IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT118/19

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

RESPONDENT'S OPPOSING AFFIDAVIT TO THE APPLICATION FOR LEAVE TO APPEAL

I, the undersigned,

TREVOR VERSFELD

do hereby declare under oath as follows:

1 I am an adult male attorney, practising as such as a director at Webber Wentzel Inc, the respondent's attorneys of record.

2 I am duly authorised to depose to this affidavit on behalf of the respondent.

3 The facts contained herein fall within my personal knowledge unless the contrary is stated or is evident from the context, and to the best of my belief are true and correct.

4 Any emphasis added to words/passages, is my emphasis.

5 I have read the affidavit deposed to by Maria Elizabeth Oelefse on behalf of the applicant in this matter in support of the application for leave to appeal, and respond thereto below.

6 In setting out the respondent's grounds of opposition to the application for leave to appeal I will:

i. deal with the general public importance;

ii. explain why the applicant has not raised an arguable point of law;

iii. set out the reasons why the Constitutional Court should <u>not</u> consider the matter in terms of section 167(3)(b)(ii) of the Constitution; and

iv. assess the constitutional issue in terms of section 167(3)(b)(i).

Thereafter, I will respond *ad seriatim* to those paragraphs in the supporting affidavit that warrant a response.

GENERAL PUBLIC IMPORTANCE

7 The respondent admits that the matter is of general public importance, albeit not for the reasons advanced by the applicant. On the contrary, it is of general public importance not to upset the order and findings of the Supreme Court of Appeal ***("the SCA")***.

8 If the applicant's argument is accepted and the appeal is upheld, all settlement agreements in terms of which payment is deferred and any interest is payable will constitute a credit transaction. The origin or cause of the amount deferred becomes irrelevant.[1]

9 If the origin of the debt is irrelevant, the above principle applies not only to disputes of a purely commercial credit nature, but across all areas of law. It would impact on settlement agreements relating to, *inter alia*, divorces, maintenance, shareholder disputes, and labour disputes.

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[1] Paragraph 7(k), pages 22 and 23 of the affidavit in support of application for leave to appeal.

10 If such settlement agreements are classified as credit agreements that are governed by the National Credit Act, 34 of 2005 *("**the NCA**")*, the creditor in each instance will be required to register as a credit provider before concluding the settlement agreement, regardless of whether it is the only credit agreement it ever concluded[2]. It will need to perform a creditworthiness check prior to concluding the settlement agreement[3], which invariably would result in reckless credit as the defendant/respondent is generally already in a precarious financial position, which usually gave rise to the institution of legal proceedings in the first place. Failure to do so will render any settlement agreement void *ab initio*[4].

11 The above principle does not discriminate between settlement agreements that are concluded prior to or after the institution of legal proceedings.

12 Where a settlement agreement is entered into prior to the institution of legal proceedings, and that settlement agreement is declared void *ab initio* as a result of an inadvertent failure by the creditor to comply with the relevant requirements of the NCA at the time, the

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2 De Bruyn NO and Others v Karsten 2019 (1) SA 403 (SCA)

3 Section 81(2) of the NCA.

4 Section 89(5)(a) of the NCA.

creditor will be required to revert to an underlying *causa* that may have prescribed in the circumstances. The innocent party will be subjected to the consequences of restitution and may be left without recourse against the debtor.

13 Where a settlement agreement is entered into after the institution of legal proceedings, and that settlement agreement is declared void *ab initio* some years later, the underlying proceedings will be resuscitated and the innocent party may need to prove its case based on evidence that is no longer available. Even if the evidence is available, a multitude of cases that had previously been settled in Court and finally disposed of will be revived, with the effect that they congest an already strained justice system.

14 The creditor under a settlement agreement will also be subjected to further administrative burdens such as providing regular statements of account[5]; complying with procedures prior to enforcing the debt in the settlement agreement[6]; and paying registration and annual renewal fees as a credit provider.

15 This must be contrasted with the salutary purpose of compromise,

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5 Section 108(1) of the NCA.

6 Section 129 and 130 of the NCA.

namely to bring an end to the *lis* between the parties and to render the dispute *res iudicata*[7]. On the applicant's approach, a new and most likely more onerous claim will arise upon concluding the compromise.

16 As a result, parties to current litigation will be dissuaded from settling matters in light of the obligations that such a settlement agreement will attract under the NCA. They will be forced to pursue the litigation to finality, as opposed to settling same, which will further congest the judicial system.

POOR PROSPECTS OF SUCCESS

17 In this section of my affidavit I will elaborate on the reasons why the applicant has failed to raise an arguable point of law. Under this section, I will discuss the following topics:

i. the mischaracterisation of a compromise;

ii. the settlement agreement in question referred to the underlying *causa* and was excluded from the operation of the NCA;

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7 *Eke v Parsons* 2016 (3) SA 37 (CC); See also the passages under the heading *"Mischaracterisation of a compromise"*, *infra*

iii. the NCA did not intend to cover settlement agreements where the underlying *causa* was not a credit agreement that was governed by the NCA; and

iv. the settlement agreement as against the applicant constitutes a credit guarantee that itself falls outside the ambit of the NCA.

Mischaracterisation of a compromise

18 Central to the applicant's case is his argument that the settlement agreement was a compromise, which exists independently of the underlying *causa* that gave rise to it.[8]

19 The general principle from which the argument is extracted, and which formed part of the *dictum* in the judgment of Wepener J, is stated as follows:

> "The general principle in our law is that such a *transactio* or compromise terminates the parties' original rights and obligations and gives rise to new rights and obligations under the new agreement."[9]

20 The case of *Road Accident Fund v Ngubane* is advanced to support

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8 Paragraph 7(d), page 18 of the affidavit in support of application for leave to appeal.

9 Paragraph 10, page 6 of the High Court judgment.

the proposition that:

> "Unless reserved in the compromise, parties thereto are precluded from enforcing the rights and obligations arising from the compromised claim."[10]

21 The above principle was underpinned in both *Ngubane*[11] and by Wepener J in his judgment[12] by the following passage from *Hamilton v Van Zyl:* ***

> "A compromise need not necessarily however follow upon a disputed contractual claim. Any kind of doubtful right can be the subject of a compromise…. Delictual claims are, for example, frequently the subject of a compromise. Nor need the claim be even prima facie actionable in law. A valid compromise may be entered into to avoid even a clearly spurious claim, and defendants frequently, for various reasons, settle claims which they know or believe the plaintiff will not succeed in enforcing by action.
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> An agreement of compromise, in the absence of an express or implied reservation of the right to proceed on the original cause of action, bars the bringing of proceedings based on such original cause of action…. Not only can the original cause of action no longer be relied upon, but a defendant is

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10 2008 (1) SA 432 (SCA) at para 12.

11 *Ngubane supra*, at para 12.

12 At para 10.

not entitled to go behind the compromise and raise defences to the original cause of action when sued on the compromise."[13]

22 The true purpose of a compromise is best defined in *Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd and Others*, where Jafta JA, citing Domat, *Civil Law*, vol. 1, para. 1078 held that:

> "A transaction is an agreement between two or more persons, who, for preventing or ending a law suit, adjust their differences by mutual consent, in the manner which they agree on; and which every one of them prefers to the hopes of gaining, joined with the danger of losing."[14]

23 The learned Justices in the SCA *in casu* appropriately interrogated the underlying rental agreements for purposes of determining whether the NCA governs the issue or not. It was correctly held by Dambuza JA that "*[the] artificiality of ignoring them is self-evident*".[15]

24 A compromise is after all, still a contract, to be interpreted *"as a whole and the circumstances attendant upon its coming into*

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13 1983 (4) SA 379 (E) at 383E-H.

14 1978 (1) SA 914 (A) at 921C-E.

15 Paragraph 20 of the SCA judgment.

existence." [16] That means that, although the parties generally cannot fall back on the underlying cause of action, they can refer thereto and to the underlying facts for instance to interpret the compromise.

25 It therefore follows that, notwithstanding any compromise between the parties, a court is entitled to take cognisance of factors beyond the compromise itself for purposes of assessing whether the NCA applies to the transaction. If the underlying facts (which are distinct from the underlying cause of action that has been compromised) result in a finding that the NCA did not apply as between the parties for whatever reason, that remains the case regardless of any compromise that may subsequently be entered into by the parties in respect of the *lis* between them.

<u>The settlement agreement expressly refers to the underlying rental agreements</u>

26 Even assuming that the applicant's argument regarding the effect of a compromise is correct in that it puts an end to the underlying cause of action that created the *lis*, and prohibits any reference to the underlying facts, which is denied, that is not enough to salvage

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[16] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at par 18

the matter for the applicant.

27 I return to the extract from *Ngubane*, which is quoted again below:

> "Unless reserved in the compromise, parties thereto are precluded from enforcing the rights and obligations arising from the compromised claim."[17]

28 Leaving aside for current purposes that compromises relate to "*the bringing of proceedings*" and nothing more, the corollary of the finding in *Ngubane* above is confirmed in *LAWSA* as follows:

> "The absence of an express or implied reservation of the right to proceed on the original cause of action, bars the bringing of proceedings based on such original cause of action."[18]

29 In the context of the current circumstances, this invites an enquiry as to whether there is anything in the settlement agreement between the applicant and the respondent, either express or implied, that reserves the position *qua* the applicability of the NCA.

30 The court *a quo* correctly found that the express reference in the settlement agreement to the underlying rental agreements is "*of vital*

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17 2008 (1) SA 432 (SCA) at para 12.

18 LAWSA, Volume 19, Second Edition Replacement as at 29 February 2016, para 241 (Compromise/Transactio).

significance". Because of this express reference, the compromise remained linked to the underlying rental agreements.[19]

31 Therefore, a further reason why the settlement agreement is not regulated by the NCA is that the underlying rental agreements were not regulated by the NCA, and this position was expressly, or at least impliedly, reserved.

The intention of the NCA

32 The applicant relies heavily on section 8(4) of the NCA which states that:

> "An agreement, irrespective of its form but not including an agreement in subsection (2), constitutes a credit transaction if it is –
> …
>
> (f) any other agreement, other than a credit facility or a credit guarantee, in terms of which payment of an amount owed by one person to another is deferred, and any charge, fee or interest is payable to the credit provider in respect of –
>
> (i) the agreement; or

[19] Paragraph 20 of the SCA judgment.

(ii) the amount that has been deferred."

33 Whilst it is common cause that the settlement agreement falls within the wording of section 8(4) of the NCA, that is not the end of the enquiry for purposes of determining whether it constitutes a credit agreement that is regulated by the NCA.

34 The NCA excludes from its ambit, agreements between parties that would ordinarily constitute credit agreements regulated by the NCA, such as:

34.1 an agreement where the credit receiver is a juristic person whose asset value or annual turnover (together with that of related persons) at the time that the agreement is entered into, equals or exceeds the threshold determined by the Minister.[20]

34.2 a credit guarantee, where the credit agreement it serves to guarantee is not regulated by the NCA.[21]

35 It is therefore incorrect to read section 8(4)(f) of the NCA in isolation, as the applicant seeks to do. This would impermissibly

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[20] Section 4(1)(a)(i) of the NCA, read with the regulations (GN 713 of 1 June 2006 stipulating a threshold of R1,000,000.00)

[21] Section 4(2)(c) and 8(5) of the NCA

result in the other provisions contained in the legislation being ignored.

36 To give proper effect to the NCA, and more specifically section 8(4) thereof, the legislation must be considered in its entirety, and with due regard to its stated purpose[22]. In this regard, section 2(1) of the NCA reads:

> "This Act must be interpreted in a manner that gives effect to the purposes set out in section 3."

37 Section 3 of the NCA in turn states:

> "The purposes of this Act are to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers…"

38 A "consumer" is defined in the NCA as a party who receives credit pursuant to a credit agreement that falls to be regulated by the NCA.

39 When the legislation is considered holistically, the NCA therefore

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[22] See for example, *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC) at paras 36-37.

seeks to regulate the credit market and industry, and to protect consumers that obtain credit pursuant to a credit agreement that is regulated by the NCA.

40 The NCA is not intended to extend beyond the scope of the credit market and the consumers within that market. What the applicant seeks to achieve is to extend the application of the NCA beyond the credit market industry in circumstances where the relationship between the parties ordinarily falls outside the credit market industry.

41 It cannot be the case that what was once beyond the ambit of the NCA suddenly falls within it, purely by virtue of two parties settling a dispute between them. The terms of the settlement agreement do not provide for the advancement of money or the granting of credit. Its sole purpose is to finally settle a pre-existing liability of the applicant and provide the mechanism for doing so.

42 The applicant is therefore incorrect to suggest that section 8(4)(f) of the NCA can be isolated from the rest of the NCA in the determination of whether the NCA was intended to regulate a settlement agreement of this nature. Its stated purpose confirms that the legislature did not intend the NCA to govern compromises,

of this nature.

The settlement agreement is a credit guarantee that falls outside of the NCA

43 Section 8(5) of the NCA states:

> "An agreement, irrespective of its form but not including an agreement contemplated in subsection (2), constitutes a credit guarantee if, in terms of that agreement, a person undertakes or promises to satisfy upon demand any obligation of another consumer in terms of a credit facility or a credit transaction to which this Act applies."

44 Two requirements must therefore be satisfied, namely, first, a person undertakes to satisfy the obligation of another consumer; and, secondly, the underlying obligation must be one that is regulated by the NCA.

45 This is reinforced by section 4(2)(c) of the NCA, which states that:

> "this Act applies to a credit guarantee only to the extent that this Act applies to a credit facility or credit transaction in respect of which the credit guarantee is granted"

46 It is common cause that the underlying rental agreements were not regulated by the NCA. It is also common cause that because the

NCA did not apply to the underlying rental agreements, the suretyship in terms of which the applicant undertook to satisfy the obligations under the rental agreements was likewise excluded from the NCA.

47 However, the applicant argues that the portion of the settlement agreement that relates to the applicant no longer constitutes a credit guarantee because it "*extinguished*" the suretyship of 2013, and holds the applicant "*jointly and severally*" liable with the company, now in liquidation.[23]

48 Before responding to this argument, it is worth mentioning that the underlying suretyship contained words that had the same effect to those contained in the settlement agreement, to wit:

> "By giving this suretyship, you may become liable individually or jointly with the debtor for the obligations of the debtor."

49 For the reasons mentioned above, the statement by the applicant that "*the compromise extinguished the suretyship of 2013*" has to be read in context. It is conceded that the compromise precluded the respondent from enforcing its claim based on the suretyship. The compromise however, did not "*extinguish*" the factual substratum

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[23] Paragraph 11.3(d)(iii), page 36 of the affidavit in support of application for leave to appeal.

which gave rise to the conclusion of the compromise.

50 In fact, it is clear *ex facie* the settlement agreement, that the parties intended to retain the factual substratum which gave rise to the compromise. It did so by expressly referring to the rental agreements as the source of the original obligation that resulted in the dispute, that was the subject of the compromise.

51 Once the court accepts that it is not prevented from considering the underlying facts for purposes of assessing the applicability of the NCA, it leads to the inescapable conclusion that the sole reason why the applicant concluded the settlement agreement was to satisfy the original obligation of the company now in liquidation, arising from the rental agreements. The settlement agreement therefore constitutes a credit guarantee, in the ordinary sense of the definition in the NCA.

52 However, and given the common cause fact that the rental agreements were not regulated by the NCA, the NCA does not apply to the settlement agreement which in substance is a credit guarantee, in terms of section 4(2)(c) of the NCA.

53 This exercise does not require a complicated assessment of

common law principles relating to suretyships. The terms "*surety*" and "*suretyship*" do not even appear in the NCA. All it involves is a simple factual enquiry, established by the legislation itself, as to whether one person seeks to satisfy the obligations of another.

54 This is the very approach that the SCA took in *Shaw and Another v Mackintosh and Another*, where the following was held in a unanimous decision:

> "I turn to consider the relevant provisions of the agreement. An essential precondition to the operation of s 8(5) of the NCA is that it applies to the obligations of another. The language of the section refers both to an undertaking and a promise to satisfy the obligation of another. It makes no reference to a suretyship or guarantee or any similar word. In terms of clause 5 of the agreement the appellants, as joint and co-principal debtors with Mabili, in terms of clause 2.1.3, undertook or promised to pay on demand the admitted debt owed by Mabili to Mackintosh as detailed in clauses 3.1, 3.1.1, 3.1.2 and 3.1.3 of the agreement. It must be stressed that Mabili was the only debtor in respect of the admitted debt. The loan was granted pursuant to an oral agreement which was concluded between Mabili and Mackintosh."[24]

> "It is clear that the appellants were not granted any loan nor was

[24] 2019 (1) SA 398 (SCA) at para 10.

any credit advanced to them and neither were they parties to the historical agreement between Mabili and Mackintosh concluded in 2009."[25]

55 The differentiation that the applicant attempts to draw in relation to *Shaw* is, with respect, irrelevant.

THE APPLICATION DOES NOT SATISFY THE TEST UNDER SECTION 167(3)(b)(ii)

56 The application for leave to appeal ought to be dismissed on the basis that it does not *"have a measure of plausibility"*[26] for the following reasons (which are a summary of the reasons given above):

56.1 The common law position in respect of a compromise is that it extinguishes the underlying *causa* so that one party is unable to rely on that *causa* for purposes of proving a claim against another party. It does not extinguish background facts that may inform whether, and to what extent, the NCA applies between the parties. This Court is therefore entitled to consider the background facts in the matter for purposes

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25 *Shaw supra* at para 12.

26 *Paulsen supra* at para 21.

of finding that the NCA does not apply to the settlement agreement[27].

56.2 Even if a compromise prevents a court from considering the background facts for purposes of assessing whether the NCA applies or not (which is denied), same cannot apply in this instance as the settlement agreement expressly preserved those background facts. The court is therefore entitled to consider the incorporated background facts, for the purposes of interrogating whether the NCA applies to the settlement agreement.

56.3 The fact that the settlement agreement fits within the wording of section 8(4)(f) of the NCA does not automatically mean that it constitutes a credit agreement that is regulated by the NCA. Sections 2 and 3 of the NCA require that it must be interpreted in a manner that promotes and advances the credit market and industry, and protects consumers within that industry. No money was advanced and no credit was granted to the applicant pursuant to the settlement agreement. The NCA never intended to, and does not,

[27] As per the judgment in *Natal Joint Municipal Pension Fund supra*

regulate settlement agreements where the underlying dispute has nothing to do with the credit industry.

56.4 Section 8(5), read with section 4(2)(c), of the NCA sets out the requirements that must be met before an agreement will constitute a credit guarantee, that is regulated under the NCA. The requirements do not flow from the common law principles relating to suretyships, but from an interpretation of section 8(5) itself. The settlement agreement meets the definition of a credit guarantee under section 8(5) of the NCA because the applicant has undertaken and promised to satisfy the obligations of another, namely the company now in liquidation. Section 4(2)(c) of the NCA specifically excludes the settlement agreement in respect of the applicant, because the underlying obligations arising from the rental agreements were not regulated by the NCA.

57 In the absence of an arguable point of law, it is not necessary to engage with the balance of the enquiry as to whether the matter is of general public importance which ought to be considered in the interests of justice under section 167(3)(b)(ii) of the Constitution. The application ought to be dismissed on this basis alone.

THE CONSTITUTIONAL ISSUES

58 The applicant argues, in the alternative, that he should be granted leave to appeal because the matter raises constitutional issues in the sense that this court has previously found that the interpretation of the NCA implicates constitutional issues. He relies on *Paulsen*[28], *Kubyana v Standard Bank of South Africa Ltd*[29] and *Sebola and Another v Standard Bank of South Africa Ltd*[30]. This is an overly-simplistic approach.

59 There are a wealth of NCA-related matters that raise constitutional issues. However, this Court may decide not to entertain them for a myriad of reasons, for example, they may already have been determined.

60 The correct test was set out in *Kubyana*:

> "It is by now trite that this court will hear a matter that raises a constitutional issue if the interests of justice so require. As previously explained, the interpretation of the Act's notice provisions implicates fundamental notions of equity in, and the transformation of, the credit market. Such an

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28 *Paulsen supra* at para 14.

29 2014 (3) SA 56 (CC) at paras 16-17.

30 2012 (5) SA 142 (CC).

interpretation is therefore inherently linked to the constitutional objective of achieving substantive equality. This matter thus gives rise to a constitutional issue."[31]

61 This Court in *Minister of Local Government, Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd* provided guidance as to what considerations should be taken into account when determining the "*interests of justice*", as follows:

> "This matter raises constitutional issues regarding the division of powers and competences between different spheres of government, as well as the proper approach to challenging public power that has been exercised under a particular statutory framework. Furthermore, the application relates to matters of great practical import and, as is evident from what follows, the appeal bears prospects of success. It is therefore in the interests of justice that leave to appeal be granted."*[32]*

62 The applicant must therefore satisfy this court that the appeal bears prospects of success before it will give leave. I submit that the applicant does not have prospects of success in the appeal, for the reasons stated above. Regardless of whether the matter raises a

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31 *Kubyana supra* at para 16.

32 2014 (1) SA 521 (CC) at para 22. See also *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* 2014 (1) SA 604 (CC) at para 4.

constitutional matter, it does not have prospects of succeeding on appeal and the application should therefore be dismissed.

AD SERIATIM RESPONSE

I now deal, to the extent necessary, with the specific allegations made by Ms Oelofse. My failure to deal with any specific allegation is not to be construed as acceptance thereof.

Ad paragraph 3.1

63 For the reasons above, whether the settlement agreement meets the requirements of section 8(4)(f) of the NCA or not is not the only consideration. It must be considered in the context of the underlying factual matrix, the NCA read as a whole and the overall purpose of the NCA.

Ad paragraphs 3.2 (both numbered 3.2) and 3.3

64 I deny that the matter raises arguable points of law for the reasons mentioned above. The appeal does not have reasonable prospects of success.

Ad paragraphs 5.1 to 5.9

65 I admit the contents of these paragraphs, save to clarify the following:

65.1 The company in question, Phapho Nkone Transport (Pty) Ltd ***("the company")***, breached the rental agreements and concluded the settlement agreement prior to its liquidation. The respondent was advised of the liquidation, shortly before the hearing before Wepener J. The reference to *"the company in liquidation"* in the founding affidavit, needs to be read in this context.

65.2 It is common cause between the parties that the underlying rental agreements and the suretyship are excluded under the NCA.

65.3 Respectfully, the respondent does not agree with the findings of Wepener J.

Ad paragraph 6

66 I deny that the learned Justices of the SCA erred in their findings or incorrectly relied on the judgments of *Grainco, Hattingh, Ribeiro* and *Shaw* for the reasons that I have explained above. I will deal with these cases in more detail below.

Ad paragraph 7(a)

67 I deny that the judgment of *Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron* is relevant. It based on the common law principles relating to the contract of suretyships, whereas the current matter relates to the definition and regulation of a credit guarantee under the NCA. This distinction was made clear in *Shaw*. This issue was already canvassed above.[33]

Ad paragraph 7(b)

68 I deny that the effect of a compromise is to exclude an interrogation of the background facts for purposes of assessing whether the NCA applies or not. It only settles the underlying *causa* of the dispute between the parties in a manner the prevents a party from relying on that underlying *causa* to institute action against the other party.

69 The judgment of *Van Zyl v Niemann* does not support an argument that, for purposes of assessing whether the NCA applies to a settlement agreement, one cannot look beyond the settlement agreement itself.

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[33] See the paragraphs beneath the heading "The settlement agreement is a credit guarantee that falls outside of the NCA", *supra*.

Ad paragraphs 7(c) to (h)

70 Similarly, the matter of *Ngubane* was limited to "*rooting a cause of action*" in the agreement of compromise[34]. It does not support a proposition that a compromise wipes away the factual background for purposes of assessing whether the NCA applies or not. The same holds true for the matters of *Cachalia v Harberer & Co*[35]; *Airports Co SA Ltd v ISO Leisure OR Tambo (Pty) Ltd and Another*[36]*; Amler's Precedents of Pleadings* Eighth Edition 89-90; and *LAWSA*[37] relied upon by the applicant.

71 *Ngubane* is also authority to support the proposition that rights and obligations may be reserved in a compromise. If it is ultimately held that a compromise ordinarily has the effect of extinguishing the factual background for purposes of assessing whether the NCA applies or not, the reference to the rental agreements in the settlement preserves the status *quo* in so far as the NCA is concerned.

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34 *Ngubane supra* at para 12.

35 At page 462, Solomon J adopted the definition of *transaction* preferred by Grotius, *Introduction*, 3.4.2 which stated that is constitutes "*an agreement between litigants for the settlement of a matter in dispute*".

36 At para 35, Vally AJ relies on the *ratio* in *Cachalia supra,* which expressed that:

> "If, however, we examine the terms of the arrangement which was come to, it appears to me to contain all the essentials of a compromise of a lawsuit."

37 At paragraph 3 it is stated that "[a] compromise is a settlement of litigation or envisaged litigation."

72 Although the applicant accepts that the parties may agree to revive the original cause of action if a compromise is not complied with[38], it is suggested that in doing so it "*negates any consequences that the application of the NCA might have on litigants who settle disputes through compromises*"[39]. No authority is provided to support this contention.

73 Instead, the applicant grounds the argument on the proposition that "[*it] would be unfair to impose the rights and obligations emanating from an agreement extinguished through compromise, against a party who was not a party to the said agreement in the first place"*[40].

74 The counter to the aforesaid complaint is that it would be unfair for a defendant/respondent to procure an escape from the exclusions codified in the NCA upon concluding a settlement agreement wherein the latter unconditionally admitted liability of a pre-existing debt (as in this case), which was concluded with the aim of rendering the dispute *res iudicata*. The plaintiff/applicant will be significantly worse off, after concluding the settlement agreement, tantamount to starting afresh to enforce a new claim, now subject to

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38 Paragraph 7(f), page 19 of the affidavit in support of application for leave to appeal.

39 Paragraph 7(g), page 19 of the affidavit in support of application for leave to appeal.

40 Paragraph 7(h), page 20 of the affidavit in support of application for leave to appeal.

the obligations imposed on a credit provider in terms of the NCA, as already canvassed above.

75 Further to the above, the applicant's argument is flawed, because it confuses rights and obligations emanating from an agreement, which is what a compromise extinguishes, with rights and obligations emanating from the NCA, which cannot be compromised. If this were the case, parties could easily circumvent the consequences of the NCA by compromising a debt between them that originally fell within the ambit of the NCA, in such a manner that the compromise avoids the NCA.

Ad paragraphs 7(i) to (k)

76 The applicant advances an argument that prefers form over substance. It is suggested that in determining whether the NCA should be applied to an agreement in these circumstances, a court is only entitled to focus on the agreement before it, and whether it fits within the wording of section 8(4)(f) of the NCA. If it does, that is the end of the enquiry. The applicant also contends that a court may not consider background facts, the influence of other provisions in the NCA such as sections 4(1)(a)(i) or 4(2)(c), or how those provisions should be interpreted to give effect to the stated purpose

of the legislature as provided for in sections 2 and 3 of the NCA. This approach is incorrect and results in an absurdity.

77 The correct approach is to interpret section 8(4)(f) of the NCA together with the other relevant provisions of the Act and the facts that apply to the situation *in casu*. This exercise results in the following outcome with regard to the settlement agreement:

77.1 In respect of the company, the settlement agreement defers payment of the settlement amount owed to the respondent, and interest is payable in respect of the amount that has been deferred. It therefore falls within the wording of section 8(4) of the NCA, if read in isolation.

77.2 Section 8(1)(b) of the NCA provides that a credit transaction constitutes a credit agreement for the purposes of the Act. But that is not the end of the enquiry.

77.3 Section 4(1)(b) of the NCA stipulates that a large agreement (R 250 000 or over) concluded with a juristic person, is excluded from the ambit of the NCA. The settlement agreement confirmed an indebtedness of R4 269 278.79

77.4 Accordingly, despite the settlement agreement falling within

the wording of section 8(4)(f) and constituting a credit agreement in terms of section 8(1) of the NCA, the NCA does not apply by virtue of section 4(1)(b) of the NCA.

77.5 Turning to the applicant, it is necessary to establish who had the obligation to pay the respondent in the first place. The settlement agreement refers to the rental agreements giving rise to the underlying debt. The obligation to pay the respondent therefore vested in the company.

77.6 In both the suretyship and the settlement agreement, the applicant promised and undertook to satisfy the obligations of the company. The settlement agreement, as it relates to the applicant, therefore constitutes a credit guarantee in terms of section 8(5) of the NCA.

77.7 As pointed out above, section 4(2)(c) of the NCA excludes the application of the NCA to the settlement agreement if the credit transaction to which it pertains falls outside of the NCA. The credit transaction which the applicant guaranteed is that of the company and which finds its origin in the rental agreements, both of which are excluded from the NCA. The portion of the settlement agreement which constitutes a

credit guarantee by the applicant is therefore excluded from the NCA.

77.8 The settlement agreement cannot be both a credit transaction and a credit guarantee in respect of the applicant. Section 8(4)(f) of the NCA defines a credit transaction as "*any other agreement, other than a credit facility or credit guarantee*". In other words, once the settlement agreement with regard to the applicant fits within the definition of a credit guarantee, it cannot also constitute a credit transaction.

77.9 Only if the above analysis results in uncertainty or ambiguity as to whether the NCA should apply to the settlement agreement or not, which I respectfully submit is not the case, does it then become necessary to interpret the provisions in a manner that promotes the purpose of the NCA, as per sections 2 and 3 of the NCA.

77.10 Section 3 of the NCA is clear, namely that the NCA's purpose and application is directed at the credit industry and its consumers. It expressly excludes credit agreements by juristic persons with an asset value above R1,000,000 and large agreements with juristic persons from the credit

industry, it seeks to regulate. It similarly expressly excludes credit guarantees pertaining to credit agreements not governed by the NCA.

77.11 It follows that the NCA was not intended to regulate situations such as that contemplated in this matter. This holds true regardless of whether a compromise is concluded by the parties for purposes of settling litigation between them.

78 The respondent's above approach is therefore consistent with De Bruyn NO and Others v Karsten; Kubyana; S v Zuma and Others; Standard Bank Investment Corporation Ltd v Competition Commission and Others[41]; and Democratic Alliance v Speaker, National Assembly and Others[42].

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41 At para 17, Schutz JA warns against an overly restrictive approach to interpretation by referring to *Jaga v Dönges NO and Another; Bhana v Dönges NO and Another* 1950 (4) SA 653 (A) at 664E-H, the relevant extract of which is as follows:

> *"…But the legitimate field of interpretation should not be restricted as the result of excessive peering at the language to be interpreted without sufficient attention to the contextual scene."*

42 At para 19, Madlanga J adopted the approach enunciated in *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC) at para 28 as follows:

> *"A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:*
>
> *(a) that statutory provisions should always be interpreted purposively;*
>
> *(b) the relevant statutory provision must be properly contextualised; and*
>
> *(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their*

79 The matter of *Carter Trading (Pty) Ltd v Blignaut* is distinguishable from the current matter for two reasons:

79.1 The acknowledgement of debt was held to be a credit transaction in terms of section 8(4)(f) of the NCA and therefore constituted a credit agreement that fell under the NCA in terms of section 8(1) of the NCA. However, and unlike the present matter, there were no circumstances that gave rise to an exclusion of the acknowledgment of debt from the NCA , in terms of sections 4(1)(a) and (b) and 4(2)(c).

79.2 The acknowledgment of debt related to the supply of goods on credit to the consumer and therefore also constituted a credit facility in terms of section 8(3) of the NCA, which was regulated by the Act.[43]

80 The matter of *MBD Securitisation (Pty) Ltd v Booi* is also distinguishable from the current matter because the consent to judgment that formed the subject of that judgment related to an underlying cause of action that was regulated by the NCA, which

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constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).”

[43] Paras 19 to 23.

was common cause between the parties[44].

Ad paragraphs 9 to 10.2

81 I deny that the appeal raises arguable points for law, and refer to what I have stated above in this regard.

Ad paragraph 10.3

82 One of the grounds that the applicant relies on in support of his appeal is that the learned Justices of the SCA incorrectly applied a purposive interpretation and not a literal interpretation with regard to the effect that the NCA has on settlement agreements[45].

83 The applicant (incorrectly) argues that the wording of section 8(4)(f) of the NCA is clear and it is therefore not necessary to consider the purpose of the legislation.

84 Apart from the submission being correct, it is also contradicted by the contents of this paragraph in terms of which it is argued that the applicant has prospects of success because "*[given] the confusion inherent in the NCA, it is probable that the NCA should be interpreted in the manner that Ratlou proposes*".

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44 Paras 7 to 12.

45 Paragraph 6(c), page 14 of the affidavit in support of application for leave to appeal.

Ad paragraphs 11.1 and 11.2

85 I deny that the learned Justices of the SCA incorrectly considered and applied the cases of *Grainco*, *Hattingh, Ribeiro* and *Shaw*.

Ad paragraph 11.3(a)

86 The applicant incorrectly distinguishes *Grainco* on the basis that the acknowledgment of debt constituted a novation and not a compromise, as in this matter.

87 That distinction is only relevant to the institution of a claim based on the underlying *causa*, not for purposes of assessing whether NCA applies or not.

Ad paragraph 11.3(b)

88 The applicant incorrectly distinguishes *Hattingh* on the basis that the compromise before this Court regulates the payment of a debt owed by a consumer to a financial institution, whereas the agreement between the parties in *Hattingh* related to the dissolution of the business between the parties.

89 In both cases a strict wording of section 8(4) of the NCA would

have, without more, meant that the agreements constituted credit agreements that were regulated by the Act.

90 The applicant now suggests that this Court should go beyond the strict wording of section 8(4) of the NCA and adopt a purposive approach to distinguish *Hattingh* on the basis that the underlying *causa* there was not one within the credit industry, whereas the current matter is.

91 Firstly, this contradicts the applicant's argument that it is not capable for this Court to interpret the NCA purposively in light of the strict wording of section 8(4) of the NCA.

92 Secondly, the relationship between the parties in this matter is specifically excluded by virtue of section 4(2) read with section 4(1) of the NCA. Neither the applicant or the company are consumers and the respondent is not a credit provider, in the circumstances of this matter. The applicant is therefore incorrect to state that *"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*".

Ad paragraph 11.3(c)

93 The applicant incorrectly distinguishes *Ribeiro* on the basis that the parties to the agreement in that matter expressly recorded that it did not amount to a novation of the pre-existing agreements, and the agreement relied upon did not "*meet the requirements of a compromise*".

94 Novation and compromise are separate concepts. Just because a matter is not novated, does not mean that it is not compromised. The difference between the two concepts is illustrated in *LAWSA* as follows:

> "As mentioned in the preceding paragraph, there is a difference between novation and compromise: A compromise is a settlement of litigation or envisaged litigation. It is a substantive contract that exists independently of the original cause. Accordingly, a compromise is not affected by the invalidity of the original obligation. It is different in the case of a novation and the original invalid contract taints the novated contract."[46]

95 It is clear from the authority cited above that a compromise/transactio constitutes an agreement between parties

[46] LAWSA, Volume 19, Second Edition Replacement as at 29 February 2016, para 241 (Compromise/Transactio).

who adjust their differences to prevent or end a lawsuit[47]. That is exactly what the agreement in *Ribeiro* achieved[48]. It therefore constituted a compromise. It is also possible that parties can reserve their rights to proceed on the underlying claim when concluding a compromise; that does not mean that the agreement does not constitute a compromise[49].

96 The applicant is therefore incorrect to say that the agreement in *Ribeiro* did not meet the requirements for a compromise.

97 Notwithstanding that the agreement in *Ribeiro* was a compromise, Cachalia JA (in a unanimous decision), first and foremost, held that background facts were relevant to determining whether the settlement agreement was regulated by the NCA or not. In doing so, the learned Justice agreed with the court *a quo*'s following finding:

> "The High Court rejected the respondents' contention that the initial loan agreements were irrelevant to determining the issue in this case. The learned judge pointed out that the agreement specifically referred to the respondents' obligations under the loan agreements and also that, at the time the agreement was concluded, the respondents still had

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47 *Gollach supra.*

48 *Ribeiro supra* at para 2.

49 *Ngubane supra*.

the obligation to guarantee RB Merit's commitments to the applicant. It was therefore not, the judge held, a credit transaction. And if it was not a credit transaction at the time the agreement was concluded, it could not have become one subsequently, after RB Merit was released from its obligations. For, if it could have, this would mean that the agreement was not void at the time that it was concluded, but became so once RB Merit had discharged its obligations under the very agreement. This result, said the High Court, would be absurd."[50]

98 The later finding by Cachalia JA that the obligations arising under the loan agreements and those under the settlement agreement were interdependent was in addition to the above finding, not a basis for it[51]. The argument advanced in relation to *Adams v SA Motor Industry Employers Association* is therefore not relevant for current purposes.

Ad paragraph 11.3(d)

99 The applicant incorrectly distinguishes *Shaw* on the basis that the compromise extinguished the applicant's suretyship of 2013 and the applicant's obligations therefore changed from being accessory to joint and several, whereas the sureties in *Shaw* remained sureties

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50 *Ribeiro supra* at para 12.

51 *Ribeiro supra* at para 13.

and the principal debtor remained the principal debtor.

100 As I have explained above, the distinction argued on behalf of the application is artificial for three reasons:

100.1 In arriving at the decision, Mathopo JA assumed for purposes of the appeal that the appellants became co-principal debtors with the original principal debtor when the acknowledgment of debt was concluded[52]. They were therefore not considered as sureties, but rather principal debtors.

100.2 The test as to whether the agreement in respect of the appellants constituted a credit guarantee or not is limited to section 8(5) of the NCA, namely whether it constitutes an undertaking and a promise to satisfy the obligation of another[53]. It does not call for a common law test on principles of suretyship.

100.3 Mabili, not the appellants, was the recipient of the money that was advanced in terms of the underlying agreement[54]. The

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52 *Shaw supra* at para 7.

53 *Shaw supra* at para 10.

54 *Shaw supra* at para 12.

assumption that the appellants became co-principal debtors under the acknowledgement of debt did not influence the fact that they only did so to satisfy the obligations of another.

Ad paragraphs 11.4 to 11.6

101 I deny that the decision in the SCA contradicts either established legal principles or case law relating to compromises.

102 Rather, the decision confirms the principles that the effect of a compromise must be interpreted narrowly. It is limited to the underlying *causa* for purposes of pursuing a claim against another party to the compromise. It does not extend to an assessment of the historical facts in the matter for purposes of determining whether the NCA applies or not.

Ad paragraphs 12 and 13

103 I admit that the issues at stake are of fundamental importance to the public, but only to the extent that a finding against the respondent will serve to upset many years of litigious matters that have been settled, and will be a disincentive for disputes to be settled out of court in the future.

104 The decision of the SCA already provides certainty, clarity and guidance to litigants. A finding adverse to the respondents will only upset that.

Ad paragraph 15

105 I deny the conclusions drawn by the applicant.

106 I also deny that the application has prospects of success, for the reasons explained above.

WHEREFORE the respondent prays that the application for leave to appeal be dismissed with costs, including the costs of two counsel.

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DEPONENT

I certify that the Deponent acknowledged that he knows and understands the contents of this affidavit, that he has no objection to the making of the prescribed oath and that he considers this oath to be binding on his conscience. I also certify that this affidavit was signed in my presence at _____on this _____ day of MAY 2019 and that the Regulations contained in Government Notice R1258 of 21 July 1972, as amended by Government Notice R1648 of 19 August 1977, have been complied with.

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COMMISSIONER OF OATHS