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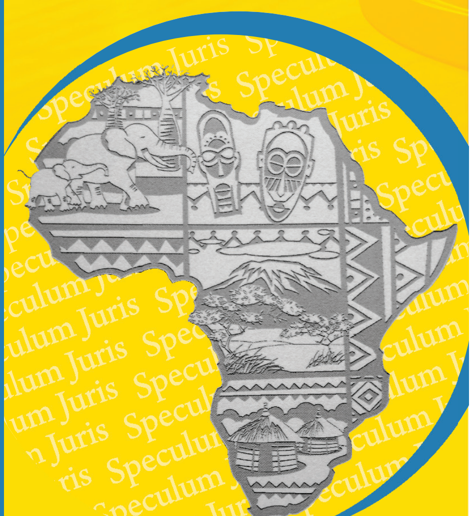

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Cession and the Application of the Consumer Protection Act 2008: A Discussion of the *South African Securitisation Programme (RF) Ltd v Jaglal-Govindpershad and South African Securitisation Programme (RF) Ltd v Lucic* Cases

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Abstract

Both cases discussed in this article involve the cancellation of fixed-term contracts concluded between the respective defendants and the supplier, a bank. The agreement provided that the supplier was entitled to claim all arrears and future payments that would have become due in terms of the agreement, in the event of a breach by the consumer. In each case the supplier ceded the right to receive payment to another person or entity – the plaintiff in both cases. In both cases the agreements were cancelled in terms of section 14 of the Consumer Protection Act. Consequently the rental payments were terminated precipitating the respective applications for summary judgment. Two questions arose for consideration. First, whether the Act applied to the agreements, considering that the supplier in both instances was a bank. Second, whether a cession of rights, namely the right to receive rental

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payments from a consumer, affects a consumer's rights under the Act. Specifically the question is considered whether a consumer is entitled to validly exercise his/her right to cancel a fixed-term agreement as provided by section 14(2)(b)(i)(bb) of the Act and, as a consequence, terminate payments to the cessionary of the right. It is argued that a cession of the right to payment does not affect a consumer's protection, provided by the Consumer Protection Act as against the cessionary if the Act applies to the original agreement. Two inter-related principles support this argument namely the principle that a cession may not place the debtor in a worse position than the debtor was before the cession, and the principle of nemo plus iuris transfere (ad alium) potest quam ipse habet. Accordingly, it is argued that the cessionary cannot receive a right that is immune from the protection provided to a consumer under the Consumer Protection Act, if such right was originally subject to the Act. An alternative interpretation would defeat the purposes of the Act. The notice exempting banks from section 14 of the Act is considered and it is argued that the agreements were for the supply of goods and services that fell outside the ambit of the exemption notice. The exemption notice therefore does not apply to the agreements and in both instances the courts correctly found that the Consumer Protection Act does apply, and that the respective defendants were within their rights to cancel the fixed term agreements.

Keywords: Cancellation; cession; consumer protection; fixed term agreement; *nemo plus iuris*-rule; section 14 of the Consumer Protection Act; securitisation

1 INTRODUCTION

In 2023, two cases were heard a few days from one another in the Johannesburg Local Division of the Gauteng High Court. They raised questions about the legal position of the consumer, when the supplier of a service cedes the right to receive payment from the consumer in terms of a fixed term agreement to a third party. The same plaintiff was involved in both cases, namely the South African Securitisation Programme (RF) Limited, and the cases came before the court as applications for summary judgment.

The facts of the cases are very similar. In each matter the consumer concluded a fixed-term agreement, a so-called Master Rental Agreement ("MRA"), with a supplier for the lease of certain equipment in return for a monthly rental. The supplier then ceded the right to receive the monthly payments to another person or entity — and there may follow a series of cessions.[1] The ultimate cessionary receives the right to payment, which is protected by provisions in the MRA agreement providing that in the event of a breach by the consumer, the cessionary can enforce payment, including future payments that were to be made for the duration of the agreement.[2] This leaves the consumer in a precarious position as the original supplier has little interest in the matter with the cessionary seemingly protected extensively by the agreement originally entered into. In each of the cases the respective courts had to consider whether the Consumer Protection Act[3] ("CPA") applied because both defendants relied on section 14 of the CPA to cancel the

1 Cession involves a substitution of the original creditor (the cedent) with a new creditor (the cessionary), while the debtor remains the same. Cession occurs when a creditor (cedent) transfers a personal right, such as a contractual right to receive payment of a debt from a debtor to the new creditor (cessionary). An agreement of cession is therefore an act of transfer of an incorporeal personal right, and distinct from the underlying contract that created the duty to transfer. See Floyd and Hutchison "Cession" in Hutchison and Pretorius *The Law of Contract in South Africa* 4ed (2022) 387–388.

2 *South African Securitisation Programme (RF) Ltd v Jaglal-Govindpershad* (5835/2022) [2023] ZAGPJHC 728 (26 June 2023) SAFLII https://www.saflii.org/za/cases/ZAGPJHC/2023/728.html para 7 (accessed 21-8-2023) ("*Jaglal-Govindpershad*") and *South African Securitisation Programme (RF) Ltd v Lucic* (2022/6034) [2023] ZAGPJHC 768 (6 July 2023) SAFLII https://www.saflii.org/za/cases/ZAGPJHC/2023/768.html (accessed 21-8-2023) ("*Lucic*") para 9.

3 CPA 68 of 2008.

fixed-term consumer agreements.[4]

The purpose of the CPA is to promote and advance the social and economic welfare of consumers in South Africa by, amongst others, establishing a fair consumer market and promoting fair business practices.[5] Chapter 2 of the Act contains the various fundamental consumer rights, including the general right of a consumer to choose. A manifestation of the right to choose is provided in section 14, which provides for a consumer to have the right to cancel a fixed term agreement without reason, provided the supplier is given 20 business days' written notice, and subject to the supplier being able to charge a reasonable cancellation penalty, while taking into consideration the factors set out in regulation 5(2) to the Act. It should be clear that this right has the potential to impact the foundational principle of the common law of contract of *pacta sunt servanda*.[6]

In both cases it was found that the CPA does apply, which allowed the respective defendants to cancel the fixed-term agreements, and the applications for summary judgment were refused accordingly.

This note considers two questions: first, whether the courts correctly held that the CPA should be applied to the fixed term agreements entered between the consumers and the original supplier, and if so, then second, whether the subsequent cessions affected the consumers' right in terms of section 14 of the CPA to cancel the fixed term agreement.

The attention now turns to a consideration of the facts and decisions of each of the cases.

2 THE CASES

2 1 *South African Securitisation Programme (RF) Ltd v Jaglal-Govindpershad*

The plaintiff sought summary judgment against the defendant, a medical practitioner, for rental in terms of an agreement (the MRA) concluded between the defendant and Sasfin Bank Limited ("Sasfin"), for telephonic equipment which the defendant rented from Sasfin.[7] The agreement was for a fixed-term of 60 months.[8] Sasfin had ceded its rights to receive the monthly rental in terms of the agreement (and other agreements) to the plaintiff.[9] The application for summary judgment was for R115 404,14, which included amounts for arrears rental, as well as future rentals.[10] Although not specifically stated, it appears as if the agreement must have contained an acceleration clause allowing the plaintiff to claim the monthly rental amounts for the remainder of the agreement period.

The application for summary judgment was precipitated by the fact that the defendant had stopped the monthly payments agreed to. The defendant pleaded that: (i) she had cancelled the agreement in terms of section 14(2)*(b)*(i)*(bb)* of the CPA; (ii) she was not in arrears and that Sasfin had not performed in terms of the agreement; and (iii) that as the cession was not properly pleaded, she had no knowledge of the rights, title, and interest of the plaintiff in the

4 A "consumer agreement" is defined in s 1 of the CPA as "an agreement between a supplier and a consumer other than a franchise agreement".

5 Section 3(1).

6 See the discussion in Naudé "The Impact of the CPA on the Law of Contract and on Specific Contracts" in Naudé and Eiselen (eds) *Commentary on the Consumer Protection Act* Revision Service 1 (2016) Contract 1 – Contract 14.

7 *Jaglal-Govindpershad* para 1.

8 *Ibid* para 3.

9 *Ibid* para 5.

10 *Ibid* para 1.

matter.[11]

Section 14(2)*(b)*(i)*(bb)* reads as follows:

> If a consumer agreement is for a fixed term
>
> …
>
> despite any provision of the consumer agreement to the contrary-
>
> the consumer may cancel that agreement-
>
> (aa) …
>
> (bb) at any other time, by giving the supplier 20 business days' notice in writing or other recorded manner and form, subject to subsection (3)(a) or (b); … .

The defendant argued that she had cancelled the agreement and that the agreement therefore terminated after 20 business days.[12] The plaintiff submitted that as there was a cession of rights between Sasfin and the plaintiff, the agreement between Sasfin and the defendant remained intact and therefore the defendant had the right in terms of section 14 to cancel the agreement with Sasfin, but the defendant could not exercise the right to cancel against the plaintiff.[13] The plaintiff further argued that Sasfin was in any event exempt from the application of section 14 and that it was the financier, and not supplier, of the equipment who was responsible.[14] (Seemingly there was another party involved who actually provided the equipment.) From this one must conclude that the plaintiff's case was that the defendant could terminate the MRA but that the right emanating from that agreement and was ceded to the plaintiff, will not terminate when the MRA is cancelled. (This aspect is discussed further below.[15]) According to the plaintiff the defendant had a claim against the actual supplier of the equipment — whoever that was — in respect of the defective goods.[16]

However, from the stated facts it appears that the agreement was concluded between the defendant and Sasfin and there is no mention of a third party as supplier.[17] The argument of the plaintiff simply appears to be that for purposes of the CPA, Sasfin was a financier, and not a supplier, and therefore the Act did not apply to the agreement.[18] A similar argument was raised in the other case under discussion and therefore this aspect is considered in more detail below.[19]

A further issue that was raised in both cases, concerned the notice exempting banks from section 14 of the CPA.[20] The notice provides that all banks registered in terms of the Banks

11 *Ibid* paras 2 and 3.

12 *Ibid* para 3.

13 *Ibid* para 5.

14 *Ibid* para 7.

15 See para 3 3 below.

16 *Jaglal-Govindpershad* para 7. It is not clear from the facts whether the equipment was defective or not. The reference to defects in paragraph 7 is the only such reference in the case except perhaps for the contention by the defendant "that Sasfin did not perform in terms of the contract" in para 1. This contention may be a reference to defective equipment resulting in the cancellation of the agreement. However, whether the equipment was defective or not, is not germane to the discussion.

17 *Jaglal-Govindpershad* paras 1 and 3.

18 *Ibid* para 7.

19 See para 3 2 below.

20 *Government Gazette* 34399 GN 532 (27 June 2011) provides that in terms of section 5(4) of the CPA, all banks registered in terms of the Banks Act 94 of 1990, mutual banks registered in terms of the Mutual Banks Act 124 of 1993, and co-operative banks registered in terms of the Co-operative Banks Act 40 of 2007, are exempted from the application of section 14 of the CPA.

Act[21] are exempted from the provisions of section 14. In light of this notice, the plaintiff argued that Sasfin was excluded from the application of section 14.[22] The court *in casu* dismissed the application for summary judgment,[23] the salient reason being that the court found that section 14 of the CPA applied to the agreement allowing the defendant to cancel it. Save for referring to the purposes of the CPA, the court did not provide reasons for finding that section 51 trumps the notice of exempting banks from section 14. This aspect receives more attention below.[24]

2 2 *South African Securitisation Programme (RF) Ltd v Lucic*

In casu, the plaintiff applied for summary judgment against the defendant for an amount of R106 290,82 for arrears and future rentals, in terms of an agreement (the MRA) concluded between the defendant and Sasfin.[25] In terms of the agreement Sasfin acquired telephonic equipment which the defendant would rent from Sasfin for a fixed term of 60 months with a monthly rental payable. The defendant does not become the owner of the equipment upon expiry of the agreement.[26] Subsequently, the plaintiff concluded an agreement with Sasfin in terms of which Sasfin ceded all its rights and delegated all its obligations in terms of the agreement, to the plaintiff.[27] The agreement provided that, should the defendant be in breach of the agreement, the plaintiff would be entitled to "claim immediate payment of all amounts which would have been payable in terms of the Master Rental Agreement until the expiry of the rental stated in the equipment schedule, whether such amounts are then due for payment or not."[28]

The defendant raised four defences against the application for summary judgment, the relevant one for current purposes being that the CPA applied to the agreement and that the defendant had cancelled the agreement,[29] which she argued she was entitled to do in terms of section 14(2)*(b)*(i)*(bb)* of the CPA.[30]

The plaintiff submitted that the CPA did not apply as Safin is not a supplier for purposes of the CPA, but rather a financier of the equipment, and furthermore, that Sasfin as a bank was exempted from the application of the CPA. The plaintiff, however, did not pursue the latter argument at the hearing.[31]

The court referred to the definition section of the CPA, particularly the definitions of "supplier" and "services". The court observed that the definition of "supplier" has a wider meaning than just a person who manufactures and sells goods.[32] It concluded that the plaintiff — even as a financier – falls within the ambit of the definition of a supplier and that consequently the

21 94 of 1990 ("Banks Act").

22 *Jaglal-Govindpershad* paras 7 and 12.

23 *Ibid* para 16.

24 See para 3 1 below.

25 *Lucic* para 1.

26 *Ibid* para 6. This excludes the agreement from the definition of a lease as contained in s1 of the National Credit Act 34 of 2005.

27 *Lucic* para 7. It is interesting to note that the agreement between Sasfin and the plaintiff, besides the cession of the rights of Sasfin to the plaintiff, provides also for the delegation of Sasfin's obligations in terms of the MRA to the plaintiff without any mention of whether the defendant agreed to such delegation. A delegation of Sasfin's obligations would not have been lawful without the defendant's consent (see Christie and Bradfield *Christie's The Law of Contract in South Africa* 6 ed (2011) 489‒490. For current purposes it is not necessary to consider this aspect further.

28 *Lucic* para 9.

29 *Ibid* para 2.

30 *Ibid* para 14.

31 *Ibid* para 15.

32 *Ibid*.

CPA does apply to the agreement.[33] The court also placed reliance on the decision of *Jaglal-Govindpershad,* which it found to be "on all fours with the current matter".[34]

Having found that the CPA did apply to the agreement it needed to be considered whether the defendant had validly cancelled the agreement. As indicated, section 14(2)*(b)*(i)*(bb)* provides that a consumer may cancel a fixed-term agreement for any reason by giving the supplier 20 business days' written notice. Although having cancelled the agreement on three different occasions, reference will be made only to one — the cancellation of 30 November 2020, which was conveyed in writing to Sasfin and in which the defendant advised Sasfin that she is terminating the agreement with immediate effect.[35] She did not in fact cancel the agreement with immediate effect in that she continued using the equipment[36] and only ceased making payments to the plaintiff on 25 March 2021, her last payment being 25 February 2021.[37]

In disputing the validity of the cancellation the plaintiff argued that for the defendant to rely on section 14(2)*(b)*(i)*(bb)*, the defendant had to "expressly provide in her notice of cancellation that she is exercising her right in terms of Section 14(2)*(b)(bb)* [sic] of the CPA and that she is providing 20 business days' notice to the supplier."[38] The court had to decide whether the section requires that a consumer's cancellation notice must state expressly that the supplier is afforded 20 business days, and whether the consumer is to state expressly that the right to cancel is exercised in terms of section 14(2)*(b)*(i)*(bb)*.[39]

The court found that the cancellation of 30 November 2020 addressed to Sasfin, was a valid cancellation[40] and that the defendant therefore had a bona fide defence necessitating the refusal of the application for summary judgment. The court's reasoning is considered below.[41]

3 DISCUSSION

In both cases under discussion the defendants had entered into a fixed-term consumer agreements with Sasfin for the leasing of certain equipment in return for which the defendants had to pay a monthly rental. At some point Sasfin had ceded the rights to receive the rental payment to the plaintiff. The defendants, both relying on the right of a consumer to cancel a fixed-term contract as provided by section 14(2)*(b)*(i)(bb) of the CPA, had cancelled the respective agreements and consequently terminated the rental payments. The plaintiff then brought the applications for summary judgment. In these applications the court was faced with two questions common to both matters. The first concerned the question of whether the CPA applied to the respective agreements, while the second question — assuming the CPA did apply — considered the effect of the cession, if any, on the consumer's right to cancel the fixed-term agreement when the right to receive payment is ceded to a new creditor.

The two questions are considered in the context of the arguments raised by the plaintiff in the two cases. The first two arguments considered below pertain to the question whether the CPA was applicable to the agreements in question. The third argument addresses the second main question of whether the consumer's right to cancel is affected by the cession. The final argument

33 *Ibid*.

34 *Ibid*.

35 *Ibid* para 19.

36 *Ibid* para 20.

37 *Ibid* para 31.

38 *Ibid* para 24.

39 *Ibid* para 26.

40 *Ibid* para 41.

41 See para 3 4 below.

raises a more formal aspect, namely the format of the cancellation notice.

3 1 The Exemption Notice Excludes the Supplier From the Application of the CPA

In both cases the matter of the exemption notice excluding banks (such as Sasfin) from the application of the CPA, was raised. In *Jaglal-Govindpershad*, in respect of this issue, the court expressed itself as follows on this aspect:

> However, in having regard to the purpose of the CPA and the Government Gazette, the purpose of exempting the bank from the application of s14 could not have the intention of depriving the consumer of the protection afforded in the CPA. Nor could it deprive the consumer of its right to cancel granted in terms of s 14. Section 14(2)*(b)*(i) of the CPA permits consumers to cancel any fixed term agreement without reason by giving 20 business days' notice.[42]

The court agreed with the defendant that the latter had cancelled the agreement and referred to the provisions of section 51 of the CPA which provide that a supplier may not make an agreement subject to a term that deprives a consumer of a right in terms of the Act, the relevant right being the right to cancel a fixed term agreement in terms of section 14(2)*(b)*.[43] Section 51 includes the following provisions:

> (1) A supplier must not make a transaction or agreement subject to any term or condition if-
>
> its general purpose or effect is to-
>
> (i) defeat the purposes and policy of this Act; …
>
> *(b)* it directly or indirectly purports to
>
> (i) waive or deprive a consumer of a right in terms of this Act;
>
> (ii) …
>
> (iii) set aside or override the effect of any provision of this Act; … .

In *Lucic* the plaintiff abandoned the argument that Sasfin is exempted from the application of section 14,[44] with the court holding on the issue that "the plaintiff as a financier in the agreement falls within the purview of the definition of a supplier under the CPA. It follows that the CPA is applicable to the agreement".[45]

The court in *Jaglal-Govindpershad* argued that the "trumping" provisions of section 51 supersede the exemption notice, while the court in *Lucic* relied on the view that Sasfin is a supplier for purposes of the CPA. In neither of the cases did the court explain what the purpose then is of the exemption notice and under what circumstances it will exclude a bank from the application of section 14 of the Act.

The Minister of Trade and Industry originally granted the exemption to ensure that consumers could not use section 14 to cancel agreements in terms of which banks held fixed deposits on behalf of consumers.[46] Section 66 of the Financial Services General Laws Amendment Act[47]

42 *Jaglal-Govindpershad* para 12.

43 *Ibid* para 13.

44 *Lucic* para 15.

45 *Ibid.*

46 See Eiselen "Section 14" in Naudé and Eiselen (eds) *Commentary on the Consumer Protection Act* (Revision service 10, 2024) 14–5.

47 45 of 2013.

exempts all financial service providers from the application of the CPA.[48] The section provides that the CPA does not apply to any function, act, transaction, goods or services that is or are subject to Financial Services Board legislation.

Both the Financial Services General Laws Amendment Act and the Financial Sector Regulation Act came into force after the CPA. It is submitted that these acts make it clear that any transaction, products, or services regulated by financial legislation, are excluded from the application of the CPA. However, it also means that where a financial institution such as a bank, is in a transaction with a consumer to provide goods or services that are not regulated by financial legislation, or stated otherwise, and such services are not the normal "business of a bank", then the CPA potentially could apply to that transaction.[49] Similarly, where a bank is acting as a supplier as defined by the CPA of goods or services that would not be the business of a bank, then the bank is no longer exempt from the application of section 14. Renting telephonic equipment to a consumer as happened in these two cases, is not the business of a bank — at least not as defined for purposes of the application of financial legislation such as the Banks Act — and for that reason the bank should not be able to rely on the protection offered by the exemption. It is submitted therefore that both courts were correct in holding that the exemption does not exclude the application of the CPA to the respective transactions.

3 2 Sasfin Is Not a Supplier for Purposes of the CPA

An argument advanced on behalf of the plaintiff in both matters was that Sasfin was not a supplier for purposes of the CPA but rather a financier.[50] In *Jaglal-Govindpershad* the court seemed to be firmly of the view that Sasfin was a supplier. This is clear from when the court stated that "the purpose of exempting the bank from the application of s14 could not have the intention of depriving the consumer of the protection afforded in the CPA";[51] "[t]he defendant did cancel the agreement which was a 'fixed-term agreement' provided for in the Consumer Protection Act";[52] and "I have noted also that the Consumer Protection Act ensures that a supplier does not unlawfully place a limitation on the rights of a consumer afforded to it by the Consumer Protection Action [*sic*]"[53]

In *Lucic*, the court found that "the plaintiff as a financier in the agreement falls within the purview of the definition of supplier under the CPA."[54] The term "supplier" is defined in section 1 of the CPA as "a person who markets any goods or services". The term "market", in turn, is defined as "to promote or supply any goods or services" when used as a verb. "Supply" when it is used as a verb and in relation to goods, "includes sell, rent, exchange and hire in the ordinary course of business and for consideration; …".[55] The court also referred to the definition of "services", the relevant part of which provides that it includes but is not limited to "any banking

48 See also s 10(1)(a) of the Financial Sector Regulation Act 9 of 2017, that provides as follows:
"(1) The Consumer Protection Act does not apply to, or in relation to—
(a) a function, act, transaction, financial product or financial service that is subject to the National Payment System Act or a financial sector law, and which is regulated by the Financial Sector Conduct Authority in terms of a financial sector law; …".

49 See the definition of "business of a bank" in section 1 of the Banks Act. Albeit a very long definition, it is submitted that it does not provide for the leasing of equipment to consumers.

50 *Jaglal-Govindpershad* para 7 and *Lucic* para 15.

51 *Ibid* para 12.

52 *Ibid* para 13.

53 *Ibid*.

54 *Lucic* para 15.

55 CPA s 1.

services, or related or similar financial services".[56]

The "banking services, or related or similar financial services" referred to in the definition of services in the CPA cannot include or refer to services provided by banks included in the definition of the business of a bank as it has been pointed out that these services are excluded from the application of the CPA by other legislation, such as section 66 of the Financial Services General Laws Amendment Act. This of course applies to all services provided by financial institutions insofar as those services or activities are subject to specific financial legislation. It also applies to other providers of financial services, such as providers of short- and long-term insurance. Consequently, where the definition of "services" in the CPA refers to banking or related services it can only refer to services provided by financial institutions that are not services regulated by financial legislation. This means that a service provided by a bank that falls within the definition of the business of a bank, is a service regulated by the Banks Act and the CPA will not apply to that service or agreement for that service. However, where the bank provides a service that does not fall within the definition of the business of a bank, the CPA can apply to such a service and the agreement for the provision of the service.

Consequently Sasfin, although a bank, was not involved in the business of a bank as regulated by financial legislation, when it concluded the lease agreements with the defendants, making Sasfin a supplier for the purpose of the application of the CPA.

3 3 Cancellation of the Agreement Does Not Terminate the Cessionary's Right to Receive Payment

As indicated above in the stating of the facts of *Jaglal-Govindpershad*, the plaintiff had argued that as the cession of rights occurred between Sasfin and the plaintiff, the agreement (MRA) between Sasfin and the defendant remained intact and therefore the defendant had the right in terms of section 14 to cancel the agreement with Sasfin, but the defendant could not exercise the right to cancel against the plaintiff.[57] The effect of such an approach would be that the moment a right is ceded to the cessionary, the consumer agreement can be cancelled as against the supplier, but that the right ceded remains unaffected by the cancellation. This would allow a supplier to avoid the protection offered consumers by section 14 of the CPA and would most certainly undermine the aims and purposes of the CPA.

But such an approach also ignores the law relating to cession which is succinctly expressed in the following passage by Lubbe:

> If the agreement between the debtor and the cedent, whereby the ceded right was created, is terminated, for instance on the grounds of misrepresentation, the fulfilment of a resolutive condition, breach of contract or the like, the right itself will expire in the hands of the cessionary.[58]

It would appear then that where the agreement giving rise to the right that was ceded, is lawfully cancelled, the right itself, even though transferred to a cessionary, will terminate.

The impact of the cession on the rights of the consumer as provided by the CPA is informed by two inter-related principles. The first is that a cession may not prejudice the debtor.[59] The cession cannot have the effect of placing the consumer in a position that is worse than what it

56 *Lucic* para 15. See also CPA s 1.

57 *Jaglal-Govindpershad* para 5.

58 Lubbe "Cession" in *LAWSA* 3ed (2013) para 184.

59 Floyd and Hutchison *Contract* 371.

was before the cession. As Lubbe puts it:

> The change of creditors brought about by cession must not impose a greater burden on the debtor than that to which, but for the cession, he or she would otherwise have been subjected. Cession must neither weaken the debtor's position nor render it more onerous [footnotes omitted].[60]

Second, the rule *nemo plus iuris transfere (ad alium) potest quam ipse habet* holds that one cannot transfer more rights than one has.[61] In *Paiges v Van Ryn Gold Mines Estates Ltd*[62] De Villiers JA explained the rule as follows:

> Finally, it is said that a trader, who, relying on the common law of the country in regard to cession, gives credit, ought not to be prejudiced by an agreement to which he was no party and of which he was not aware. But this argument loses sight of the cardinal fact that at most the cessionary only steps into the shoes of the cedent, and can have no greater rights than the cedent himself has.[63]

The cessionary, by taking transfer of the right, steps into the shoes of the cedent and therefore as a general rule, the cessionary's position as against the debtor can never be stronger than that of the cedent's position was as against the debtor.[64] A right that is transferred by way of a cession is transferred with all its benefits or advantages, but also with all its limitations,[65] including those imposed by legislation.[66] In *Adams v SA Motor Industry Employers Association*[67] the Supreme Court of Appeal stated:

> In accordance with the *nemo plus juris* rule it follows that if the creditor were to cede the original obligation to a third party and retain the instrument, the third party would be subject to the same restrictions in relation to the old obligation to which the creditor was before the cession.

The agreement giving rise to the right may be subject to specific legislation such as the CPA. Presuming that the CPA does apply, a fixed-term agreement is subject to cancellation in terms of section 14 of the Act at the behest of the consumer and once validly exercised, the agreement is terminated 20 days from the date of notification, subject only to the provisions of section 14(3), that the consumer remains liable for any arrear amounts due, and the right of the supplier to charge a reasonable cancellation penalty. The right to receive payment is limited therefore by the right of the consumer to cancel the agreement, giving rise to the right to receive payment. One can assume that the right of the cessionary is conditional upon the continued existence of the agreement between the supplier (cedent) and the consumer. Consequently, the right to receive payment can be ceded, but subject to the existing right of the consumer (debtor) to cancel the original agreement that gave rise to the right to receive payment. The right of the debtor to cancel the agreement thus constitutes an attribute — in the form of a limitation — of the right that was ceded. The underlying agreement to sell and transfer the right to the cessionary

60 Lubbe *LAWSA* para 166.

61 Floyd and Hutchison *Contract* 372.

62 1920 AD 600 616.

63 See also *Brayton Carlswald (Pty) Ltd v Brews* (245/2016) [2017] ZASCA 68 (31 May 2017) para 13, where the court stated that a party cannot "cede something that did not belong to them and to which they had no right".

64 Van der Merwe *Contract: General Principles* 4ed (2012) 422. See also Kerr *The Principles of the Law of Contract* 6ed (2002) 506.

65 Floyd and Hutchison *Contract* 372.

66 Lubbe *LAWSA* para 171 states that "the cessionary takes the right as he or she finds it, for better or worse, with all its benefits and privileges, but also with all its defects and disadvantages." See also Lubbe *LAWSA* para 177.

67 1981 3 SA 1189 (A) 1199.

by way of a cession, cannot remove this limitation or the right of the debtor to cancel. To hold otherwise, will place the debtor in a much worse position than the debtor was before the cession. Not only will this violate the principle that the debtor cannot be placed in a worse position than before the cession,[68] but it will defeat the purposes of the CPA. Provisions aimed at producing a result — whether intentionally or otherwise — in terms of which the right to payment remains immune from the consumer's right to cancel if this right is transferred to a cessionary, must fall foul of section 51[69] of the CPA. The court in *Jaglal-Govindpershad* has specifically noted that the purpose of the relevant provisions of section 51 is to avoid the contractual exclusion or limitation of a consumer's rights.[70]

This means that the cessionary is at risk in the event of the debtor cancelling the fixed term agreement. However, this risk is something for the cessionary and cedent to consider and for the cessionary to mitigate against when negotiating with the cedent and is not of any concern to the debtor.

3 4 The Cancellation Notice Must State Expressly the Applicable Provision Relied Upon and the Days Stipulated in the Section After Which the Cancellation Will Take Effect

As explained above, the court had to decide whether section 14(2)*(b)*(i)*(bb)* of the CPA requires that a consumer's cancellation notice must expressly state that the supplier is afforded 20 business days, and whether the consumer is to expressly state that the right to cancel is exercised in terms of section 14(2)*(b)*(i)*(bb)*.[71]

The court referred to *Transcend Residential Property Fund (Pty) Ltd v Mati*,[72] in which it was held that there is no requirement for a consumer to be informed expressly that it has 20 days to remedy a breach of the agreement before it is cancelled by the supplier.[73] However, *Transcend* deals with section 14(2)*(b)*(ii), which allows a *supplier* to cancel a consumer agreement where the consumer is in material breach, but only after having given the consumer 20 business days' notice to remedy the breach and the consumer remains in breach after that period. The effect of *Transcend* is that the consumer need not be expressly informed that it has 20 business days to remedy the defect, provided that the right to cancel is not exercised before the lapsing of the 20 business days. In the present matter, the court found support in this principle to hold that it is not a requirement for the cancellation notice to expressly indicate the 20 business days or to expressly indicate that the consumer is exercising its right in terms of section 14(2)*(b)*(i)*(bb)* of the CPA. The court concluded that "should the consumer provide written notice of the cancellation and afford the supplier 20 days' notice before the consumer acts on the cancellation, the cancellation would be effective under Section 14(2)*(b)(bb)* [sic] of the CPA".[74]

68 Van der Merwe *Contract* 411.

69 CPA s 51(1)*(b)*(i) provides that a supplier must not make a transaction or agreement subject to a term if it directly or indirectly purports to deprive a consumer of a right in terms of the Act. Section 51(3) provides that such a term is void to the extent that it contravenes the section.

70 *Jaglal-Govindpershad* para 13.

71 *Lucic* para 26.

72 2018 4 SA 515 (WCC).

73 *Lucic* para 29.

74 *Ibid* para 30.

Transcend has been criticised. Eiselen states as follows:

> This decision is questionable in the light of earlier decisions where a failure to provide a reasonable period to place a party in mora coupled with a termination notice, was held to invalidate the notice and to invalidate the exercise of the right to terminate. The decision in *Transcend* also runs counter to the express imperative of the Act to interpret and apply the Act in a manner that provides protection to consumers [footnotes omitted].[75]

It is submitted that the critique expressed by the author against the approach in *Transcend* supports the approach by the court in the present matter. By not requiring the consumer to have to expressly inform the supplier of the specific section relied on and the 20-day period, the relevant provision is interpreted to protect consumers.

It is further submitted that the respective provisions of sub-paragraphs (i) and (ii) of section 14(2)*(b)* serve distinct purposes that justify different approaches. Section 14(2)*(b)*(i)*(bb)* — the relevant provision for current purposes — sets out the procedure for the consumer on how the right to cancel must be exercised, that is by giving written notice of cancellation of the agreement to the supplier, but which cancellation can only take effect at least 20 business days after the cancellation notice was given. However, the provision also limits the right to cancel in that it cannot, for instance, be used to cancel the agreement with immediate effect. Provided that the consumer adheres to the procedural requirements as set out, the cancellation cannot be undone by the supplier. In other words, the provision does not create a statutory escape route for the supplier to prevent the cancellation. On the other hand, section14(2)*(b)*(ii) serves to ensure that the consumer is informed of a material breach and that the agreement is to be cancelled should the consumer not remedy the breach within the specific time. The provision prescribes a period of 20 business days within which the breach can be remedied. If the breach is remedied within the time, it will prevent the cancellation. This makes informing the consumer of the 20 day "grace period" crucial, whilst not informing the supplier expressly of the 20 business days', will not prejudice the supplier's position in any material way.[76] Therefore the view of the court *in casu* is supported.

4 CONCLUDING REMARKS

In the cases discussed, two basic issues arose, namely whether the CPA applies to the agreements, and if the CPA does apply when the cession of rights affected the consumer rights under the Act, especially their right to cancel a fixed-term consumer agreement. The agreements were fixed-term agreements concluded between the consumer and supplier, containing an acceleration clause seemingly depriving the consumer of their rights to cancel a fixed-term agreement. The respective rights to receive payment were ceded to the plaintiff in each case, probably for the purpose of securitisation.[77]

It is argued that the courts were correct in finding that Sasfin is a supplier for purposes of the CPA and that the Act therefore should apply to the agreements. Also, it is argued that the notice exempting banks from the provisions of section 14 only applies where a bank provides banking services only and not when it provides services outside the parameters of the definition of the business of a bank, such as the renting of telephonic equipment. but still falling within the definition of supply as defined in the CPA. The exemption notice therefore does not apply to

75 Eiselen *Commentary on the CPA* 14-8A.

76 See also *Lucic* para 30.

77 See Bodie *Investments* 13ed (2024) G-12, who explains the concept as the pooling of loans for various purposes into standardised securities backed by those loans, which can then be traded like any other security. Securitisation then basically is a process by which a group of income-producing assets is transformed into one investable security.

the agreements in question with the result that the CPA could be applied to the agreements in question.

In respect of the second question, it was argued that a cession of a right does not affect the protection provided a debtor (consumer) by the CPA if the Act applied to the original agreement. Two interrelated principles support this argument: first, that a cession may not place the debtor in a worse position than the latter was before the cession, and second, is the *nemo plus iuris*-rule. Accordingly, a cessionary cannot receive a right that is immune from the protection provided a consumer in terms of the CPA, if such right was originally subject to the CPA.