**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

CASE NUMBER: ……

SCA CASE NO: 1309/2017

GJ CASE NO: 26332/2016

In the matter between:

**PHASWANA STEPHEN RATLOU** APPLICANT

and

**MAN FINANCIAL SERVICES (SA) (PTY) LTD** RESPONDENT

---

**SUPPORTING AFFIDAVIT**

---

I, the undersigned,

MARIA ELIZABETH OELOFSE

hereby declare under oath as follows:

## A. DEPONENT AND APPLICANT

1.

1.1. I am a major female practising attorney of the High Court of the Republic of South Africa, employed with MACHOBANE KRIEL INCORPORATED situated at 179 Lynnwood Road, Brooklyn, Pretoria.

1.2. The content of this affidavit is true and correct and falls within my own personal knowledge, except where the contrary clearly appears from the context or is otherwise stated.

1.3. I am the applicant's attorney of record. I am duly authorised to depose to this affidavit on behalf of the applicant.

1.4. The applicant is PHASWANA STEPHEN RATLOU, a major male businessman residing at 93 Bellairs Drive, Unit 12, Northriding, Johannesburg. For ease of reference, I shall refer to the applicant as "*Ratlou*".

1.5. Ratlou was the appellant in the Supreme Court of Appeal and the second respondent in the Court of first instance, the Gauteng Division of the High Court, Johannesburg.

## B. THE RESPONDENT

2.

The respondent is **MAN FINANCIAL SERVICES SA (PTY) LTD [REG: 1997/011686/07],** a private company with limited liability, duly incorporated in terms of the company laws of the Republic of South

Africa with its principal place of business situated at 75 Linksfield Road, Dowerglen, Edenvale.

## C. OVERVIEW OF DISPUTE

3.

3.1. This is an application for leave to appeal against the whole judgment and order of the Supreme Court of Appeal overturning a finding by the Court of first instance. The latter Court held that a compromise, concluded between the parties, was governed by the *National Credit Act* 34 of 2005 (herein later referred to as "the NCA"). The Supreme Court of Appeal found to the contrary and held that the said compromise did not fall within the ambit of the NCA because the legislator never had the intention to make the NCA applicable to settlement agreements of this nature. This finding was made despite the fact that the terms of said agreement meet the requirements of s 8(4)(*f*) of the NCA.

3.2. This application is brought in terms of section 167(3)(b)(ii) of the *Constitution of the Republic of South Africa*, Act 108 of 1996 read with Rule 19 of the Rules of the Constitutional Court as stated in Practice Direction dated 17 March 2015.

3.2. I respectfully submit that the matter raises an arguable point of law, which is of general public importance, and which therefore ought to be considered by the Court. It concerns the proper interpretation of the NCA in light of its purpose and its context.

3.3. *In the alternative* and in the event that the Court finds that this matter does not fall within the ambit of section 167(3)(b)(ii) of the Constitution, then I respectfully submit that this matter raises constitutional issues. This Court has previously found that the interpretation of the NCA implicates constitutional issues.

**SEE IN THIS REGARD** *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC) at [14] where reference is made to *Kubyana v Standard Bank of South Africa Ltd* 2014 (3) SA 56 (CC) paras 16 – 17 and *Sebola and Another v Standard Bank of South Africa Ltd* 2012 (5) SA 142 (CC).

## D. THE DECISION AGAINST WHICH THE APPEAL IS BROUGHT

4.

4.1. The impugned judgment of the Supreme Court of Appeal was delivered on 1 April 2019. I respectfully refer the Court to a copy of the judgment attached hereto and marked as annexure "**PSR1**".

4.2. Ratlou was the appellant in the main appeal and the respondent in the cross-appeal. The Supreme Court of Appeal dismissed Ratlou's appeal with costs and upheld the

respondent's cross-appeal with costs, including the cost of two counsel.

4.3. The judgment of the Gauteng Division of the High Court, Johannesburg (the Honourable Wepener J sitting as court of first instance) was overturned and is attached hereto and marked as annexure "**PSR2**". The said judgment was reported as *MAN Financial Services SA (Pty) Ltd v Phaphoakane Transport And Another* 2017 (5) SA 526 (GJ).

4.4. For ease of reference, and in conformity with the nomenclature in the abovementioned judgment, I will refer to the respondent as MAN.

## E. LITIGATION HISTORY

5.

5.1. MAN and PHAPHO NKONE TRANSPORT (PTY) LTD (in liquidation) (herein later referred to as "*the company in*

*liquidation*"), entered into several written rental agreements during December 2014 in respect of trucks leased by MAN to the company in liquidation. Prior to the rental agreements and on 24 October 2013, Ratlou bound himself as surety and co-principal debtor with the company in liquidation in favour of the MAN for payment of any amounts which the company in liquidation may owe MAN.

5.2. The company in liquidation was in breach of the rental agreements. The agreements were subsequently cancelled and the trucks that formed the subject matter of the rental agreements were returned to MAN. An amount of R 4 915 043.98 remained outstanding.

5.3. Subsequent settlement negotiations resulted in a written settlement agreement between MAN, the company in liquidation and Ratlou. The settlement agreement was attached to the MAN's founding affidavit in the Court of first instance as annexure "JN13", and is attached hereto as

annexure "**PSR3**". It appears *ex facie* the document that Ratlou signed the settlement agreement on behalf of the company in liquidation and also in his personal capacity. In terms of the settlement agreement, Ratlou was liable with the company in liquidation jointly and severally, the one paying the other to be absolved, towards MAN for payment in the amount of R 4 269 278.79.

5.4. The settlement agreement stipulated payment in several monthly instalments and, if calculated, the amount exceeded the capital amount of R 4 269 278.79. As such, the agreement to repay included additional fees or interest on the capital amount.

5.5. MAN launched its application for payment in the Court of first instance. In its notice of motion, MAN prayed for the following relief:

"*1. Payment of the sum of R 4 269 278.79*

2. *Interest on the above amount at the rate of 10,5% per annum calculated monthly in arrears, from 8 July 2016 to date of payment in full;*
3. *Cost of the application of [sic] the attorneys and client scale;*
4. *…"*

5.6. The settlement agreement provided that the company in liquidation and Ratlou are jointly and severally liable for the debt therein described. The Honourable Wepener J, sitting as court of first instance, held that the settlement agreement, being a compromise, ended the relationship between the parties as far as the rental agreements and suretyships were concerned.

5.7. The Court held, correctly I submit, that the settlement agreement constitutes a new credit agreement within the meaning of the NCA, and that MAN was consequently obliged

to comply with the provisions of section 129 of the NCA which it had failed to do.

**SEE IN THIS REGARD** paragraph [15] of the judgment by the Honourable Wepener J.

5.8. In light of the aforementioned, the Court of first instance made the following order:

" 1. *……*

*2. Against the second respondent:*

*2.1.* ***The settlement agreement annexed as annexure JN13 to the founding affidavit is made an order of court*** *[own emphasis];*

*2.2. The application is postponed sine die.*

*3. The applicant may not set this matter down until:*

*3.1. It has complied with the provisions of s 129(1)(a) as read with s 130 of the National Credit Act 2005; and*

*3.2. It has upon completion of the remedies referred to in s 129(1)(a) of the NCA, if resorted to or otherwise, become entitled to resume its application.*

*4. …*"

5.8. Ratlou subsequently applied for leave to appeal to have paragraph 2.1 of the order by the Honourable Wepener J set aside, that is, the declaration that the settlement agreement was an order of Court. The learned Judge refused leave to appeal and Ratlou subsequently obtained leave from the Supreme Court of Appeal. Following the granting of leave to appeal to the Supreme Court of Appeal, MAN applied and obtained leave from the Honourable Wepener J to cross-appeal against paragraphs 3 and 4 of the learned Judge's

order, in terms of which MAN was ordered to comply with the provisions of the NCA and pay the costs of the application.

5.9. On appeal before the Supreme Court of Appeal, the parties were in agreement that a determination of the cross-appeal would dispose of the matter in its entirety and entitle MAN to judgment as sought. The parties agreed that if MAN were unsuccessful in its cross-appeal, then it would concede Ratlou's appeal.

## F. GROUNDS UPON WHICH THE DESCISION OF THE SUPREME COURT OF APPEAL IS DISPUTED.

6.

It is submitted, with respect, that the learned Justices of the Supreme Court of Appeal erred by finding that:

a) the argument based on the finding of the Honourable Wepener J that the compromise terminated the parties' original rights

and obligations, and gave rise to new rights and obligations, is "*artificial*";

**SEE IN THIS REGARD** paragraph [19] of the judgment of the Supreme Court of Appeal

b) the compromise remained linked to the underlying *causa* and because the underlying *causa* was excluded from the NCA, the subsequent compromise should also be excluded;

**SEE IN THIS REGARD** paragraph [20] of the judgment of the Supreme Court of Appeal

c) by applying a purposive interpretation and not a literal interpretation, it is clear that the NCA was not aimed at settlement agreements;

**SEE IN THIS REGARD** paragraph [21] of the judgment of the Supreme Court of Appeal

d) the application of the NCA to settlement agreements will have a devastating effect on the efficacy and the willingness of parties to conclude settlement agreements and thereby curtail litigation;

**SEE IN THIS REGARD** paragraph [21] of the judgment of the Supreme Court of Appeal

e) the judgments of *Grainco (Pty) Ltd v Broodryk NO & Others*[1], *Hattingh v Hattingh* [2] , *Ribeiro & Another v Slip Knot Investments 777 (Pty) Ltd*[3] and *Shaw & Another v McKintosh & Another*[4] are applicable to the facts *in casu,* despite the fact that, apart from *Ribeiro*, none of the said cases related to compromises;

1 2012 (4) SA 517 (FB) (herein later referred to as "*Grainco*").
2 2014 (3) SA 162 (FB) (herein later referred to as "*Hattingh*").
3 2011 (1) SA 575 (SCA) (herein later referred to as "*Ribeiro*").
4 2019 (1) SA 398 (SCA) (herein later referred to as "*Shaw*").

f) In *Ribeiro*, the parties specifically recorded that the agreement did not constitute a novation of the initial loan agreement and that the obligations and undertakings, as accepted by the sureties, have as their origin, the initial undertakings and obligations;

**SEE IN THIS REGARD** paragraphs [24], [25] and [26] of the judgment of the Supreme Court of Appeal

g) the principles enunciated in *Grainco, Hattingh, Ribeiro* and *Shaw* [which did not relate to compromises but to settlement agreements where the original *causa* survived in some form or the other] are applicable to the compromise concluded *in casu;*

h) that the compromise *in casu* is governed by the NCA.

7.

The learned Justices of the Supreme Court of Appeal failed to consider, or attach significant consideration to the following:

a) Ratlou was not a party to the rental agreements concluded by the company in liquidation with MAN. The Court failed to consider the judgment of *Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron*[5] where it was stated that a surety's obligation remains only accessory to the main obligation, despite the fact that the surety has bound himself as co-principal debtor as well. The fact that the surety bound himself as co-principal debtor did not render him liable in any capacity other than that of surety who has renounced the benefits ordinarily available to the surety against a creditor; it does not make the surety a party to the main agreement.

b) It is common cause between the parties that the settlement agreement constitutes a compromise. The compromise extinguished (1) the suretyship of 2013 and (2) the subsequent rental agreements concluded by the company in liquidation.

---

5 1978 (1) SA 463 (A) at 471C – G

The compromise rendered any dispute pertaining to or arising from the suretyship and rental agreements, *res iudicata.*

**SEE IN THIS REGARD** *Van Zyl v Niemann* 1964 (4) SA 661 (A) at 669H – 670A.

c) MAN was precluded from relying on the rental agreements and suretyship by going behind the compromise.

**SEE IN THIS REGARD** *Road Accident Fund v Ngubane* 2008 (1) SA 432 (SCA) at 437A – 437E.

d) It is trite law that the compromise created a new self-standing agreement, which exists independently of the cause that gave rise to it. It materially altered the rights and obligations of the parties.

**SEE IN THIS REGARD** *Cachalia v Harberer & CO* 1905 TS 457; *Airports Co SA Ltd v ISO Leisure OR Tambo (Pty) Ltd*

2011 4 SA 642 (GSJ) pars 35 – 36; *Road Accident Fund v Ngubane* 2008 (1) SA 432 (SCA) at 437A – D; *Amler's Precedents of Pleadings* Eighth Edition 89 – 90 and LAWSA Vol 19 Second Edition par 241.

e) The fact that the compromise *in casu* made express reference to the rental agreements in clause 3 thereof cannot change the consequence of a compromise being an independent agreement rendering the underlying *causa res iudicata*;

f) The parties to a compromise may agree, expressly or tacitly, that the effectiveness of the compromise shall be conditional on it being carried out, or that the original cause of action shall revive if the compromise is not carried out.

**SEE IN THIS REGARD** *Van Zyl v Niemann* 1964 (4) SA 661 (A) at 671H – 672A; *Trust Bank van Afrika Bpk v Eksteen* 1969 (1) SA 276 (A); *Christie's The Law of Contract in South*

*Africa* 7th Edition 2016 LexisNexis Durban Chapter 12 page 534.

g) The abovementioned preservation or revival of the original cause of action, negates any consequences that the application of the NCA might have on litigants who settle disputes through compromises;

h) The NCA is a legislative effort to regulate and improve relations between consumers and providers of credit. The main purposes of the NCA are "*to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry and to protect consumers*".

**SEE IN THIS REGARD** *Kubyana v Standard Bank of South Africa Ltd* 2014 (3) SA 56 (CC) at [19]

It would be unfair to impose the rights and obligations emanating from an agreement that was extinguished through compromise, against a person who was not a party to the said agreement in the first place.

i) In *De Bruyn NO and Others v Karsten* 2019 (2) SA 403 (SCA) at [25] and [27], the Supreme Court of Appeal stated that the process of interpretation of a statute is objective and not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so concerning a statute or statutory instrument, is to cross the divide between interpretation and legislation.

j) Although statutes must be interpreted with the regard to their purpose and within their context, it does not mean that

ordinary meaning and clear language may be discarded, for interpretation is not divination and courts must respect the separation of powers when construing Acts of Parliament.

**SEE IN THIS REGARD** *Kubyana v Standard Bank of South Africa Ltd* 2014 (3) SA 56 (CC) at [18]

It cannot be too strongly emphasized that a statutory instrument does not mean whatever we might wish it to mean. The language of a statute must be respected; if the language used by the lawgiver is ignored in favour of a general resort to "values" the result is not interpretation but divination.

**SEE IN THIS REGARD** *S v Zuma and Others* 1995 (2) SA 642 (CC) at paras 17 – 18; *Standard Bank Investment Corporation Ltd v Competition Commission and Others; Liberty Life Association of Africa Ltd v Competition Commission and Others* 2000 (2) SA 797 (SCA) [16] – [20];

*Democratic Alliance v Speaker, National Assembly and Others* 2016 (3) SA 487 (CC) at [19].

k) The wording of s 8(4)(*f)* of the NCA is clear: "***an agreement, irrespective of its form*** (own emphasis) *constitutes a credit transaction if… **any other agreement*** (own emphasis) *in terms of which payment of the amount owed by one person to another is deferred, and any charge, fee or interest is payable."*

It is submitted with respect that the intention of the legislature appears from the language used - the legislator intended for the NCA to apply to any agreement irrespective of its form including a compromise. The origin or cause of the amount deferred becomes irrelevant because it is compromised.

In *Carter Trading (Pty) Ltd v Blignaut*[6] Van der Bijl AJ held that an acknowledgement of debt entered into between parties, satisfied the requirements of s 8 of the NCA and that it was a credit agreement for the purposes of the NCA. In *MBD Securitisation (Pty) Ltd v Booi*[7] a Full Court of the Free State Division referred to *Carter* in dealing with a consent to judgment in terms of s 58 of the *Magistrates' Court Act* 32 of 1944.

## G. LEAVE TO APPEAL TO THIS COURT

8.

The requirements that must be satisfied for this Court to grant leave to appeal in terms of s 167(3)(*b*)(ii) of the Constitution, are the following:

a) the matter must raise an arguable point of law;

---

6 2010 (2) SA 46 (ECP).
7 2015 (5) SA 450 (FB) at [37].

b) the point should be one of general public importance; and

c) the point ought to be considered by this Court.

**SEE IN THIS REGARD** *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC) at [16].

*ARGUABLE POINT OF LAW*

9.

9.1. It is submitted that the issues raised in this matter are legal issues and they are arguable. There are no disputes pertaining to fact.

9.2. The points of law are the following:

a) Does the NCA apply to a compromise if the underlying *causa* was not governed by the NCA?

b) To what extent can a Court, for the purposes of deciding whether or not the NCA applies to the said compromise, go behind a compromise to consider the underlying *causa*?

c) Can it be said that the surety must be regarded as a party to a preceding agreement that constitutes the underlying *causa* of a subsequent compromise for the purpose of deciding whether the NCA is applicable to a subsequent compromise or not?

d) Was it the intention of the legislature to exclude compromises from the ambit of the NCA despite the express wording of the NCA?

e) If the NCA is applicable to compromises, will it impact negatively on the efficacy and the willingness of parties to conclude compromises?

10.

10.1. The abovementioned points of law are cogent, and at the very least, arguable. It entails merit and there is compelling substance in the argument advanced.

**SEE IN THIS REGARD** *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC) at [21] and [22].

10.2. The points of law arguable for the following reasons:

a) The matter raises a new and difficult question of law concerning a determination as to the proper interplay between the purpose of the NCA and the wording used in s 8(4)(*f*) of the NCA;

b) this Court is called upon to determine the impact of established and trite legal principles relating to compromises and suretyship agreements on the one hand and the meaning and purpose of the NCA on the other;

c) The answer to the abovementioned questions are not readily discernible.

10.3. Given the confusion inherent in the NCA, it is probable that the NCA should be interpreted in the manner that Ratlou proposes; his argument has prospects of success because it is based on trite legal principles that were confirmed by the Appellate Division and the Supreme Court of Appeal.

**SEE IN THIS REGARD** *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC) at [24].

11.

11.1. Ratlou's prospects of success lie therein that the Honourable Wepener J correctly distinguished the cases of *Grainco, Hattingh* and *Ribeiro* from the facts *in casu*. Additionally, the learned justices of the Supreme Court of Appeal failed to distinguish the facts in *Shaw* from the facts *in casu*.

11.2. The most important feature that distinguishes *Grainco*, *Hattingh*, *Ribeiro* and *Shaw* from the current matter, is that, as a matter of law, the underlying *causa* in each of the said matters survived and were not extinguished by the subsequent agreements concluded therein; the opposite holds true *in casu*.

11.3. The material differences between each of the abovementioned matters and the current matter can be summarised as follows;

*a) Grainco:*

i) the underlying *causa* for the indebtedness of the debtors therein was a damages claim (*Grainco* at 524B);

ii) the acknowledgment of debt was a simple novation and not a compromise; the underlying *causa* was not

extinguished. The parties did not intend to compromise *Grainco's* claim against the debtors or to end or prevent litigation. In fact, the parties made provision for further litigation by agreeing that outstanding amounts in terms of the agreement may be recovered without further notice and "*by wyse van uitreiking van 'n dagvaarding*" (*Grainco* at 522A);

iii) the parties retained their respective roles: the sureties signed the acknowledgement of debt as sureties and not as principal debtors (*Grainco* at 521E – G); the sureties' obligations remained accessory.

iv) *In the alternative* and insofar as this Court does not agree with the argument above, then it is respectfully submitted that the judgment of *Grainco* is not applicable for the following reasons:

a. the learned Judge in *Grainco* compared the matter before him to the facts in *Bridgeway Ltd v Markam*

2008 (6) SA 123 (W). The *Bridgeway*-matter, was criticized by the Supreme Court of Appeal in *ABSA Technology Finance Solutions (Pty) Ltd v Michael's Bid A House CC and Another* 2013 (3) SA 426 (SCA) at [19] and [20]. The Supreme Court of Appeal criticized the view adopted in *Bridgeway* that a court, in determining the nature of the contract, "*must scrutinise the whole course of the parties' dealings*";

b. *In casu*, it would be contrary to the principles and effect of a compromise to "*scrutinise the whole course of the parties' dealings*" so as to "*find a purpose for the compromise."*

*b) Hattingh:*

i) The agreement concluded in the *Hattingh*-matter amounted to an agreement in terms of which a

partnership of two brothers was dissolved. It was neither a compromise, nor a novation of existing obligations (*Hattingh* at 165G – I). It was the first and only agreement regulating the parties' dissolution of their business interests;

ii) The court in the *Hattingh*-matter distinguished the agreement before it, from the one in *Carter Trading (Pty) Ltd v Blignaut* 2010 (2) SA 46 (EC). In *Carter,* an acknowledgement of debt was found to be a credit agreement in terms of the NCA. At [16] of the *Hattingh*-judgment, the learned Van Zyl J stated that the agreement in *Carter* was a "*dokument wat tipies is aan dit wat in die handelswêreld algemeen bekend is.*" The learned Van Zyl J concluded by stating that it could not have been the intention of the legislature to make the NCA applicable to an agreement like the one before him which he described as "*…'n ooreenkoms wat die verhouding tussen die partye*

*reguleer, voortpruitend uit die besluit van die partye om die besigheid en sake wat hulle vir 'die afgelope' dekades in samewerking met mekaar gedoen het, te beëindig…*" (*Hattingh* at 174A – B).

iii) The abovementioned is cleary distinguishable from the facts *in casu*: the compromise before this Court regulates payment of a debt owed by a consumer to a financial institution - the very purpose for which the NCA was enacted.

*c) Ribeiro*

i) The *Ribeiro*-matter is distinguishable for a number of reasons, the most important of which is that the parties to that agreement expressly stated that the subsequent agreement did not amount to a novation of pre-existing agreements (*Ribeiro* at 579D – E). The Supreme Court of Appeal held that the parties

explicitly intended not to extinguish their obligations arising from the initial agreement, but rather to confirm it, which meant that the obligations under the pre-existing agreements were interdependent from the subsequent agreement (*Ribeiro* at 580C – D).

ii) The abovementioned interdependency was a reference to the interdependency as explained in *Adams v SA Motor Industry Employers Association* 1981 (3) SA 1189 (A). The said interdependency referred to an acknowledgement of debt that **did not constitute a compromise.** The acknowledgement of debt referred to therein created a new additional obligation that coexisted with the original obligation without extinguishing it (*Adams* 1198A – B). It is interdependent because the parties intended the rights under the original agreement to remain alive and the Court found that once it is accepted that there is no legal obstacle to obligations coexisting in

respect of the same performance or common debt, it follows that in this respect also, effect must be given to the intention of the parties (*Adams* 1199B – C).

The Appellate Division in *Adams* explained the interdependency with reference to the position where a negotiable instrument, such as a promissory note, is given in respect of an existing debt. There can be little doubt that - unless a novation is intended, which is not presumed - two obligations then exist: the original obligation and the obligation arising from the note. They are interdependent. The original obligation may in a sense be said to be the *causa* of the new obligation and defences in respect of the original obligation may be raised in respect of the new obligation; performance of either discharges the other (*Adams* 1199G – 1200A).

iii) The interdependency in *Ribeiro* and *Adams* is not authority for the proposition that there exists an interdependency between a compromise and its underlying *causa.*

iv) The Court in *Ribeiro* did not find that the agreement amounted to a compromise. Although the Court did not pronounce on the issue (as it was never an issue), it is submitted that the said agreement did not meet the requirements of a compromise. The sureties' obligation, remained accessory in the subsequent agreement; the role of the sureties was not altered. It was for that reason that Supreme Court of Appeal found in *Ribeiro* that the NCA was not applicable to the agreement.

d) *Shaw:*

i) In the said matter, the judgment creditor sued the appellants as sureties (*Shaw* [3]). The sureties remained sureties, and the principal debtor remained the principal debtor. The roles were not altered as they are in the present case;

ii) This was based on the terms of an agreement entered into where the parties stipulated that the sureties (Shaw and Taylor) will be liable to the creditor for any amounts which may become due by the company to the creditor from whatsoever cause (*Shaw* [5]);

iii) The agreement *in casu*, does not constitute a credit guarantee like the one in *Shaw* because Ratlou was bound jointly and severally with the company in liquidation by the compromise; the compromise extinguished the suretyship of 2013. Ratlou's obligations changed from being accessory to joint and several.

iv) In *Shaw,* the Supreme Court of Appeal found that the agreement constituted a credit guarantee: "*it must be stressed that Mabili (*the company in that matter*), and only Mabili, was the debtor in respect of the admitted debt.*" (*Shaw* 401I – J, paragraph [10]).

v) *In casu,* the debt became Ratlou's own, which is in contrast to the facts in *Shaw*. Ratlou was not a surety or guarantor of the company in liquidation's debt.

11.4. The learned justices of the Supreme Court of Appeal did not consider or discuss the fundamental differences of the agreement concluded in the abovementioned cases as opposed to the compromise that was concluded *in casu.*

11.5. I submit, with respect, that the Supreme Court of Appeal erred when it applied the principles of settlement agreements (where the underlying *causa* survived or was kept alive by express agreement between the parties) to the compromise *in casu*

where the established legal principles dictate that the underlying *causa*(s), being the suretyship and rental agreements, were extinguished.

11.6. The finding by the Supreme Court of Appeal in the present case, is in stark contradiction with time-honoured and established legal principles relating to compromises which principles was referred to by Voet and were confirmed by the Appellate Division in *Van Zyl v Niemann* 1964 (4) SA 661 (A) and the Supreme Court of Appeal in *Road Accident Fund v Ngubane* 2008 (1) SA 432 (SCA).

*GENERAL PUBLIC IMPORTANCE*

12.

12.1. The Supreme Court of Appeal held at paragraph 4 of the impugned judgment that the finding by the Court of first instance that the agreement was governed by the NCA,

"*raises a discrete legal point of public importance that would affect settlement agreements concluded in the future*".

12.2. It is submitted that the impact and consequences of the issues raised herein are substantial, broad-based, transcending the litigation-interests of the parties herein and bearing upon the public interest.

12.3. This Court has held previously that the NCA regulates commercial activity undertaken by many people and institutions on a daily basis, and that the issues at stake are therefore of fundamental importance to many South Africans.

**SEE IN THIS REGARD** *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC) at [27].

12.4. Settlement agreements constituting compromises are used on a daily basis by parties to avoid and curtail litigation and more often than not contains the same structure as the compromise

*in casu.* It is therefore submitted that a judgment by this Court will provide certainty, clarity and guidance to litigants who enter into compromises that fall within the ambit of s 8(4)(*f*) of the NCA.

13.

13.1. It is submitted that the impugned judgment by the Supreme Court of Appeal instead of creating certainty, created uncertainty for the following reasons:

a) It failed to distinguish between types of settlement agreements;

b) it failed to take into account the purpose and principles relating to compromises; and

c) it opens the door to more litigation pertaining to the interpretation of agreements with reference to the enigmatic purpose of the NCA.

## H. STATEMENT PERTAINING TO LEAVE TO APPEAL TO ANY OTHER COURT

14.

The applicant does not intend to apply for leave to appeal to any other Court than the Constitutional Court.

## I. CONCLUSION

15.

15.1. The judgment of the Supreme Court of Appeal failed to have regard to the differences between settlement agreements in general on the one hand, and compromises, where the underlying *causa* was extinguished, on the other hand. It was incorrectly held that the finding by the Court of first instance

that the preceding suretyship agreement and rental agreements were extinguished by the compromised, was “artificial”. On the contrary, it is respectfully submitted that the Honourable Wepener J correctly applied the common law as it existed for centuries.

15.2. The Supreme Court of Appeal failed to distinguish the facts of the *Grainco*, *Hattingh*, *Ribeiro* and *Shaw* matters from the facts *in casu*.

15.3. It is respectfully submitted that the issues raised herein are points of law of general public importance, which ought to be considered by the Constitutional Court. I submit that:

a) the points of law are compelling;
b) they are of general public importance;
c) Ratlou has prospects of success.

**WHEREFORE** the applicant respectfully seeks the relief set out in the notice of motion.

_____

DEPONENT

I certify that the deponent has acknowledged that she knows and understands the contents of this affidavit, that she does not have any objection to taking the oath, and that she considers it to be binding on her conscience, and which was sworn to and signed before me at Pretoria on this the 23rd day of APRIL 2019 and that the administering oath complied with the regulations in Government Gazette No. R1258 of 21 July 1972, as amended.

COMMISSIONER OF OATHS:
FULL NAMES:
CAPACITY:
ADDRESS: