IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

[*Reportable*]

CASE NO: 5651/2014

In the matter between:

HENDRIK CORNELIS VAN WYK Plaintiff

t/a SKYDIVE MOSSEL BAY

and

UPS SCS SOUTH AFRICA (PTY) LTD Defendant

JUDGMENT: 4 DECEMBER 2019

Introduction

[1] The Plaintiff, who resides in Mossel Bay in the area of jurisdiction of this court, and who operates a skydiving business under the name and style of Skydive Mossel Bay, instituted an action in this court against the Defendant, for payment of an amount of R386 140,30 in respect of the value of an aircraft engine, plus interest at the prescribed rate of 15.5% per annum from 12 June 2013 to date of payment. The allegations upon which the Plaintiff basis this claim, are briefly set out as per the particulars of claim.

[2] During the period 12 December 2012 to 31 May 2013, the Plaintiff required the services of an entity to convey or transport an aircraft engine, that was at that time at 2505 West Broadway, Collinsville, Oklahoma in the United States of America, to the Garden Route Air Maintenance, Hangar 27, George Airport, George. This aircraft engine had been sent to the United States of America in 2007, to have it overhauled for the purposes of flying an aircraft which the Plaintiff used to conduct his skydiving business.

[3] The Plaintiff, in the process of acquiring the services of such a service provider, came into contact with the Defendant, and this resulted in an email exchange between the two of them. In this regard the Plaintiff in his particulars of claim records the following email exchange between the two parties:

a) On 12 December 2012[1], the Plaintiff sent the Defendant an email, requesting a quotation for conveyance of the crate containing an aircraft engine from and to the above-mentioned destinations.

b) On 24 December 2012 the Defendant, represented by Dirk Swanepoel ("Swanepoel"), sent the Plaintiff an email, to which was attached an estimate of charges for such conveyance, copies of which email and estimate of charges are annexed to the particulars of claim.[2]

c) On 21 January 2013 the Plaintiff sent the Defendant an email, making further enquiries, stating that the cost of the overhaul was $21,500 and enquiring whether there should be any import duty, which is also annexed to the

[1] PC 1 of the record
[2] PC 2.1 and PC 2.2 respectively

particulars of claim[3]; he also enquired how long conveyance of the engine by sea freight would take.

d) On 22 January 2013 at 7:57 a.m. the Defendant, in reply thereto, which is also annexed to the particulars of claim, answered that approximately 45 days in transit could be anticipated for ocean freight, and further answered that aircraft engines did not attract import duty, but that VAT would be payable on the value of the engine and not just the value of the repair. He further stated that an ITAC[4] certificate might be required depending on what documentation the Plaintiff had available.[5]

e) At 9:55 a.m. on 22 January 2013, the Plaintiff sent the Defendant an email stating that he would like to proceed and enquiring what the Defendant needed from him to do so.[6]

f) At 10:14 a.m. on 22 January 2013 the Defendant sent the Plaintiff an email, to the effect that the Plaintiff would need to open an account with the Defendant, in order for the Defendant to proceed.[7]

g) In reply to this at 10:24 a.m. on 22 January 2013, the Plaintiff sent the Defendant an email enquiring as to the procedure for opening an account with the Defendant.[8]

h) At 10:34 a.m. on 22 January 2013, the Defendant sent the Plaintiff an email to the effect that if the Plaintiff completed the Defendant's credit application, attached to the email, it would to be able to proceed.[9]

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[3] PC 3 of the record
[4] International Trade Administration Commission of South Africa
[5] PC 4 of the record
[6] PC 5 of the record, annexed, to the particulars of claim
[7] PC 6, also annexed to the particulars of claim
[8] PC 7, annexed to the particulars of claim
[9] PC 8 attached to the particulars of claim

i) At 16:12 a.m. on 22 January 2013 the Plaintiff sent the Defendant an email. forwarding a completed credit application similar to the one that the Plaintiff was requested to complete.[10]

j) On 31 May 2013 the Defendant sent the Plaintiff an email indicating that the said aircraft engine was scheduled for collection the following day.[11]

[4] The Plaintiff alleged in the particulars of claim that, based on these email exchanges between himself and the Defendant, a written agreement came into existence between them, which agreement was concluded on or about 22 January 2013, alternatively on or about 31 May 2013 in Johannesburg, alternatively Mossel Bay, for the conveyance by the Defendant of an aircraft engine from 2505 West Broadway, Collinsville, Oklahoma to Garden Route Air Maintenance, hangar 27, George Airport, George.

[5] The Plaintiff further alleged that the aircraft engine in question was a Model O-470-R S/N 451808, which at all times belonged to him and was worth not less than R386 140.30. The Plaintiff also alleged that pursuant to the agreement, the said aircraft engine was delivered, at the instance of the Plaintiff, on or about 1 June 2013 at 2505 West Broadway, Collinsville, Oklahoma, to the Defendant, whose agent accepted the delivery.

[6] According to the Plaintiff the Defendant has failed to deliver the said aircraft engine to the Plaintiff, or at all, and instead notified the Plaintiff, on 12 June 2013,

[10] PC 9. 1 and PC 9.2 attached to the particulars of claim
[11] PC 10 attached to the particulars of claim

that it had been damaged while in transit in the United States of America and was a total loss. The Plaintiff further alleged that the agreement was governed by the provisions of the Consumer Protection Act 68 of 2008 ("CPA"), because the agreement was for the "supply" of a "service" as contemplated in this Act.

[7] According to the Plaintiff, the credit application (PC 9.2) incorporated provisions purporting to limit the risk of liability of both the Defendant and the Plaintiff himself. The Plaintiff was at no relevant time aware thereof and it was not drawn to his attention by the Defendant in a manner and/or form satisfying the requirements of section 49 (3) to 49 (5) of the CPA.

[8] The Plaintiff pleads that insofar as it may be necessary, an order in terms of section 52 (4) (a) (ii) of the CPA, severing from the said agreement or provisions of PC 9.2 those which purport to limit the risk of liability of the Defendant, would be appropriate. Alternatively, that the court declare such provisions to have no force or effect with respect to the said agreement.

The Defendant's Special Plea and Plea on the Merits

The Special Plea

[9] The Defendant raised a special plea based on the following averments: that the Defendant's registered address and principal place of business is situated at Unit C, 33 Brussels Rd, Aeroport, Spartan, Ext 2, Kempton Park, Gauteng; that the written agreement between itself and the Plaintiff was concluded in Johannesburg; that the Defendant is not resident in the court's area of jurisdiction; the cause of action also did not arise within the court's area of jurisdiction; and based on the

allegations as set out in the Plaintiff's particulars of claim, this court accordingly does not have the necessary jurisdiction to adjudicate this matter.

Defendant's Plea on the Merits

[10] The Defendant, in its plea, admits that there was an email exchange, to the extent as set out in the particulars of claim, between itself and the Plaintiff, but denies that based on these email correspondence a written agreement come into existence. Furthermore, the Defendant alleges that, save to admit that the Plaintiff and the Defendant concluded a written agreement on 22 January 2013 and at Kempton Park, the rest of the allegations are denied. And that such agreement is based on the document marked PC 9.2, attached to the particulars of claim.

[11] The Defendant further denies that the subject matter of the claim is an aircraft engine, with model number and value as described in the Plaintiff's particulars of claim. The Defendant further pleads that it shall not, in any circumstances, be liable for any loss or damage of the goods, or for non-delivery or miss delivery, whether on the grounds of breach of contract or negligence, in respect of any type of loss and damage, however arising, unless it is proved that the loss, damage, non-delivery or miss delivery occurred whilst the goods was in the actual custody of the Defendant and under its actual control, based on clause 32 of PC 9.2. The engine was not in the Defendant's actual custody or possession, or under its actual control, when it was damaged.

[12] In the alternative the Defendant pleads that should it be found that the engine was in its actual possession and under is actual control at the time when it was

damaged, the Defendant shall not be held liable for the loss of the goods unless it is proved that the damage was caused by the Defendant's gross negligence. In this regard the Defendant relies on the provisions of clause 33 of PC 9.2. The Defendant alleges that it was not negligent, alternatively grossly negligent, or that its negligence caused the damage to the engine.

[13] In a further alternative the Defendant, on the basis of clause 35.2 of PC 9.2, submits that it shall be discharged from liability for the loss of the consignment unless it receives written notice from the Plaintiff within 28 days of the date on which the consignment was supposed to be delivered. And the Plaintiff did not notify the Defendant in writing in the aforesaid time. The Defendant is according absolved of liability (if any) for the loss of the engine: in terms of clause 12 of the agreement, the Plaintiff warranted that the goods in question had been properly packed and prepared.

[14] In the further alternative, based on clause 36, 36.1 and 36.2 of PC 9.2, the Defendant pleads that in no case whatsoever shall any liability of the Defendant, however arising, exceed the value of the goods or the value declared by the Plaintiff for insurance, customs or carriage purposes, or an amount equal to R100,00 per 1000 kg, or part thereof, for inward consignments to be received or forwarded by sea freight or other surface carriage, or R50 per consignment if forwarded by airfreight, whichever amount is the lowest. And in yet another further alternative the Defendant pleads that, based on clause 13.2 of the agreement, which states that where the Defendant employed independent third parties to perform any of the functions required of the Defendant, the Defendant would have no responsibility or liability to

the Plaintiff for any act or omission of such third party, even though the Defendant may have been responsible for the payment of such third party's charges, the Defendant is not so liable or responsible.

[15] The Defendant in general denies that the provisions of the CPA are applicable in this case, but without derogating from the generality of the denial, further pleads that the Plaintiff, businessman and owner of a skydiving business, signed the agreement and is accordingly bound by the terms recorded therein.

[16] The Defendant alleges that the terms of the agreement are written in plain language, and are sufficiently conspicuous in the circumstances to attract the attention of an ordinary alert consumer, such as the Plaintiff. Furthermore, the Plaintiff, as a businessman and owner of a skydiving business, would have understood the meaning and import of the terms and conditions of the agreement, and specifically those limiting the liability of the Defendant.

[17] The Defendant further pleads that if it can be found that it did incur liability to the Plaintiff for the loss of the engine, then in terms of clause 36.2 of the agreement, its liability in respect of the consignment is limited to R100 per 1000 kilograms, or part thereof.

The Defendant prays that the Plaintiff's claim be dismissed with costs.

Replication

[18] In replication to the Defendant's plea, the Plaintiff alleges that inasmuch as a contract of carriage between the parties required delivery, by the Defendant, of the

subject matter thereof at an address in George, within the area of jurisdiction of this court, his action is in respect of a cause arising within the area of jurisdiction of this court, as contemplated by section 21 (1) Superior Courts Act 10 of 2013.

[19] The Plaintiff further denies that the standard trading conditions of the Defendant, incorporated in annexure PC 9.22 to the particulars of claim, form part of the contract of carriage between the parties. The Plaintiff further submits that, inasmuch as it was the Defendant itself who notified the Plaintiff of the loss of the consignment, any obligation there may have been on the Plaintiff to give the Defendant notice of such loss was excused, and the Plaintiff in any event notified the Defendant of the loss of the consignment by submitting a written claim to the Defendant, on or about 26 June 2013, for compensation for such loss.

[20] The Plaintiff further submits that his primary contention is that the contract of carriage between the parties was concluded upon receipt by the Defendant of annexure PC 5 to the particulars of claim. The Plaintiff further alleges that annexure PC 9.2 to the particulars of claim, which proclaims itself to be a credit application, was only completed and submitted to the Defendant, by the Plaintiff, as a formality required of the Plaintiff for the purpose of allocation to him, by the Defendant, of an account number, and not for the purposes of seeking any credit.

[21] Lastly, the Defendant did not explain to the Plaintiff and the Plaintiff did not reasonably understand that the second and third pages of annexure PC 9.2 to the particulars of claim, which had not been furnished to him prior to receipt of annexure PC 8 to the particulars of claim, incorporated terms and conditions which would

apply to the contract of carriage between the parties, that had been or was in the process of being concluded.

The Evidence

[22] The Plaintiff himself testified and also presented the evidence of Gordon Alexander, an expert witness, who is an Aircraft Engineer. The Defendant did not present any evidence and closed its case. The Plaintiff's evidence in chief is broadly a repetition of the allegations he made in the particulars of claim. He testified that he is the owner and operator of Skydive Mossel Bay and that he conducts his business from Mossel Bay Airfield, with a team of instructors.

[23] They make use of a Cessna 182 aircraft on a daily basis. The aircraft engine which is the subject of this case, had been sent to the USA during 2007 to have it overhauled. It first had to be inspected, in order to ascertain what needed to be done to have it overhauled, after which a report, containing the findings of the inspection, was handed to him. At that time, there was no need to have it done immediately and he was looking around for other options.

[24] During 2012 the need for the engine to be overhauled and sent back to him in South Africa became more pressing, because the engine on the aircraft in use at that time reached a life span of 1500 hours, after which it too had to be overhauled. During the middle of 2012 he gave instructions to America's Aircraft Engines Inc., the relevant American company, to start overhauling the engine, and for it to be shipped back to South Africa. And according to a document titled: "*Authorized Release*

Certificate",[12] issued by the company, the overhaul of the engine was completed and it was ready to be released on 7 December 2012.

[25] The Plaintiff testified that at that stage he needed to ship the engine back to South Africa, and he made some enquiries to get a quotation for the costs of shipping it back to South Africa. It is then that he contacted the Defendant for such a quotation; he had made use of their services on a previous occasion, but he cannot remember precisely when. It was at that stage that he started to make enquiries which resulted in the email correspondence, as referred to in the particulars of claim and as set out above.

[26] The first quotation he received from the Defendant was for an amount of R24 364,98. He then requested them to provide a cheaper quote, and also enquired whether the shipping of the aircraft engine could be done by means of sea freight. He was thereafter given a quote for shipping by means of sea freight, which he accepted, for the amount of R11 070,05. He was further informed by Swanepoel that he would have to pay VAT on the value of the engine, which according to him included the value of the repairs. He was further requested to open an account with the Defendant, which he did not want to do as he was going to pay upfront. He was informed by Swanepoel that he did not have that option, because they had to have a valid account number.

[27] According to Swanepoel, in an email dated 22 January 2013 at 10:34 a.m., it's a requirement that shipments to and from the USA, in what is called regulated trade,

[12] Page 1 trial bundle

complies with the multitude of rules and regulations imposed by the US government and US customs. It was therefore required that a valid account number existed. Swanepoel attached a credit application to this email, which the Plaintiff completed and signed. On the document[13] under the heading "*Credit Facilities Required"* the amount of 'R30 000' was filled in next to the credit limit indication, and under other payment terms the Plaintiff entered the words "*Pay up front".* He assumed that the amount of R30 000 would be appropriate, based on what had been quoted for air freight and for sea freight. After this form had been filled in and signed on 21 January 2013, he scanned it and sent it to Swanepoel.

[28] The Plaintiff testified that he realised that he wanted to get the engine back in South Africa, but that it was not that urgent for him to do so at that stage. The engine in the aircraft in use at the time, was still operational but was becoming due for an overall, and there was a need to replace the engine. It was for that reason that he started to make plans to get the contested engine back in the country.

[29] On 23 January 2013 he was requested by the Defendant to supply them with all outstanding documents, which he in the interim had to acquire from various authorities after registration with these authorities. These included a VAT certificate, to show that the Plaintiff was registered as an importer/exporter; an ITAC certificate, which authorised the Plaintiff to import a used aircraft engine from any country; and an invoice from America's Aircraft Engines Inc. It seems that he only acquired the necessary documentation from the relevant authorities during the course of April and May 2013.

[13] Page 24 trial bundle, also referred to as PC 9.2

[30] On 10 June 2013 the Plaintiff sent an email sent to the Defendant, at 10:28 p.m., stating that in the interim the circumstances had changed and that he needed the engine to be shipped by air freight. The aircraft engine in use at the time had broken down, and it became urgent that the engine be shipped to him as soon as possible. He further enquired as to whether the costs of the air freight, excluding VAT to be paid to SA customs, would still be R24 364,98, as per the original quote that had been supplied to him by the Defendant.

[31] At that stage the aircraft engine was already on its way by means of sea freight. Swanepoel, in reply to this request, on 12 June 2013 in an email sent at 8:28 a.m., informed the Plaintiff that he had discussed the change of arrangements with all the parties involved and it had been arranged that the cargo be intercepted once it arrived in New York in a couple of days. Furthermore, Swanepoel informed him that at that stage the engine was on a feeder truck en route from Dallas to New York, and from New York it would fly on the direct service to Johannesburg. Swanepoel also informed the Plaintiff that he would only be able to confirm the final flight details once it was on hand in New York, and after he had requested the cost for the change.[14]

[32] Later on 12 June 2013, at 2:54 p.m., he was informed by Swanepoel, via email,[15] that, after all the arrangements had been confirmed, they received a notification from the carrier that while en route to New Jersey, the truck and trailer carrying the engine caught fire as a result of equipment malfunction, and that the truck and cargo appeared to be a total loss.

[14] Trial bundle page 56
[15] Also trial bundle page 56

[33] He was further advised to provide them with the necessary documents, and a quotation or estimate of the value of the engine. At that stage his business was not operating and he reminded them that he needed a speedy resolution to the problem. He was sent an insurance claim form, which he had to fill in in order to process his claim.[16] This form was then sent off to the Defendant for the purposes of his claim. In a letter sent by email dated 1 October 2013, he was informed by the Defendant that the shipment had not been insured and according to the UPS SCS terms and conditions for ocean freight shipments, they are only liable to pay out $500 USD per shipment and that the possible pay out as a result would be in the sum of $500 USD. Attached to this letter was a settlement of release form, which he had to fill in and send back to them, whereupon a payment of liability on the merits would follow.

[34] As a result of this, the Plaintiff realised he had a big problem and contacted his attorney. On 3 October 2013, he sent a letter to Swanepoel where he requested a copy of all the contracts, including terms and agreements, which had been signed in relation to this transaction. At some stage, one Desmond De Meyer, of the Defendant, sent him an email wherein he said that he doubted whether he (the Plaintiff) had signed any contract, but that he would have signed the terms and conditions upon opening an account. He never received his aircraft engine and it was never delivered to him.

[35] In cross-examination, he confirmed that he received the document referred to in annexure PC 9.2,[17] and he further said that he only read part of the document. He only read the front page of the document, which he was required to complete. He

[16] Trial bundle page 72
[17] Trial bundle page 24, 25, 26, 27 and 28

did not read the second or third pages.[18]

[36] He further denied that he indicated to the Defendant that he did in fact read the document. And he further testified that all the handwritten entries on the document were in his handwriting. He said that although he indicated that the payment would be made upfront, he was waiting for the Defendant to send him such a request for payment. In answer to a question regarding the fact that he stated that he agreed to the terms and conditions as contained on the second and third pages of the document, he said that he filled in the document so that UPS would open an account for him and he just signed it and filled it in for that purpose.

[37] He further admitted that in his skydiving business he has a contract which contains an indemnity clause indemnifying him from risks. He further conceded that, although he realised that in bringing an aircraft engine into South Africa there might be potential for damage or loss, he did not take out insurance for that purpose, because he was of the view that the Defendant would insure the cargo, as he believed that it was contained in the quotation that had been sent to him. When it was pointed out to him that the quotation did not make provision for insurance, he said he only realised that afterwards.

[38] He further stated that no one told him that he should get his own insurance, because he thought it should be included in the freight charges. He further, when it was put to him that UPS was not an insurance company, said that he thought so. He also stated that at that time when he had to complete the credit application form and

[18] Trial bundle page 25 and 26

although he was experienced in business, someone ought to have drawn his attention to the terms and conditions in the agreement. And he had been under the impression that the Defendant wanted him to sign the forms just to capture his details, because he did not wish to have a long-term relationship with the Defendant and for that reason it was not important for him to read the terms and conditions.

[39] He stated further that although his attention was specifically drawn to the terms and conditions, he did not pay any attention to it. He would have preferred if someone had specifically indicated which clauses were really important. He conceded that by signing the credit application, the Defendant must have assumed that he agreed to the terms and conditions of the agreement.

[40] He furthermore conceded in cross-examination that he primarily dealt with the Defendant, who was based in Johannesburg, but further stated that at the initial stages when he contacted the Defendant he dealt with people situated in Cape Town. And that at all times relevant to concluding the agreement, he dealt with Swanepoel, who was in Johannesburg. He furthermore stated, when it was put to him that the carrier is not the Defendant, that it seemed that the Defendant made use of a subcontractor.

[41] He further testified that the engine that was sent for repairs was at the end of its life in terms of normal wear and tear of the components, and it was just basically the core value that remained, being the crankcase, the crankshaft and the CSU. He further explained that an aircraft engine life does not have a shelf life but that such engines could only run for a certain amount of flight hours before they need to be

overhauled – at intervals of 1500 hours. Engines can be overhauled over and over again, and during such an overhaul the crankcase and the crankshaft would be inspected.

[42] He further testified that when it was asked of him, in the claim form, where it was asked whether he had his own insurance, he understood it to mean whether he did not have his own personal insurance should the engine be lost or damaged, because he was under the impression that the Defendant would take care of the insurance. He also conceded that even if he would have paid cash on delivery of the engine, that he had to fill in the credit application, which was part of the agreement with the Defendant. He furthermore, with reference to the specific clauses relied upon by the Defendant, conceded that the engine at the time of the incident was not in the control of the defendant, but stated that he did not know that at the stage when it was damaged.

[43] He further stated that even if it had been under the control of someone else, he had authorised the Defendant to pick up the engine and bring it to him, not any other party. He further stated that he was under the impression that when the engine was transported it was under the control, or in the possession, of the Defendant. He also stated that he considered the Defendant to be responsible for his cargo, from the moment it was picked up in America until the time it would have been dropped off in George in South Africa. He furthermore stated that not any of the clauses in the credit application on which Defendant relies, which are clauses 13.2, 32, 33, 35.2 and 36 were brought under his attention or pointed out to him before he signed the credit agreement.

[44] The Plaintiff called Gordon Alexander Anderson, who was an expert witness, and qualified as an aircraft mechanic in 1991 after starting with his apprenticeship in 1988. He worked for various companies in the industry, until he took up employment in 2001 with the Aircraft Power Plant Company, also known as Apco, which is based at the Wonderboom airport in Pretoria. He testified that he also obtained an N4 qualification, which is a higher level qualification than the N3 diploma which is required to be an aircraft mechanic.

[45] He has worked as an engineer for various companies and indicated that an aircraft engineer is someone that acquired further qualifications than that of an aircraft mechanic. It also means that such a person is certified to inspect certain types of engines or aircraft, which he may certify without anybody else doing a dual inspection. His company, Apco, specialises in the service, repair and overhauling of piston engines. The position he holds at Apco is that of engineer and technical administrator.

[46] He further testified that an engine core is a component of an aircraft that can no longer be used for serviceability, due to the fact that all its functioning hours had run out. It is in an engine of which the working hours are completed and it has to be overhauled, after which it can be put back into service with the zero-hour value. It is also not a worthless engine, because the functioning parts in the engine still have value, but it cannot be used until it has been re –zeroed. During the process of overhauling an engine, the manufacturer's specifications have to be followed as to which parts to replace. Once those parts have been replaced and the overhaul completed, the engine is reassembled then it is ready for service again. An overhaul

does not simply involve the repairing of existing parts, but also the replacing of parts. He further referred to an invoice,[19] dated 22 July 2013, issued by his company in relation to this case. It was an invoice for the repair and overhaul of a model O-470-R core engine. The first item, in the spares category, is the engine core, at a cost of R65 000, which cost was to acquire an engine core, due to the fact that the customer's engine was no longer available.

[47] The invoice was for the cost of refurbishing, as well as the cost of an engine core similar to that which the Plaintiff had lost. He further testified that the fair value of an overhauled and repaired model O-470-R in 2013 would have been between R400 000 and R401 000. In 2013 alone he was involved in the overhauling of 3 or 4 of this type of engine, and in his career he overhauled between 25 and 30 of this particular model. He furthermore testified in cross examination, that he has no knowledge of the condition of the engine, which forms the subject matter in this particular case, at the time when it was destroyed or damaged.

[48] He furthermore testified that an engine that is newer in year terms would be more valuable than an engine that is older, irrespective of the flight hours. And the reason for this, among others, is that the new engine would have the latest parts and it would be more advanced and modified than an older one. He further stated that he did not have the year of manufacture of the engine that forms the subject matter of this litigation. The Defendant did not present any evidence and elected to close its case. The credibility, as well as the probabilities of the evidence presented by the Plaintiff, is not in issue in this case. The issues in dispute have been set out clearly

[19] Trial bundle page 69

in the pleadings, which I referred to earlier on in this judgment. These are: a) whether this court had jurisdiction to hear the matter: b) whether the Defendant is liable for the damage suffered by the Plaintiff, and if so, c) whether the Plaintiff has proven such damages.

Arguments and Evaluation

Special Plea: Lack of jurisdiction

[49] The special plea raised by the Defendant is that the court does not have jurisdiction, because the Defendant's registered address and principal place of business is situated in Kempton Park, Gauteng, and that the written agreement between the Plaintiff and the Defendant was concluded on 22 January 2013 in Johannesburg. In the alternative "*on or about 31 May 2013 in Mossel Bay for the conveyance of an aircraft engine from 2505 West Broadway, Collinsville, Oklahoma to Garden Route Air Maintenance, Hangar 27, George Airport George".* And in paragraph 7 of the Plaintiff's particulars of claim, the Plaintiff alleged the following: "*The Defendant has failed to deliver this aircraft engine to the Plaintiff at Garden Route Air Maintenance, Hanger 27, George Airport or at all and notified the Plaintiff on 12 June 2013 that it had been damaged while in transit in United States and was a total loss*."

[50] The Plaintiff, in replication, submitted that any division of the High Court has jurisdiction to entertain an action against a Defendant who is a *peregrinus* in the area over which that division exercises jurisdiction, but resides in the Republic, if the cause of action arose, or the contract in respect of which the Plaintiff claims was entered into or is to be performed within, that court's area of jurisdiction. The Plaintiff

submitted that, inasmuch as the contract of carriage between the parties required delivery by the Defendant of the subject matter thereof at an address in George, within the area of jurisdiction of this court, his action is in respect of a cause arising within the area of jurisdiction of this court as contemplated by section 21 (1) Superior Courts Act 10 of 2013.

[51] Mr. Acton, who appeared for the Plaintiff, submitted that based on the Plaintiff's evidence, it had been shown that the contract entered into with the Defendant required delivery of the aircraft engine at the George Airport, which is within the jurisdiction of this court and therefore the contract was to be performed within the jurisdiction of this court. In this regard he relied on the case of *Brooks v Maquassi Halls Limited* 1914 CPD 371, where at page 376 it was held:

> *"The material point which arises in this case, is whether the Court has jurisdiction in the matter. It will be advisable to consider what the law and practice were on the subject of jurisdiction before the passing of the Act 27 of 1912. According to our common law and practice under it, the Court will exercise jurisdiction upon any one of the following grounds, viz.: (1) Ratione domicilii; (2) ratione rei sitae; (3) ratione contractus; that is, where the contract has either been entered into or has to be executed within the jurisdiction."*

In terms of the common law therefore, courts will exercise jurisdiction on the grounds of *ratione domicilii* or *rei gestae*, which includes *ratione contractus*, in which case a court would have jurisdiction in respect of contracts that are to be executed within its area of jurisdiction, which is clearly applicable in this case, based on the evidence.

[52] It is well established that, just as in the case of the now repealed section 19 of the Supreme Court Act 59 of 1959, section 21 of the Superior Courts Act 10 of 2013 does not contain a codification of the jurisdiction of the High Court. According to *Erasmus et al, Superior Court Practice:* Chapter 6, section 21 of the Superior Courts Act, like section 19 Supreme Court Act, was deliberately couched in indefinite wording, because the intention of the legislature obviously was to interfere with the common law as little as possible. According to the authors, regard must therefore be had to the principles of common law, to ascertain what competency the various divisions of the High Court possess to adjudicate effectively and pronounce upon a matter before, and heard by, them.

[53] The jurisdiction of the High Court, therefore, under section 21 of the Act, is also determined by reference to the common law. And in such a determination regard must be had to: (a) the jurisdictional connecting factors, or *rationes jurisdictionis,* recognised by the common law; and (b) attachment to found or confirm jurisdiction. According to the learned authors, at A2-103 to 104, which also finds application in this case: "*The jurisdictional connecting factors or rationes jurisdictionis recognized by the common law include residence, domicile (ratio domicilii), the situation of the subject-matter of the action within the jurisdiction (ratio rei sitae), cause of action (ratio rei gestae)* ***which includes the conclusion or performance of a contract (ratio contractus****) and the commission of a delict within the jurisdiction (ratio delicti)." (Footnotes omitted and emphasis added.)*

[54] Mr. Silver, who appeared for the Defendant, submitted that in order to determine whether a court has jurisdiction, one has to consider its pleadings; in this

regard he relied on the case of *My Vote Counts NPC v Speaker of the National Assembly and Others* 2016 (1) SA 132 (CC), where the court held, at paragraph 132, that jurisdiction is determined on the basis of a claim in the pleadings. The court went further and, with reference to the decision of *Chirwa v Transnet Ltd and Others* 2008 (4) SA 367 (CC), held at paragraph 133 that*: "… Jurisdiction is determined on the basis of the pleadings, as Langa CJ held in Chirwa, and not the substantive merits of the case… In the event of the court's jurisdiction being challenged at the outset (in limine), the applicant's pleadings are the determining factor."*

[55] According to Mr Silver, one has to have regard to the Plaintiff's pleadings, which is a determining factor, and which states that the Defendant's registered address and principal place of business is at Kempton Park and with its principal place of business within the area of jurisdiction of the Western Cape High Court. The Plaintiff furthermore alleges that the written agreement was concluded in Johannesburg, alternatively Mossel Bay. According to him, therefore, based on the *My Vote Counts* case, in the pleadings, the principal place of business and registered office of the Defendant, reflected as being in Johannesburg, Gauteng, was admitted. And once, based on the pleadings, a fact has been admitted, it is not competent for any party to disprove that fact.

[56] In this regard he relied on the provisions of section 15 of the Civil Proceedings Evidence Act, 25 of 1965 ("the CPEA"), which reads as follows: *"It shall not be necessary for any party in any civil proceedings to prove nor shall it be competent for any such party to disprove any fact admitted on the record of such proceedings."*
It is therefore not open to them to say that the principal place of business was not in Johannesburg, because the Defendant admitted it. They cannot now ask the court

to find that it has jurisdiction, after the Defendant has admitted that the principal place of business, as alleged by the Plaintiff, is in Johannesburg. In terms of section 15 of the CPEA, they are not permitted to do so.

[57] It seems that Mr Silver does not dispute the fact that, based on the cause of action (*ratio rei gestae*), which includes the conclusion or performance of a contract (*ratio contractus*), although the contract was concluded in Johannesburg, the performance thereof could only have been completed by the delivery of the engine by the Defendant at the George Airport, which falls within the jurisdiction of this court. What he submits is that it was not competent for the Plaintiff to present such evidence.

[58] I do not agree with this submission. Firstly, if regard is had to the Plaintiff's particulars of claim, it was pleaded in the alternative that on the basis of the engine having had to be delivered to the airport in George, which falls within the jurisdiction of this court, this court also had jurisdiction. This was expressly pleaded in the alternative.

[59] Furthermore, I do not agree with Mr Silver's submission that the provisions of section 15 of the CPEA, so interpreted, prohibits the Plaintiff from relying on the evidence that the contract would have been completed once the engine had been delivered to the airport in George. The purpose of section 15 of the CPEA, in my view, is twofold; firstly, it is to create a situation where a party makes an allegation in the pleadings for the opposing party to admit to, without the party who made the allegation, and on whom the onus rest, having to prove that fact or allegation. And

secondly, to prohibit the party that made such an admission from withdrawing or disproving such an admission by means of evidence.

[60] An admission is therefore binding only on the party that made the admission, and not the party in whose favour such an admission is made. The admission made has to benefit or assist the party in whose favour it was made. It cannot be prejudicial to the party, in this case the Plaintiff, where the facts of the Plaintiff's case, as has happened in this case, are not consistent with the admission that was made by the Defendant. *Musi JA*, in *Minister of Higher Education & Training v Hospital Association of South Africa and others* [2016] JOL 36086 (LAC) said the following at [21]-[22]:

> "*A factual admission made by a respondent in an answering affidavit will be conclusively binding on such respondent and such party may not adduce evidence to disprove or contradict the admission… Section 15 of the Civil Proceedings Evidence Act provides that it shall not be necessary for any party in civil proceedings to prove nor shall it be competent for any such party to disprove any fact admitted on the record of such proceedings. A properly made formal admission or judicial admission is therefore beyond proof and disproof." (Footnote omitted and own emphasis added.)*

[61] If Mr. Silver's submission is correct, then a party would not be able to plead in the alternative, and would not be able to rely on facts or evidence which might emerge during a trial, which would sustain or support such an alternative plea, where such a party fails to prove the main allegations as set out in the particulars of claim.
I am therefore not persuaded by the argument that this court did not have the

necessary jurisdiction to adjudicate upon this matter. The special plea based on the fact that this court lacks jurisdiction is therefore dismissed.

The Contractual dispute

[62] Mr. Acton submitted that, based on the various email exchanges between the Plaintiff and the Defendant during the period 12 December 2012 to 31 May 2013, a written agreement came into existence between the Plaintiff and the Defendant, which was concluded on or about 22 January 2013, alternatively on or about 31 May 2013, in Johannesburg, alternatively in Mossel Bay. This exchange of emails between the parties is set out above in this judgment, and also in paragraph 3 of the particulars of claim.

[63] The Defendant denies that the written agreement between the parties came into existence on 22 January 2013, based on these various in the exchanges between the two parties. According to the Defendant, the agreement that came into existence between the parties was based on PC 9.2, which was a credit application the Defendant insisted that the Plaintiff complete before the agreement came into existence. And on page 1 of this credit application, under the heading "*Conditions",* it is stated that the agreement was *"subject to the Standard Trading Terms and Conditions and Terms and Conditions of Carriage printed overleaf." (Paraphrased*). Which, according to this document, were in the possession of the Plaintiff, to which he agreed to be bound for any business which he may conduct with either or both the Freight and Warehousing Division and International Express Parcels Division (United Parcel Service), and which was signed by the Plaintiff.

[64] According to the Defendant, it is either not liable, or its liability is limited for the loss incurred by the Plaintiff for the non-delivery of the aircraft engine, based on the clauses (referred to in paragraphs 12, 13 and 14 above) of the credit application which was signed by the Plaintiff, as set out in its plea.

[65] The Plaintiff insisted in his evidence that he merely signed the credit application to facilitate and expedite the process, and because he was requested to do so by the Defendant. It was never his intention to enter into a credit agreement with the Defendant and to bind himself so as to exonerate, exclude or limit the liability of the Defendant for the loss he incurred, due to the non-delivery of his aircraft engine. He further stated that it had been his intention all along to make a payment in cash to the Defendant for the delivery of the engine.

[66] He was, however, in his evidence, constrained to concede that it was a requirement for the agreement between himself and the Defendant, and for the delivery of the aircraft engine to eventuate, for him to sign the credit application. This was based on an email he sent to Swanepoel, dated 22 January 2013 at 10:24 a.m., wherein he (Plaintiff) stated: "... *I don't have an account with UPS. Can I not make a make a full upfront payment? Else, send me the procedure for opening an account please."* To which Swanepoel replied on that same day, at 10:34 a.m. by stating the following: "… *Hi Henk, unfortunately for US shipments, that is not an option. The only way we can move ocean (sic) on the US lane is if a valid account number exist (even if it is a COD account). Shipments to and from the USA is on(sic) what is called a regulated trade and we have to comply with a multitude of rules and regulations imposed by US government and US Customs. Attached is a*

copy of credit application. If you can complete it we can start the process."

[67] Mr. Acton, in his argument, tried to persuade this court that the credit application, based on the initial intention of the Plaintiff, did not form part of the agreement between the two parties; he was however, and quite correctly, constrained to concede that, based on the evidence given by the Plaintiff, as well as the correspondence referred to in the previous paragraph between the Plaintiff and Swanepoel, no agreement could have come into existence without the Plaintiff having signed the credit application.

[68] It seems that the Plaintiff quite wisely had foreseen that the credit application may form part of the agreement, and that that was the reason why he, in paragraph 8 of the particulars of claim, further alleged that the said agreement is governed by, and falls to be construed according to, the laws of the Republic of South Africa and was for the "supply" of a "service" as contemplated by the CPA. And further, at paragraph 9 of the particulars of claim, he alleged that insofar as PC 9.2 (the credit application/agreement) incorporates provisions purporting to limit the risk or liability of the Defendant, the Plaintiff was at no relevant time aware thereof and these clauses were not drawn to the Plaintiff's attention by the Defendant, in a manner and/or form satisfying the requirements of section 49 (3) to 49 (5) of the CPA.

[69] The Plaintiff further claims that it may be necessary that an order be issued in terms of section 52 (4) (a) (ii) of the CPA, severing the said agreement and all provisions of PC 9.2, which proposed to limit the risk or liability of the Defendant, alternatively declaring such provision to have no force or effect with respect to the

said agreement. In my view therefore, the credit agreement forms an integral part of the written agreement which came in existence between the Plaintiff and the Defendant.

[70] The liability of the Defendant therefore falls to be decided on the question whether the agreement is in compliance with the provisions of the CPA, as pleaded by the Plaintiff in paragraphs 8 and 9 of the particulars of claim. The Plaintiff, in his evidence, conceded that he signed the credit application and filled in, under the heading "Credit Limit", an amount of R30 000. He also filled in, under the heading "Credit Facilities Required", in "Payment Terms" the words "*pay upfront".*

[71] He further testified that he understood the document was sent to him to basically capture his details, so that they could open an account for him and that he was not asking for any credit. He said that was why he stated on the document *"payment upfront".* He further stated, when it was put to him in cross examination by Mr Silver,[20] and when his attention was drawn to the fifth line under the heading *"Conditions",* that he had acknowledged that he was authorised to sign the document, a copy of which was handed to him, and that he had agreed to the terms and conditions therein, and that all the business would be governed by and be subject to the terms of the standard trading conditions and the terms of the conditions of carriage printed overleaf, and that he had agreed to be bound thereby, that it was only during his evidence that he realised when these clauses were brought to his attention that he should have looked at the document more carefully.

[20] Transcribed trial record of the evidence at page 88, 89 and 90

[72] He further stated that this credit application was sent to him only for the purpose of capturing address details, telephone number and other personal particulars, so that the Defendant could open an account for him, in order to facilitate the shipment. That was what he understood about the significance of this document. He further stated, when it was put to him and his attention was drawn to the terms and conditions which are on pages 25 and 26 of the trial bundle, which sets out the terms and conditions of the agreement, that he "missed it".

[73] He further stated that ... "*I missed the intent (sic) to specifically draw my intention to the fine print"* and that it had not been clear to him at that time. He furthermore had not understood, at that time, that he was binding himself to all sorts of fine print that he could not even read. He furthermore testified that in his skydiving business he, due to the hazardous nature thereof, recently concluded contracts with potential clients which would include some indemnity clause or protection clause, in case his company was negligent, in order to absolve them from liability. The rules of interpretation has been laid down in the matter of *Wallis JA* in *Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)* at para 18. In that matter it was stated that interpretation is the process of attributing meaning to the words in the document, be it legislation or some other statutory instrument or contract. And that the process of interpretation requires consideration of the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears and the apparent purpose to which it is directed. It is further established law that an interpretation which renders the meaning or use of some words and phrases meaningless is to be avoided.

[74] This court is required to interpret the provisions of the CPA in a way which gives effect to its fundamental values, of dignity, equality, human rights and freedom as set out in Section 1. This is clearly what the CPA seeks to achieve. In this regard, the Constitutional Court in the matter of *Investigating Directorate: SEO v Hyundai Motor Distributors 2001 (1)*[21] *SA 545* where *Langa DP* (as he then was) stated at [22] – [23] the following:

> *"[22] The purport and objects of the Constitution find expression in s 1, which lays out the fundamental values which the Constitution is designed to achieve. The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Consitution.*
>
> *[23] In De Lange v Smuts NO and Others, Ackermann J stated that the principle of reading in conformity does*
>
> *'no more than give expression to a sound principle of constitutional interpretation recognised by other open and democratic societies based on human dignity, equality and freedom such as, for example, the United States of America, Canada and Germany, whose constitutions, like our 1996 Constitution, contain no express provision to such effect. In my view, the same interpretative approach should be adopted under the 1996 Constitution.'*
>
> *Accordingly, judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section."*

[21] See also De Lange v Smuts NO and Others 1998 (3) SA 785 (CC) as referred to by *Langa DP* in the *Hyundai* matter.

[75] In my view, it is against this background and evidence that the court will have regard to the relevant provisions of section 49 of the CPA. It would also be convenient at this stage to have a look at the relevant provisions of this section: which reads as follows:

"49 Notice required for certain terms and conditions

(1) Any notice to consumers or provision of a consumer agreement that purports to-

(a) limit in any way the risk or liability of the supplier or any other person;

(b) constitute an assumption of risk or liability by the consumer;

(c) impose an obligation on the consumer to indemnify the supplier or any other person for any cause; or

(d) be an acknowledgement of any fact by the consumer,

must be drawn to the attention of the consumer in a manner and form that satisfies the formal requirements of subsections (3) to (5).

(2) …

(3) A provision, condition or notice contemplated in subsection (1) or (2) must be written in plain language, as described in section 22.

(4) The fact, nature and effect of the provision or notice contemplated in subsection (1) must be drawn to the attention of the consumer-

(a) in a conspicuous manner and form that is likely to attract the attention of an ordinarily alert consumer, having regard to the circumstances; and

(b) before the earlier of the time at which the consumer-

(i) enters into the transaction or agreement, begins to engage in the activity, or enters or gains access to the facility; or

(ii) is required or expected to offer consideration for the transaction or agreement.

(5) The consumer must be given an adequate opportunity in the circumstances to receive and comprehend the provision or notice as contemplated in subsection (1)."

[76] It is clear from the wording of this section, especially subsection (1), that any notice to a consumer, or any provision of a consumer agreement, that purports to- a) limit in any way the risk or liability of the supplier; b) constitutes an assumption of risk or liability by the consumer; c) imposes an obligation on the consumer to indemnify the supplier or any other person for any cause; or d) involves an acknowledgement of any fact by the consumer, *it must be drawn to the attention of the consumer in the manner and form that satisfies the formal requirements of subsections (3) to (5).*

[77] In terms of subsection (3) such provision, condition or notice must be written in plain language as described in section 22. And in terms of subsection (4) the fact, nature and effect of the provision or notice contemplated in subsection (1) must be drawn to the attention of the consumer in: a) a conspicuous manner and form that is likely to attract the attention of an ordinarily alert consumer having regard to the circumstances; b) before the earlier of the time at which the consumer –i) enters into the transaction or agreement, begins to engage in the activity, or enters or gains access to the facility; or ii) is required or expected to offer consideration for the transaction or agreement.

[78] Furthermore, in terms of subsection (5) the consumer must be given an adequate opportunity in the circumstances to receive and comprehend the provision or notice as contemplated in subsection (1). This section clearly places an obligation on the supplier who wants rely on a notice or provision of a consumer agreement, as set out in subsections (1) a-d.

[79] In my view, this section clearly seeks to advance the very aim and purpose of the act, which is to promote a fair, accessible and a sustainable marketplace for consumer products and services, and to that end to establish national norms and standards relating to consumer protection. To provide also for improved standards of consumer information, to prohibit unfair marketing and business practices, to promote responsible consumer behaviour, and to promote a consistent legislative and enforcement framework relating to consumer transactions and agreements. And in interpreting this section, the court should have regard to what is stated in the preamble of this act, which seeks to recognise that apartheid and discriminatory laws

of the past have burdened the nation with unacceptably high levels of poverty, illiteracy and other forms of social and economic inequality.

[80] It also seeks to develop and employ innovative means to fulfil the rights of historically disadvantaged persons, and to promote their full participation as consumers. And furthermore it seeks to protect the interests of all consumers, which is to ensure accessible, transparent and efficient redress for consumers who are subjected to abuse or exploitation in the marketplace. And this section in particular has as its aim to improve access to quality of information, which is necessary so that consumers are able to make informed choices according to their individual wishes and needs.

[81] This section clearly and unambiguously seeks to protect a consumer where, in terms of a notice or provision of the consumer agreement, such notice or agreement purports to limit the risk or liability of the supplier or any person; where such provision or agreement seeks to constitute an assumption of liability by the consumer; impose an obligation on the consumer to indemnify the supplier or any other person for any cause; and lastly where such notice or consumer agreement requires an acknowledgement of any fact by the consumer. And it seeks to temper the unjust and unfair application of the *caveat subscriptor* rule, especially on unsuspecting and illiterate consumers.

[82] It furthermore seeks to prevent the formalistic application and harsh consequences thereof, as happened in *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA), which applied the principle that was laid down in *George v Fairmead (Pty)*

Ltd 1958 (2) SA 465 (A) at 472 A-B, where *Fagan CJ* said: "… *When a man is asked to put his signature to a document he cannot fail to realise that he is called upon to signify, by doing so, his assent to whatever words appear above his signature"*. And at 472 H- 473 A, the court further states: "*… If he chose not to read what that additional something was, he was, with his open eyes, taking the risk of being bound by it. He cannot then be heard to say that his ignorance of what was in it was a justus error."*

[83] The act now places an obligation on a supplier of goods or services, to explain the existence, the content and the consequences of such clauses, as set out in section 49; an obligation which *Brand JA* in *Afrox Healthcare* (supra) said did not exist, unless there was a legal duty on such supplier of goods or services to do so, when he held the following at paragraph 36: "… [*T*]*hat the respondent's subjective expectations about what the agreement between himself and the appellant would contain played no role in the question of whether a legal duty had rested upon the admission clerk to point out the content of the exclusionary clause to the respondent. What was important was whether provision such as the relevant exclusionary clause was, objectively speaking, unexpected. Today, exclusionary clauses in standard contracts were the rule rather than the exception…. The relevant clause in the admission document was accordingly not, objectively speaking, unexpected. The admission clerk had accordingly had no legal duty to bring it to the respondent's attention and the respondent was bound by the terms of the clause as if he had read it and had expressly agreed thereto." (This is the translation of the original Afrikaans version of this paragraph, as set out in the headnote).*

[84] The act now clearly places a legal duty upon a supplier of goods or services, to bring such clauses clearly and unambiguously to the attention of a consumer when it concludes a transaction with such a consumer, which falls within the ambit of CPA. [22]

[85] The wording of the act is clear where it states that such provision, condition or notice must be written in plain, and in my view understandable, language.[23] It clearly, furthermore, places an obligation on a supplier to properly, and in practical terms, inform a consumer where the provisions in an agreement as stated in subsections (1) (a)-(d) would be applicable. Particularly if regard is to be had to the fact that the act recognises that many of our consumers are impoverished and illiterate, and did not, as a result of our past, play an active role in our economy, from which they would be able to understand the nature and import of the obligations as referred to in subsections (1) (a)-(d), which the courts over the years took for granted

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[22] In terms of section 5(2)
"(2) This Act does not apply to any transaction-
(a) in terms of which goods or services are promoted or supplied to the State;
(b) in terms of which the consumer is a juristic person whose asset value or annual turnover, at the time of the transaction, equals or exceeds the threshold value determined by the Minister in terms of section 6;
(c) if the transaction falls within an exemption granted by the Minister in terms of subsections (3) and (4);
(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;
(e) pertaining to services to be supplied under an employment contract;
(f) giving effect to a collective bargaining agreement within the meaning of section 23 of the Constitution and the Labour Relations Act, 1995 (Act 66 of 1995); or
(g) giving effect to a collective agreement as defined in section 213 of the Labour Relations Act, 1995 (Act 66 of 1995)."

[23] "**22. Right to information in plain and understandable language.**—(1) The producer of a notice, document or visual representation that is required, in terms of this Act or any other law, to be produced, provided or displayed to a consumer must produce, provide or display that notice, document or visual representation—
(*a*) in the form prescribed in terms of this Act or any other legislation, if any, for that notice, document or visual representation; or
(*b*) in plain language, if no form has been prescribed for that notice, document or visual representation.
(2) For the purposes of this Act, a notice, document or visual representation is in plain language if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the notice, document or visual representation 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 or visual representation without undue effort, having regard to—
(*a*) the context, comprehensiveness and consistency of the notice, document or visual representation;
(*b*) the organisation, form and style of the notice, document or visual representation;
(*c*) the vocabulary, usage and sentence structure of the notice, document or visual representation; and
(*d*) the use of any illustrations, examples, headings or other aids to reading and understanding."

that consumers should expect, because as was held by *Brand JA* (in Afrox Health supra) such clauses in standard contracts are the rule rather than the exception.

[86] In my view, it is exactly for this reason that such a legislative provision was necessary and long overdue. Such provision, condition or notice must furthermore be drawn to the attention of the consumer, in a conspicuous manner and form that is likely to attract the attention of an ordinarily alert consumer.

[87] It cannot be concealed in an obscure and opaque section of the agreement which the consumer is not aware of, or in a provision of an agreement which would be meaningless to the ordinary consumer. The supplier must be open, transparent, and honest in its dealings with a consumer, if it wants to rely on such a provision in a consumer agreement. The obligation, in my view, rests on the supplier before such consumer enters into such transaction, or before such agreement takes effect, or the consumer starts to engage in any activity as a consequence of a transaction or agreement, to bring such a provision or notice to the attention of the consumer in a clear, transparent and unambiguous manner.

[88] The section, in my view, requires nothing less of a supplier who wants to embark and rely on such clauses, which would, if not properly explained or brought to the attention of the consumer, lead to undue hardship and prejudice. It clearly has, as one of its purposes, to avoid a situation where the consumer is caught off-guard, or where a consumer would be tripped up by an unscrupulous or indifferent supplier.

[89] In coming back to the credit agreement in this case, also known as PC 9.2, it is clearly an agreement as contemplated in section 49 (1) (a), (b) and (c) of the CPA. The clauses on which the Defendant relies clearly seek to limit exposure to, or indemnify the Defendant against, any liability based on the agreement concluded with the Plaintiff, for the damages he sustained due to the loss of his aircraft engine. The Plaintiff was furthermore presented with two full pages, which was not very conspicuous or clearly delineated, and in relation to which no effort was made to draw the Plaintiff's attention to any of the provisions. It was furthermore written in extremely small font, which even this court on the original document found extremely difficult to read, and which contains the very clauses mentioned in section 49 (1), against which the act seeks to protect the consumer.

[90] Mr. Silver conceded during argument in court that none of these provisions in the agreement, on which the Defendant relies, had been brought to the Plaintiff's attention. He nonetheless in a separate note, requested by this court, submitted that the plaintiff, being an experienced businessman who has concluded many contracts must have been aware of indemnity clause in contracts. And furthermore, he had made use of the services the defendant previously and therefore must have been alive to the defendant's contracts and that it contains indemnity clauses.

[91] I do not understand the submission especially in the light of the concession made in argument by Mr Silver. That is why he did not address this court on that aspect. And even if Mr Silver is correct it does not absolve the defendant from its obligations placed upon it in terms of the act, which the defendant clearly did not comply with. This submission is in any event not borne out by any evidence

presented by the defendant and it is contrary to the evidence given by the plaintiff which was accepted.

[92] The Plaintiff in his evidence stated that his attention was not drawn to these provisions. I furthermore agree with the submissions made by Mr. Acton, insofar as this case is concerned, that a supplier such as the Defendant is not in a position to determine the level of sophistication of a customer, particularly in a case when all contact with the customer had been by email. Levels of education and sophistication are extremely subjective and even when dealing with people experienced in business, it would not necessarily mean that the businessman in question would expect a clause of this nature in a similar context.

[93] I am furthermore in agreement with the submission that even the most experienced business person is unlikely to understand the nature and effect of the clauses in question, without explanation. I also agree with the submission, and as stated above, that it seems that the obligations placed on a supplier such as the Defendant, are absolute.

[94] The Plaintiff, in terms of paragraph A of his particulars of claim, requested that this court grant an order in terms of section 52 (4) (a) (ii) of the CPA, severing from the said agreement the provisions of PC 9.2 purporting to limit the risk or liability of the Defendant, alternatively declaring such provisions to have no force or effect with respect of the said agreement. Section 52 (4) (a) (ii) states the following:

> *"(4) If, in any proceedings before a court concerning a transaction or agreement between a supplier and a consumer, a person alleges that an agreement, a term or condition of an agreement, or a notice to which a transaction or agreement is purportedly subject, is void in terms of this Act or failed to satisfy any applicable*

requirements set out in section 49, the court may-

(a) make an order-

(i) …

(ii) in the case of a provision or notice that fails to satisfy any provision of section 49, severing the provision or notice from the agreement, or declaring it to have no force or effect with respect to the transaction; …".

[95] The specific clauses on which the Defendant relies to escape liability, or limit its liability, are therefore severed from this agreement and the Defendant is not entitled to rely thereon to escape or limit its liability. I therefore hold that the Defendant is liable for the loss which the Plaintiff has incurred, as a result of the loss of the aircraft engine the Defendant undertook to transport from the United States of America and to deliver to him at George in the Western Cape.

[96] Mr Silver, rather belatedly and without having raised this in his pleadings, submitted that the provisions of the CPA are not applicable in this case, because this agreement concluded between the parties constitutes a credit agreement under the National Credit Act ("the NCA"). For this submission he relies on section 5 (2) (d) of the CPA, which states: "*This Act does not apply to any transaction … 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."*

[97] I am in agreement with Mr Silver that this is a credit agreement in terms of the National Credit Act, because based on the credit application which was completed by the plaintiff a credit agreement came into existence because it was an application for a credit facility as defined in section 8 (3) of the NCA. It was an agreement, however, where the credit provider, in this case the defendant, undertook to supply a service to the consumer, in this case the plaintiff, where either the plaintiff's

obligation to pay any part of the cost of the services or to repay the credit provider any part thereof was deferred. I do not however agree, that the provisions of the CPA is not applicable. For the simple reason, that it was a transaction based on an agreement between the two parties to supply a service in exchange for a consideration in terms of which the defendant would have transported an aircraft engine to the plaintiff from the USA as defined in section 1 of the CPA.

[98] In my view, this submission has no merit, because the second portion of section 5 (2) (d) of the CPA, which states "*but the goods or services that are the subject of the credit agreement are not excluded from the ambit of this Act",* is self-explanatory. Clearly what was expected of the defendant even though in terms of a credit agreement was the supply of a service which are not excluded from the ambit of the CPA.

Quantum based on the Expert Evidence

[99] The Plaintiff presented the evidence of Mr. Anderson, an expert aircraft engineer of many years standing and experience. His evidence about his expertise regarding the repair and maintenance of engines, as well as the cost to have such an engine overhauled, was not disputed by any other evidence presented by the Defendant. And although he had no knowledge of the condition of the subject engine at the time it was destroyed, he, in my view, was eminently qualified, based on his experience and expertise, to give an opinion as to the costs that would have to be incurred to replace and overall such an engine.

[100] I therefore have no hesitation in accepting his evidence, based on his experience and expertise, as to the cost of having such an engine, of a similar kind to that which the Plaintiff has lost, overhauled and replaced. I am, therefore, satisfied that the Plaintiff has shown, by means of this evidence, what damages he incurred when his engine was destroyed, whilst it was transported by the Defendant or an agent of the Defendant. The evidence was that to replace such an engine, without the transport costs, would be an amount of R386 140, 30. The Plaintiff also does not claim for any transport costs. I am therefore satisfied that the Plaintiff has made out a case for the relief he sought in prayers A and B.

Costs

[101] I will now deal with the issue of costs. There is no question that the costs in the main action should be granted in favour of the Plaintiff, as prayed for in his particulars of claim. The only question regarding costs that remains to be resolved, is the wasted costs incurred after this matter had been set down for trial before this court on 5 September 2019: this court granted an order that the matter be removed from the roll, because of the fact that there was a dispute between the parties as to whether the Plaintiff should be allowed to file an application for condonation for the late filing of his replication, which was filed out of time.

[102] There was a dispute between the parties as to whether such application would have been opposed by the Defendant, and as a result of this impasse this court then concluded that at that stage the matter was not trial ready, and that it should be removed from the roll; costs would stand over for later determination, because it was of the view that this issue had to be resolved before the matter was

set down for trial.

[103] The Plaintiff thereafter, on 5 October 2018, filed, in terms of rule 27, an application for condonation of the late filing of his replication to the Defendant's plea. It is common cause that summons was issued by the Plaintiff out of this court on 1 April 2014. The Defendant thereafter entered an appearance to defend the matter and proceeded to file its plea on 5 June 2014. The Plaintiff only filed a replication to Defendant's plea on 11 March 2015. The Plaintiff conceded that the filing thereof was substantially late in terms of the rules of the court. The Plaintiff's attorney stated, in an affidavit filed in support of his application for condonation for the late filing of his replication, wherein he stated the various reasons for the late filing of the replication, to which I will refer to hereunder.

[104] He further stated that this was discussed in correspondence between himself and the Defendant's attorney, Mr. David Kotzen ("Kotzen") at the, time which ended with a letter from the Defendant's attorney dated 4 August. He and the Plaintiff could only consult with counsel on the matter on 28 August 2014. He further stated that the Plaintiff is often abroad for business reasons, and that counsel's chambers is in Cape Town, while his practice is situated in Mossel Bay. And as a result, this presented logistical problems regarding arranging consultation dates for the matter.

[105] At a consultation dated 28 August 2014, it was decided that he should proceed to engage the Defendant's attorney in informal, without prejudice, discussions with a view to try and settle the matter. He further stated that on 5 September 2014 he had a long telephonic discussion on the matter with Kotzen, who

informed him that they had no intention of withdrawing the Defendant's special plea, and that it should be heard together with the plea on the merits of this case. They furthermore discussed some aspects of the case, and it was agreed that Kotzen would approach his client for instructions on a possible settlement of the matter and would then revert to him before the end of September 2014.

[106] Despite several attempts to obtain a response from Kotzen, none was forthcoming and he contacted counsel on 4 November 2014, informed him that the attempt to settle the matter had not been successful, and enquired as to how they should proceed with the matter. While he could not recall the exact reason for the delay, counsel only reverted back to him during January 2015 and it was decided that they should file a reply to the Defendant's plea. He also stated that he recalled that at that stage he sent a letter to Kotzen to that effect, on 13 February 2015, to which he received a reply on 20 February 2015.

[107] In this letter, which was attached to the founding affidavit of the Plaintiff's attorney in the condonation application, the Defendant states the following: "*We are in receipt of the telefax dated 13 February and apologise for not reverting sooner as we have been waiting for instructions from our client. At this stage, we cannot stop from filing a reply to our client's plea, however we do not condone the latest thereof. However, in terms of the rules of court you out of time to serve and file a reply and I suggest that you make an application for condonation as well. If the ground for the delay are acceptable, then he will not oppose a condonation unnecessarily.*"

[108] In reply to this, in a letter dated 11 May 2015, the Plaintiff's attorney set out in detail the reason for the delay and requested that the Defendant should revert if they still insist on a formal condonation application to be filed. The Plaintiff's attorney further stated that he believed, and still does so, that the Defendant was not prejudiced in any way by the late filing of the replication in the circumstances. He did not receive any response to this letter and assumed that Kotzen accepted the reasons presented for delay, and no longer took issue with the late filing of the replication.

[109] This belief was fortified especially during a rule 37 conference held on 1 September 2017, which was held telephonically by a colleague of the Plaintiff's attorney and Kotzen. Minutes of the conference were drawn up and signed by the respective parties. The issue of the late filing of the reply was never mentioned during the conference. And in fact in paragraph 4.1 the view was recorded about both parties that: "*Neither party feels that it has yet been prejudice because of any failure by the other to comply with the rules of court."*

[110] According to the Plaintiff's attorney it was furthermore stated in the pre-trial minute that: "*Neither party intends amending his or its pleadings at this stage, but both reserve the right to seek to do so in terms of the rules of court."* After that a timetable was agreed on with regard to the further trial preparations, in terms of which the Defendant was to deliver its answer to the request for trial particulars by 3 November 2017. The Defendant at no stage expressed any objection to the contents of any of the Plaintiff's pleadings.

[111] Further pre-trial conferences were held to implement the timetable agreed to and to file the necessary documents. At some stage an application was brought to compel the Defendant to discover, after they failed to reply to a request for trial particulars. Eventually on 6 March 2018 Kotzen signed a rule 37 (8) compliance certificate, declaring the matter to be trial ready, which was then so certified by the pre-trial judge on 9 March 2018. The matter was subsequently sent down for hearing before myself on 5 September 2018.

[112] At no point prior to the date when the matter was set down for trial, and after the trial judge at that stage enquired whether the parties were ready for trial and how many witnesses they would be calling, was there ever any indication that they were not ready to proceed. It was only after the Plaintiff's counsel's opening address when he informed the court that an application was being made from the bar for condonation of the late filing of the replication back in 2015, that the Defendant's counsel raised issue with such application from the bar and proceeded to tell the court it would raise an exception to the Plaintiff's replication.

[113] These facts alluded to above were set out in the application for condonation, as mentioned earlier, which was filed on 5 October 2018 after this matter had been removed from the trial roll by this court on 5 September 2018. It seems that subsequently, when the Plaintiff's application for condonation for the late filing of the replication was set down for hearing, the Defendant did not oppose the application and did not bring a counter application that it would raise an exception to the Plaintiff's replication.

[114] Based on these facts, Mr. Acton requested this court to grant an order that the wasted costs of the proceedings of 5 September 2018 be granted in favour of the Plaintiff. I agree with Mr. Acton's submissions, and I am of the view that, given the subsequent conduct in not opposing the application for condonation, and furthermore, not launching a counter application to take exception to the replication, the Defendant's conduct resulted in an undue delay in the finalisation of these proceedings. In my view, even though the Plaintiff filed its replication out of time, the Defendant showed, through its subsequent conduct, that it would not have been prejudiced thereby.

[115] In the result therefore, I would also grant an order that the Defendant be held liable for the wasted costs occasioned by the spurious opposition to the late filing of the Plaintiff's replication, and the insistence upon a formal condonation application being launched to have such late filing condoned.

[116] I therefore make the following order:

a) The defendant's special plea is dismissed;

b) That in terms of section 52 (4) (a) (ii) of the Consumer Protection Act 68 of 2008, the clauses in the agreement concluded between the Plaintiff and the Defendant identified as annexure PC 9.2, purporting to limit the risk of liability of the Defendant, is severed from such agreement and in the absence of such clauses the Defendant is therefore held liable for the loss incurred by the Plaintiff, caused by the destruction of his aircraft engine when it was conveyed from the United States of America, to George in the Western Cape;

c) The Defendant is ordered to pay an amount of R386 140,30, with interest thereon at the prescribed rate of 15.5% per annum from 12 June 2013 to date of payment;

d) That the Defendant pays the costs of suit, including the wasted costs occasioned by the removal of the matter from the trial roll on 5 September 2018.

R.C.A. HENNEY

Judge of the High Court