



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA  
JUDGMENT**

**Reportable**

Case no: 065/2024

**ALETTA CATERIENA VAN NIEKERK**

**APPELLANT**

and

**FIRSTRAND BANK LIMITED**

**RESPONDENT**

**Neutral citation:** *Van Niekerk v FirstRand Bank Limited* (065/2024) [2025] ZASCA 187 (10 December 2025)

**Coram:** MOKGOHLOA, WEINER and COPPIN JJA and STEYN and CHILI AJJA

**Heard:** 22 August 2025

**Delivered:** This judgment was handed down electronically by circulation to the parties' representatives via email, by publication on the website of the Supreme Court of Appeal and by release to SAFLII. The date and time for hand-down is deemed to be 11h00 on 10 December 2025.

**Summary:** Law of Contract – whether the purchaser lawfully cancelled a sale agreement on the ground of latent defects to the goods – whether the purchaser had waived her right to rely on the common law right of the *actio redhibitoria* in cancelling the credit agreement that is governed by the National Credit Act 34 of 2005 (the NCA).

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## ORDER

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**On appeal from:** North West Division of the High Court, Mahikeng (Djaje J, sitting as court of first instance):

1. The appeal succeeds with costs.
2. The order of the high court is set aside and substituted with the following order:
  - '(a) The plaintiff's claim is dismissed with costs.
  - (b) The defendant's counterclaim succeeds, and the following relief is granted:
    - (i) The cancellation of the credit agreement is confirmed.
    - (ii) The plaintiff is to make payment of R170 023.23 to the defendant.
    - (iii) The plaintiff is to pay interest on the amount under (ii) at the prescribed rate of 10,25% from date of demand, being 16 April 2018.
    - (iv) The plaintiff is to pay the costs of suit.'

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## JUDGMENT

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**Steyn AJA (Mokgohloa, Weiner and Coppin JJA and Chili AJA concurring)**

### Introduction

[1] Central to this appeal is whether the appellant could rely on a common law aedilician remedy to cancel a credit agreement (the agreement) in terms of the National Credit Act 34 of 2005 (the NCA) after discovering that the second-hand motor vehicle she had bought in terms of the agreement had latent defects. The purchase was financed by the respondent. The high court, finding in favour of the respondent, held that she could not. This appeal is with leave of the high court.

[2] The respondent, FirstRand Bank Limited (the bank), instituted action against the appellant, Aletta Cateriena van Niekerk (Mrs van Niekerk), in the North West Division of the High Court (the high court) wherein it sought, amongst others, an order cancelling the agreement and judgment for the damages it had allegedly suffered, together with interest thereon. Mrs van Niekerk defended the action and pleaded that

the agreement was duly cancelled by her in April 2018 in terms of the common law, alternatively in terms of s 56(2) of the Consumer Protection Act 68 of 2008 (the CPA). The appellant also instituted a counterclaim wherein she claimed for: (a) the confirmation of the cancellation of the agreement; (b) payment in the sum of R170 023.23; (c) interest on the latter amount at the prescribed rate; and (d) costs of the suit. The amount of R170 023.23 was computed as follows: the deposit of R150 000 paid to the bank as well as the five monthly instalments in terms of the agreement between her and the bank. The high court granted judgment in favour of the bank and dismissed Mrs van Niekerk's counterclaim and ordered her to pay the bank's costs.<sup>1</sup>

[3] When the matter was heard, the high court concluded that Mrs van Niekerk had waived her right to rely on the common law by returning the vehicle to the motor dealer to be repaired instead of cancelling the agreement. The high court found that the CPA does not find application, because it does not apply to a credit agreement entered into in terms of the NCA.<sup>2</sup>

### **Factual background**

[4] On 20 December 2017, at Koster in the North West Province, Mrs van Niekerk signed the agreement in terms of s 8 of the NCA. In terms of the agreement she bought a 2012 Ford Ranger 3.2 TDCI 4x4, Automatic vehicle (the vehicle) from the bank. The vehicle was bought for her son, Mr Gerrie van Niekerk (Gerrie). The sale transaction was concluded after Gerrie negotiated the deal with a local motor dealer, Autorama, in Klerksdorp. The dealer undertook to arrange the finance with the bank for Mrs van Niekerk. She paid the bank a deposit of R150 000 (by way of a trade-in of another vehicle) towards the purchase price. The balance of R268 180.56, including

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<sup>1</sup> The order issued was:

'1. Cancellation of the Credit Agreement.

2. Judgment for the amount of damages that the Plaintiff may have suffered, together with interest thereon is postponed *sine die*, pending the return of the vehicle to the Plaintiff, the subsequent valuation and sale thereof and the calculation of the amount to which the Plaintiff is entitled.

3. That the defendant's counterclaim is dismissed.

4. The defendant to pay the costs of suit.'

<sup>2</sup> The high court held:

'[S]ection 5(2) of the CPA does not apply to any transaction that constitutes a credit agreement under the National Credit Act. The agreement between the plaintiff and the defendant in this matter is clearly an instalment sale agreement which is excluded from the CPA.'

interest and finance charges, were payable in 72 equal monthly instalments of R3 724.73, commencing on 1 February 2018. The vehicle was delivered to Mrs van Niekerk on 20 December 2017 and Gerrie took possession of it on the same day.

[5] On 24 December 2017, four days after the vehicle was delivered, it experienced problems relating to the oil cooler and the gearbox. Gerrie returned the vehicle to Autorama, where the gearbox was replaced. On 25 January 2018, the vehicle was returned to Gerrie. However, within two months the vehicle overheated and Gerrie again returned the vehicle to Autorama, stating that he was no longer interested in having it, and that the salesperson at the dealership should cancel the agreement. The agreement was subsequently also formally cancelled in writing on 16 April 2018, by Gerrie's attorney, Ms Trudie Broekmann (Ms Broekmann) in a letter addressed to Autorama and the bank.

[6] A professional mechanic engaged by Ms Broekman, Mr Gonasagren Moodley (Mr Moodley), pointed out in correspondence to Ms Broekmann that the replaced gearbox was manufactured for an entirely different model of vehicle and it was not suitable for the vehicle bought by Mrs van Niekerk. Subsequently, Mr Moodley testified to that same effect at the trial.

[7] The bank did not accept Mrs Van Niekerk's cancellation and elected to institute an action in the high court for cancellation of the agreement. In response, Mrs van Niekerk filed a plea and a counterclaim, seeking the relief as set out in paragraph 2 of this judgment. She essentially pleaded an *actio redhibitoria*. The bank, in its plea to the counterclaim, denied that Mrs van Niekerk was entitled to the amount claimed, and pleaded, amongst other things, that her counterclaim was premature, since she had not exhausted the remedies in terms of s 69 of the CPA. Section 69 of the CPA, provides:

'A person contemplated in section 4(1) may seek to enforce any right in terms of this Act or in terms of a transaction or agreement, or otherwise resolve any dispute with a supplier, by:

(a) referring the matter directly to the Tribunal, if such a direct referral is permitted by this Act in the case of the particular dispute;

(b) referring the matter to the applicable ombud with jurisdiction, if the supplier is subject to the jurisdiction of any such ombud;

- (c) if the matter does not concern a supplier contemplated in paragraph (b)-
- (i) referring the matter to the applicable industry ombud, accredited in terms of section 82 (6), if the supplier is subject to any such ombud; or
  - (ii) applying to the consumer court of the province with jurisdiction over the matter, if there is such a consumer court, subject to the law establishing or governing that consumer court;
  - (iii) referring the matter to another alternative dispute resolution agent contemplated in section 70; or
  - (iv) filing a complaint with the Commission in accordance with section 71; or
- (d) *approaching a court with jurisdiction over the matter, if all other remedies available to that person in terms of national legislation have been exhausted.*' (Emphasis added.)

[8] The bank further pleaded that the vehicle was procured from Autorama, which was the supplier and denied that the vehicle was returned to the bank. The aforementioned plea to her counterclaim was later amended to aver that Mrs van Niekerk had waived her right to cancel the agreement in terms of the common law, more specifically in terms of the *actio redhibitoria*. It pleaded that she had abided by the agreement from 20 December 2017 when the vehicle was returned to Autorama for repairs and thereafter when it was used from 25 January 2018 until March 2018. In her replication, Mrs van Niekerk pleaded that s 69 of the CPA does not find application to the facts of the case.

### **In the high court**

[9] At the trial Mrs van Niekerk called witnesses in support of her case, including the mechanic, Mr Moodley. Mrs van Niekerk testified to the effect that neither she, nor Gerrie, were aware of any defects when the vehicle was purchased. The uncontradicted evidence of Mr Moodley was that the vehicle was defective in a number of respects, which included the gearbox and the oil cooler. In his opinion, the vehicle was most likely in an accident, prior to it being sold to Mrs van Niekerk; and in the course of its repair was fitted with an inappropriate gearbox. His findings were supported by photographs showing that the bolts of the oil cooler, for example, were not properly fastened, causing the cooler to come loose. According to him, the defects would not have been detected by ordinary observation. Despite that evidence, the bank elected to close its case without calling any witnesses.

[10] The high court concluded that the bank was not the supplier, as defined in the CPA, and that it had merely financed the vehicle. Importantly, the high court concluded that the bank's claim was based on an instalment sale agreement which is excluded from the operation of the CPA. It also held that Mrs van Niekerk ought to have cancelled the agreement with the bank when the defect to the gearbox was first discovered. Moreover, the high court found that she ought to have exhausted the remedies in s 69 of the CPA before instituting her counterclaim.

### **Issues for determination**

[11] The issues that require determination are:

- (a) Whether Mrs Van Niekerk had waived her right to rely on the common law remedy of the *actio redhibitoria*;
- (b) Whether the provisions of the CPA relating to the quality of the sold goods are excluded when the sale was in terms of a credit agreement under the NCA; and
- (c) Whether s 69 of the CPA is applicable to the matter and whether the appellant had to exhaust all remedies in terms of s 69 of the CPA before she could institute her counterclaim.

[12] Mrs van Niekerk's counsel submitted that if this Court finds in her favour in terms of the common law then such a finding would be dispositive of the matter. Accordingly, it is necessary to consider and determine Mrs van Niekerk's reliance on the *actio redhibitoria* and whether her conduct could constitute any waiver of her rights, as contended by the bank.

### ***Actio redhibitoria***

[13] The *actio redhibitoria* is an aedilician action for setting aside the contract and for restoring the position of the parties to what it was prior to them entering into the contract, so far as that is possible.<sup>3</sup> In *Phame (Pty) Ltd v Paizes*<sup>4</sup> the Court held:

'(i) If there is a latent defect, at the time of the sale *ipso facto* the aedilician remedy is available (unless excluded by agreement). The seller's obligation and the buyer's right arise by *operation of law*, and not by reference to the intention of the parties. ... Nor does the buyer have to aver and prove a breach of a term of the contract....

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<sup>3</sup> See *Van Zyl v Credit Corporation of SA Ltd* 1960 (4) SA 582 (A) at 589H-590A.

<sup>4</sup> *Phame (Pty) Ltd v Paizes* 1973 (3) SA 397 (A).

(ii) Similarly, if during the negotiations the seller made a *dictum et promissum* bearing on the quality of the *res vendita* and it falls short of it, *ipso facto* the aedilician remedy is available, by operation of law. There is no need to invoke any warranty or term or to aver the breach of either. Indeed, that is one of the reasons why the aedilician remedy is useful to buyers...<sup>5</sup>

[14] The trite requirements for succeeding with the *actio redhibitoria* are: the thing sold had a defect that impaired its utility or effectiveness; the defect existed at the time of the sale; the defect was latent and not visible upon inspection; the purchaser was unaware of its existence; the purchaser would not have purchased the item had she known of the defect; and she is willing and able to make restitution. Importantly, the buyer must act within a reasonable time after discovering the defect and return the item to the seller.<sup>6</sup>

[15] The test for the *actio redhibitoria* is objective determining whether a reasonable person in the purchaser's position would have bought the goods had he known of the defects.<sup>7</sup> Fundamental to the *actio redhibitoria* is the cancellation of the sale and the reciprocal restoration of what was paid and delivered pursuant to the sale. In this regard the rules governing restitution under the *actio redhibitoria* are similar to that of *restitutio in integrum*.<sup>8</sup>

[16] It is required, briefly, to consider the nature of the defects of the vehicle, since the bank accepted that they were latent defects only for the purposes of its argument regarding the cancellation of the agreement. This Court in *Glaston House (Pty) Ltd v Inag (Pty) Ltd* took a broad view of what constituted a latent defect.<sup>9</sup> It is now settled that any material imperfection preventing or hindering the ordinary or common use of the *res vendita* (the thing sold) is an aedilician defect.<sup>10</sup> Importantly, Corbett JA, as he then was, in *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd*<sup>11</sup> stated: 'Broadly speaking in this context a defect may be described as an abnormal quality or attribute which destroys or substantially impairs the utility or effectiveness of the *res vendita*, for the

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<sup>5</sup> Ibid at 416H-417A.

<sup>6</sup> *Du Plessis v West* [1998] JOL 202 (N) at 6-9 Combrinck J summarised the requirements.

<sup>7</sup> *De Vries v Wholesale Cars en 'n Ander* 1986 (2) SA 22 (O).

<sup>8</sup> *Van Zyl v Credit Corporation of South Africa Limited* 1960 (4) SA 582 (A) at 589H-590A.

<sup>9</sup> *Glaston House (Pty) Ltd v Inag (Pty) Ltd* 1977 (2) SA 846 (A) at 866F.

<sup>10</sup> See A J Kerr *The Law of Sale and Lease* 3rd ed (2004) at 120.

<sup>11</sup> *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A) (*Holmdene Brickworks*).

purpose for which it has been sold or for which it is commonly used... Such a defect is latent when it is one which is not visible or discoverable upon an inspection of the *res vendita*.<sup>12</sup> (Footnotes omitted.)

In *Odendaal v Ferraris*,<sup>13</sup> this Court referred to the test for latent defects as the *Holmdene Brickworks* test.<sup>14</sup>

[17] The uncontroverted evidence of Mr Moodley overwhelmingly supported a finding that the vehicle had latent defects. They were of such a nature that they impacted on the utility of the vehicle. The high court was misdirected in its evaluation of the evidence and by not finding that the vehicle was latently, materially defective. Mrs van Niekerk's case remained uncontested and the bank never adduced evidence in support of its pleaded case.

[18] Importantly, the bank attempted to rely on the conduct of Mrs Van Niekerk as constituting waiver. In *Road Accident Fund v Mothupi*,<sup>15</sup> it was held:

'Waiver is first and foremost a matter of intention. Whether it is the waiver of a right or a remedy, a privilege or power, an interest or benefit, and whether in unilateral or bilateral form, the starting point invariably is the will of the party said to have waived it....

The test to determine intention to waive has been said to be objective....'

More recently this Court in *Phoenix Salt Industries (Pty) Ltd v The Lubavitch Foundation of Southern Africa*<sup>16</sup> held:

'A waiver denotes a *voluntary abandonment of a known existing right*, benefit or privilege which if it were not for such waiver the party would have enjoyed it. It should be a deliberate abandonment either expressly or by conduct plainly inconsistent with an intention to enforce such right. The principle that a person may denounce any right or privilege available to him provided such a waiver is not prohibited by law or does not offend public policy, is well established in our law. *The existence of a waiver can be traced from the conduct of the parties. Whether there was a waiver or not is a matter of evidence.*' (Emphasis added and footnotes omitted.)

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<sup>12</sup> Ibid at 683H-684A.

<sup>13</sup> *Odendaal v Ferraris* [2008] ZASCA 85; [2008] 4 All SA 529 (SCA); 2009 (4) SA 313 (SCA).

<sup>14</sup> Ibid para 26.

<sup>15</sup> *Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA); [2000] 3 All SA 181 (SCA) paras 15 and 16.

<sup>16</sup> *Phoenix Salt Industries (Pty) Ltd v The Lubavitch Foundation of Southern Africa* [2024] ZASCA 107 para 15.

[19] There was no evidence that could warrant a conclusion that Mrs van Niekerk's conduct, constituted a waiver, implied or imputed by the operation of the law.<sup>17</sup> The fact that the vehicle was accepted back after it was first returned to Gerrie after its purported repair did not constitute a waiver of Mrs van Niekerk's right to cancel the agreement when she and Gerrie first became aware of the latent defects. The high court overlooked the latter part of s 5(2)(d) of the CPA, which provides as follows:

'(2) This Act does not apply to any transaction–

...

(d) that constitutes a credit agreement under the National Credit Act, but the *goods or services that are the subject of the credit agreement are not excluded from the ambit of this Act.*<sup>18</sup>

The agreement between Mrs van Niekerk and the bank was excluded from the operation of the CPA, but the vehicle which was the subject matter of the agreement, was not excluded.

### **Was the bank the supplier and was the CPA applicable**

[20] On behalf of the bank it was submitted that it financed the vehicle and was not the seller or the supplier of the vehicle.<sup>19</sup> In interpreting the relevant clauses of the agreement, I am guided by the approach followed by the Constitutional Court in *University of Johannesburg v Auckland Park Theological Seminary and Another*:<sup>20</sup>

'The Supreme Court of Appeal famously set out the position in the following widely quoted statement in its decision in *Endumeni*:

"Interpretation is the process of *attributing meaning to the words used in a document*, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, *consideration must be given to the language used* in the light of the ordinary rules

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<sup>17</sup> *Contago Trading SA v Central Energy Fund SOC Ltd* [2019] ZASCA 191; [2020] 1 All SA 613 (SCA); 2020 (3) SA 58 (SCA) paras 42 and 43.

<sup>18</sup> Emphasis added.

<sup>19</sup> The vehicle in question fits the description of what amounts to 'goods' in terms of s 1 of the CPA which reads: "**goods**" includes–

...

(b) any tangible object not otherwise contemplated in paragraph (a), including any medium on which anything is or may be written or encoded...'

<sup>20</sup> *University of Johannesburg v Auckland Park Theological Seminary and Another*<sup>20</sup> [2021] ZACC 13; 2021 (8) BCLR 807 (CC); 2021 (6) SA 1 (CC) paras 64 and 65. Also see *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 ZASCA 13; 2012 (4) SA 593 (SCA); [2012] 2 All SA 262 (SCA) (*Endumeni*) para 18.

of grammar and syntax; *the context* in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. *A sensible meaning is to be preferred* to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

This approach to interpretation requires that "from the outset one considers the context and the language together, with neither predominating over the other". In *Chisuse*, although speaking in the context of statutory interpretation, this court held that this "now settled" approach to interpretation, is a "unitary" exercise. *This means that interpretation is to be approached holistically: simultaneously considering the text, context and purpose.*' (Emphasis added.)

[21] In applying trite principles of interpretation and following a purposive approach in interpreting the agreement, it is necessary to consider the purpose of the NCA. Section 3 of the NCA provides:

'The purposes of this Act are to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, *and to protect consumers....*' (Emphasis added.)

[22] In *Nkata v Firstrand Bank Limited*,<sup>21</sup> Moseneke DCJ, emphasising the purpose of the NCA, stated:

'...This court has before expressed itself on the purposes of the Act. In *Sebola*, in the context of s 129(1)(a) of the Act, Cameron J observed that at the core of the Act is the objective to protect consumers. This protection, however, must be balanced against the interests of credit providers and should not stifle a "competitive, sustainable, responsible, efficient [and] effective . . . credit market and industry". The Act, the court noted, replaces the apartheid-era

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<sup>21</sup> *Nkata v Firstrand Bank Limited and Others* [2016] ZACC 12; 2016 (6) BCLR 794 (CC); 2016 (4) SA 257 (CC) paras 95 and 96.

legislation that regulated the credit market, and infuses constitutional considerations into the culture of borrowing and lending between consumers and credit providers.

The purposes of the Act are directly attributable to the constitutional values of fairness and equality. *Sebola* recognised that the Act is at pains to create a credit marketplace that agrees with our constitutional democracy, both through its purpose – to promote “a fair . . . marketplace for access to consumer credit” – as well as through the means that ought to be adopted to achieve these goals. *The tools for achieving the Act’s purposes include the promotion of “equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers”,* and the development of “a consistent and accessible system of consensual resolution of disputes arising from credit agreements”. In sum, the Act is “a clean break from the past” and encourages dialogue between consumers and credit providers.’ (Emphasis added and footnotes omitted.)

[23] Turning now to the contention raised by the bank that it was not the supplier or seller of the vehicle. Four clauses of the agreement will be highlighted:

Clause 1.15 defines supplier as:

‘the party from whom you procure the goods.’

Clause 2.1 reads:

‘We sell the Goods to you on the terms and conditions of this Agreement.’

Clause 4.1 reads:

‘We will remain the owner of the Goods until you have paid all of the amounts due under this Agreement’..

Clause 6.6 reads:

‘If the Goods is a motor vehicle, the Goods will be registered in terms of the National Road Traffic Act 93 of 1996, in our name as “Titleholder” and in your name as “Owner”, and you must keep the Goods in a good and roadworthy condition at your own cost.’

[24] Having regard to the interpretation of the above clauses and in the context of the entire credit agreement leads to the inescapable conclusion that the bank most certainly wore two hats when it entered into the agreement, namely, as that of supplier and that of credit provider.<sup>22</sup> Inasmuch as it was argued by the bank that it was only the credit provider, the credit agreement considered in its entirety and following a

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<sup>22</sup> For a discussion of the scenarios see Otto, J M, Van Heerden, C M and Barnard, J 2014, ‘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’, SA Mercantile Law Journal, vol. 26, no. 2, pp. 247-281, at 256.

purposive interpretation, compellingly suggests the contrary.

[25] In light of the purpose of the NCA, the term ‘supplier’ has to mean ‘to supply the goods’ and to provide the supply-services related to the specified goods. In *casu* the bank as the owner of the vehicle, was the supplier and credit provider. The bank relied on *MFC (A division of Nedbank Ltd) v JAJ Botha (Botha)*<sup>23</sup> in support of its argument that it was not the supplier. There the court held that the credit provider’s role is to provide credit and not to fulfil the role of being the supplier of the goods. It held on the one hand that the NCA was excluded by s 5(2)(d) of the CPA, and on the other hand, held that the applicant had failed to comply with the provisions of s 129(1) of the NCA. In my view the court in *Botha* followed a narrow approach in interpreting the NCA and had failed to recognise the protection afforded to consumers in terms of the goods purchased. Had the court there considered ss 6 and 5(2)(b) of the CPA and applied a purposive interpretation to the said provisions, then it would have reached a different conclusion.<sup>24</sup> As stated above, the NCA excludes transactions that constitute credit agreements, but not the goods or services that are the subject of the agreement. The high court had failed to apply the trite principles of interpretation as developed since *Endumeni*, and if it had, it would have found in favour of Mrs van Niekerk.

### **Applicability of s 69 of the CPA**

[26] As stated above, the bank elected to institute its claim in the high court. It then argues that the consumer, Mrs van Niekerk, is precluded from instituting her counterclaim in the very same forum since she did not exhaust the s 69 remedies of the CPA. In my view, Mrs van Niekerk had no choice but to proceed with her counterclaim in the forum elected by the bank and she had to do so in terms of the Uniform Rules of Court. Any interpretation that would effectively result in closing the door of the court to a consumer in circumstances where she was brought to the court by the bank and where she defends the claim instituted against her by the bank, would be in conflict with the purpose of the CPA and s 34 of the Constitution, which imposes a positive obligation on the state to provide a consumer access to an appropriate

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<sup>23</sup> *MFC (A division of Nedbank Ltd) v JAJ Botha* (6981/13) [2013] ZAWCHC 107 (15 August 2013).

<sup>24</sup> See the criticism of *Botha* by scholars like Otto *et al* fn 22 at 271-276. Also see *Nedbank v Sithole* (0321118/2022) [2024] ZAGPPHC 59 (2 February 2024).

forum.<sup>25</sup>

[27] Mrs Van Niekerk's counsel invited this Court to finally resolve the conflicting judgments regarding s 69 of the CPA. The section does not find application in this case, because Mrs van Niekerk was brought before the high court by the bank and she was entitled to defend the claim and plead a counterclaim in the matter. It is therefore not necessary to seek to resolve the position concerning that section in these proceedings.<sup>26</sup>

[28] In conclusion, for the reasons mentioned above, Mrs Van Niekerk did not waive her common law right when she returned the vehicle; she was entitled to cancel the agreement or rely on the *actio redhibitoria*. The high court was misdirected in its finding that the CPA was not applicable, since the vehicle was not excluded in terms of s 5(2)(d) of the CPA. Lastly, s 69 of the CPA could not serve as a bar against her counterclaim. Mrs van Niekerk in my view succeeded in invoking the *actio redhibitoria* and should have been successful in her counterclaim. Accordingly, the bank was not entitled to judgment in its favour. The appeal must succeed, and costs should follow the result.

[29] I make the following order:

1. The appeal succeeds with costs.

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<sup>25</sup> See Currie I and De Waal J 'The Bill of Rights Handbook' 5th ed (2005) Juta at 708. Also see *Khoza v IFA Fair-Zim Hotel and Resort (Pty) Ltd and Another* [2024] ZAKZDHC 45 paras 24-26.

<sup>26</sup> This Court dealt with the challenges that s 69 poses in *Motus Corporation (Pty) Ltd and Another v Wentzel* [2021] ZASCA 40; [2021] 3 All SA 98 (SCA) para 25 albeit in an *obiter dictum* as follows:

'The section has caused considerable difficulty and is the source of conflicting judgments in the high court. The authors of *Commentary on the Consumer Protection Act* say that "the various entities that can be approached for purposes of redress are not indicated in s 69 in an order that presents a clear picture of the exact route that a person has to follow in this quest for redress". Nonetheless they suggest that the section contemplates a hierarchy of remedies and they make a valiant effort to describe such hierarchy. The difficulty posed by the notion that the section creates a hierarchy of remedies is illustrated by cases where the route taken by the dissatisfied consumer has avoided the applicable ombudsman with jurisdiction in terms of s 69(b). Requiring dissatisfied consumers to pursue other remedies under s 69 before approaching the high court under s 69(d) has resulted in the consumer being non-suited. In the present case MIOSA did not deal with Ms Wentzel's complaints until 10 September 2018, when it wrote to her saying that it had no jurisdiction, because the complaint needed to be received by it before the institution of legal action. The reference to it preceded the present litigation so it was incorrect to reject jurisdiction.'

2. The order of the high court is set aside and substituted with the following order:
- '(a) The plaintiff's claim is dismissed with costs.
  - (b) The defendant's counterclaim succeeds, and the following relief is granted:
    - (i) The cancellation of the credit agreement is confirmed.
    - (ii) The plaintiff is to make payment of R170 023.23 to the defendant.
    - (iii) The plaintiff is to pay interest on the amount under (ii) at the prescribed rate of 10,25% from date of demand, being 16 April 2018.
    - (iv) The plaintiff is to pay the costs of suit.'

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E J S STEYN  
ACTING JUDGE OF APPEAL

**Appearances:**

For the appellant:

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