I do not think that there was a reasonable prospect of an appeal to this court succeeding, or that there was a compelling reason to hear an appeal.[24] In the

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[22] Section 5(6) of the Act provides:
'For greater certainty, the following arrangements must be regarded as a transaction between a supplier and consumer, within the meaning of this Act:
(a) The supply of any goods or services in the ordinary course of business to any of its members by a club, trade union, association, society or other collectivity. . . .
(b) a solicitation of offers to enter into a franchise agreement;
(c) an offer by a potential franchisor to enter into a franchise agreement with a potential franchisee;
(d) a franchise agreement or an agreement supplementary to a franchise agreement; and
(e) the supply of any goods or services to a franchisee in terms of a franchise agreement.'

[23] *S v Smith* [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) para 7.

[24] Section 17 of the Superior Courts Act 10 of 2013 provides in relevant part:
(1) leave to appeal may only be given where the judge or judges concerned are of the opinion that–
(a) (i) the appeal would have a reasonable prospect of success; or
(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.'

result, the parties were put through the inconvenience and expense of an appeal without any merit.

[35] The appeal is dismissed with costs.

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A Schippers
Judge of Appeal

APPEARANCES

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