IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT CASE NUMBER: CCT 118/2019

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

APPLICANT'S WRITTEN HEADS OF ARGUMENT

A. BRIEF INTRODUCTION

SALIENT FACTS

[1] For ease of reference, the parties herein will be referred to in a similar fashion as they were referred to by Supreme Court of Appeal; the applicant will be referred to as "*Ratlou*", the respondent as "*MAN*" and PHAPHO NKONE TRANSPORT (PTY) LTD will be referred to as "*PNT*".

[2] Ratlou acquired PNT and the latter's business during 2013 as a going concern. At the time of the acquisition, there were pre-existing agreements between MAN and PNT for the rental of five trucks. These agreements came to end during 2014; they expired through passage of time. Pursuant to and shortly after the acquisition as aforesaid, MAN required security and Ratlou bound himself as surety and co-principal debtor in favour of MAN for payment of any amounts that PNT may be owing or in future owe MAN.[1]

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1 Deed of Suretyship annexed as Annexure "JN11" to MAN's founding affidavit in the Court of first instance at **1/50**.

[3] At the end of 2014, MAN and PNT entered into several new written rental agreements in respect of trucks to be leased by MAN to PNT.[2]

[4] PNT fell in breach of the rental agreements. Consequently, the rental agreements were cancelled.[3] The trucks that formed the subject matter of the rental agreements were returned to MAN.[4] An amount of R 4 915 043.98 remained outstanding as liquidated damages suffered by MAN after the latter had sold the trucks.[5]

[5] Subsequent settlement negotiations resulted in a written settlement agreement (herein referred to as "*the compromise*") between MAN, PNT and Ratlou.[6] PNT, represented by Ratlou, and Raltou in his personal capacity undertook, jointly and severally, the one paying the other to be absolved, to pay MAN the amount of R 4 269 278.79.[7] Ratlou was no longer described or bound as surety but became liable jointly and severally.

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2 Annexure "JN3" up to Annexure "JN10" to MAN's founding affidavit in the Court of first instance at **1/17 – 1/49**.

3 Para 5.4 at **1/6/21 – 23**.

4 Para 5.4 at **1/6/21 – 23**.

5 Para 5.5 at **1/6/26**.

6 Annexure "JN13" at **1/56 – 1/61**.

7 Para 6.2 at **1/7/4 – 7**; Clause 4 of the Compromise at **1/59/3 – 7**.

[6] The compromise stipulated payment in several monthly instalments and, if calculated, the amount exceeded the capital amount of R 4 269 278.79.[8] As such, the compromise included additional fees or interest on the capital amount.

LITIGATION HISTORY

The Court of first instance

[7] MAN launched its application for payment in the Court of first instance. In its notice of motion, MAN prayed for the following relief[9]:

> "*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. ...*"

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8 Clause 5 of the Compromise at **1/59/8 – 14**.

9 Notice of Motion at **1/1**.

[8] The Honourable Wepener J, sitting as the Court of first instance, held that the original rental agreements did not fall within the ambit of the *National Credit Act* 34 of 2005 (herein later referred to as "*the NCA*") and, consequently, neither did the agreement of suretyship entered into by Ratlou.[10]

[9] However, the 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. [11] The Court held 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 s 129 of the NCA, which it had failed to do.[12]

[10] In light of the aforementioned, the Court of first instance made the following order[13]:

"*1.* .....

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10 Judgment of the Court of first instance at **2/151/1 – 4**.

11 Judgment of the Court of first instance at **2/151/15 – 17**.

12 Judgment of the Court of first instance at **2/156/18 – 22**.

13 Order of the Court of first instance at **2/159/18 – 28**.

2. *Against the second respondent:*

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

   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. ..."

[11] The abovementioned judgment of the Court of first instance was reported as *MAN Financial Services SA (Pty) Ltd v Phaphoakane Transport and Another* 2017 (5) SA 526 (GJ). Ratlou subsequently applied for leave to appeal to have paragraph 2.1 of the order of the Court of first instance set aside. Ratlou was refused leave to appeal and he 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 Court of first instance to cross-appeal against paragraphs 3 and 4 of the

Court's order. The order, which MAN sought to overturn, was the Court's finding pertaining to the applicability of the provisions of the NCA.

The Supreme Court of Appeal

[12] On appeal before the Supreme Court of Appeal, the parties agreed 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, it would concede Ratlou's appeal.

[13] The Supreme Court of Appeal, in upholding MAN's cross-appeal, held that the fact that the compromise made express reference to the rental agreements is of vital significance; it was held that the compromise remained linked to the underlying *causa*, being the rental agreements. The artificiality of ignoring them, so it was held, is self-evident.[14]

14 SCA Judgment at **3/190/11 – 17**.

[14] The Supreme Court of Appeal stated that on a purposive interpretation and not a literal interpretation of s 8(4)(*f*) of the NCA it is clear that the NCA was not aimed at settlement agreements. The Supreme Court of Appeal agreed with the main argument advanced by MAN that applying the provisions of the NCA to settlement agreements, will have a devastating effect on the efficacy and the willingness of parties to litigation to conclude settlement agreements and thereby curtail litigation.[15]

[15] The Supreme Court of Appeal dismissed Ratlou's appeal and upheld MAN's cross-appeal. The finding by the Court of first instance pertaining to the applicability of the NCA to the compromise, was thus overturned.

B. OVERVIEW OF DISPUTE

[16] With this application, Ratlou seeks leave to appeal against the whole judgment and order of the Supreme Court of Appeal that overturned the finding by the Court of first instance.

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15 SCA Judgment at **3/190/18 – 21**.

[17] Ratlou brings this application in terms of section 167(3)(b)(ii)[16] 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. This case raises an arguable point of law, which is of general public importance, and which ought to be considered by this Court. It concerns the proper interpretation of the NCA in light of its purpose and its context. MAN conceded that the matter is of general public importance, albeit for reasons that differ from the reasons advanced by Ratlou.[17]

[18] *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 Ratlou respectfully submits that this matter raises

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16 ***S 167 CONSTITUTIONAL COURT***

...

(3) The Constitutional Court -

(b) may decide –

(i) constitutional matters; and

(ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court;

17 MAN'S Opposing Affidavit at para 7.

constitutional issues. This Court has previously found that the interpretation of the NCA implicates constitutional issues.[18]

C. GROUNDS UPON WHICH THE DESCISION OF THE SUPREME COURT OF APPEAL ARE DISPUTED.

[22] It is submitted, with respect, that the learned Justices of the Supreme Court of Appeal erred by finding and / or holding that:

a. Ratlou's 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*";[19]

b. the compromise *in casu* remained "linked" to the underlying *causa* and because the underlying *causa* was excluded from

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18 *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).

19 SCA Judgment para [19] at **3/190/4 – 10**.

the NCA, the subsequent compromise should also be excluded;[20]

c. by applying a purposive interpretation and not a literal interpretation, it is clear that the NCA was not aimed at settlement agreements;[21]

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;[22]

e. The judgments of *Grainco (Pty) Ltd v Broodryk NO & Others*[23], *Hattingh v Hattingh* [24], *Ribeiro & Another v Slip Knot Investments 777 (Pty) Ltd* [25] and *Shaw & Another v*

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20 SCA Judgment para [20] at **3/190/11 – 17**.

21 SCA Judgment para [21] at **3/190/18 – 21**.

22 SCA Judgment para [21] at **3/190/18 – 21**.

23 2012 (4) SA 517 (FB) (herein later referred to as "*Grainco*").

24 2014 (3) SA 162 (FB) (herein later referred to as "*Hattingh*").

25 2011 (1) SA 575 (SCA) (herein later referred to as "*Ribeiro*").

McKintosh& Another [26] are applicable. The principles enunciated in these cases are applicable to the facts *in casu*;[27]

f. that the compromise *in casu* does not fall within the ambit the NCA.[28]

D. LEAVE TO APPEAL TO THIS COURT

[24] 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;
b. the point should be one of general public importance; and
c. the point ought to be considered by this Court.[29]

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26 2019 (1) SA 398 (SCA) (herein later referred to as "*Shaw*").

27 SCA Judgment para [24] at **3/191/14 – 23**.

28 SCA Judgment para [28] at **3/192/25 – 3/193/2.**

29 *Paulsen* fn 18 *supra* at [16].

[25] Ratlou satisfies the requirements of the test laid down by this Court in *Kubyana*.[30] The outcome of this case is a matter, which is in the public's interests; it raises a discrete legal point of public importance that would affect settlement agreements concluded in the future.[31]

[26] Settlement agreements constituting compromises are used on a daily basis by parties to avoid and curtail litigation. 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. 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. 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.[32]

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30 *Kubyana* fn 18 *supra* at paras 16 – 17.

31 SCA Judgment **3/186/1 – 2**.

32 *Paulsen* fn 18 *supra* at para [27].

[27] While prospects of success are important in determining whether leave to appeal should be granted, they are not determinative.[33]

ARGUABLE POINT OF LAW

[28] It is submitted that the issues raised in this matter are arguable legal issues. There are no disputes pertaining to fact. 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*

33 *Trustees, Simcha Trust v Da Cruz And Others* 2019 (3) SA 78 (CC) at para [20] and *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) at para [29].

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?

[29] 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.[34]

[30] The points of law are 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;

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34 *Paulsen* fn 18 *supra* at [21] and [22].

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;

d. 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.[35]

THE ARGUMENT

[31] The argument advanced on behalf of Ratlou herein below, addresses the abovementioned issues as well as the issues

35 *Paulsen* fn 18 *supra* at [24].

pertaining to the prospects of success. Ratlou's argument can conveniently be categorised under the following headings:

a. MAN's point of departure: the efficacy and willingness of parties to conclude settlement agreements;

b. The principles and nature of the compromise and suretyship *in casu*;

c. The purpose of the NCA;

d. whether the compromise *in casu* constitutes a "*credit guarantee*" that falls outside of the NCA;

e. the case law relied upon by MAN.

MAN's point of departure: the efficacy and willingness of parties to conclude settlement agreements

[32] The main complaint levelled by MAN against Ratlou's argument is that if Ratlou's argument is accepted and the appeal is upheld, **ALL**

(own emphasis) settlement agreements in terms of which payment is deferred and **ANY** (own emphasis) interest is payable will constitute a credit transaction. MAN argues that if the origin of the debt is irrelevant, the 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 divorces, maintenance, shareholder disputes, labour disputes *et cetera*.[36]

[33] It is submitted that the abovementioned argument is an incorrect generalisation:

a. 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.[37] This 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;

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36 MAN'S opposing affidavit in the application for leave to appeal paras 8 and 9.

37 *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 at page 534.

b. compromises or settlement agreements can be excluded from the ambit of the NCA quite easily. The NCA will only apply if the parties to the compromise or settlement agreement agree that the debtor will repay the creditor the amount due at a later stage or in instalments and that the debtor will pay the creditor interest on the deferred amount. The most obvious answer is that if the parties agree that no interest is payable, the compromise or settlement agreement will not fall within the ambit of the NCA. It should be emphasised that the current consideration before Court is limited to a scenario in which parties include in their compromises or settlement agreements a provision that the debtor will pay an agreed rate of interest to the creditor;

c. The said argument fails to distinguish between commercial interest, which is interest agreed upon (*ex contractu*) and *mora* interest (interest *ex lege*). *Mora* interest is not interest agreed upon, but a species of damages; it serves to compensate a creditor for the fact that the latter was deprived of the productive use of his money and consequently suffered

a loss. It is an ancillary obligation automatically attaching to some principal obligation by operation of law.[38] Commercial interest is interest *ex contractu;* it does not attach to the principal obligation by law but is expressly agreed upon between the parties. It is submitted that the NCA does not apply to *mora* interest because it accrues whether the agreement makes provision for it or not and depends solely on whether the debtor is in default of a payment obligation.

d. It is submitted that even a pure moneylending transaction between a financial institution and a natural person can be excluded from the ambit of the NCA if no agreed interest is payable by the debtor to the creditor;

e. In practice, the majority of cases concerning divorces, maintenance disputes, delictual claims and labour disputes, the parties to a settlement agreement do not agree that the debtor will pay the creditor a capital amount together with anything other than *mora* interest. In a divorce action, where

38 *Crookes Brothers Ltd v Regional Land Claims Commission, Mpumalanga, and Others* 2013 (2) SA 259 (SCA) at 268E to 269G.

a specified amount is payable by one spouse to the other in respect of an accrual for example, the parties rarely agree that the debtor spouse will pay the creditor spouse the capital amount of money plus commercial interest at a specified agreed rate. The same argument is applicable in respect of settlement agreements pertaining to the payment of maintenance. In respect of delictual claims, the *mora* interest that accrued up and until the date of the settlement agreement is normally capitalised and made part of the compensation payable by the debtor to the creditor;

f. It is submitted that some settlement agreements like settlement agreements pertaining to divorces or maintenance claims will be excluded by the provisions of s 4(1) and 4(2)(*b*)(iii) or (iv)[39] of the NCA on the basis that the parties were not dealing at arm's length for the purposes of the NCA.

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39 ***4. Application of Act.***

(1) Subject to sections 5 and 6, this Act applies to every credit agreement between parties dealing at arm's length [own emphasis]...

(2) For greater certainty in applying subsection (1)—

(b) in any of the following arrangements, the parties are not dealing at arm's length:

[34] The extent of the honourable Wepener J's judgment in the Court of first instance was that a compromise **may** (own emphasis) fall within the ambit of the NCA. The compromise or settlement agreement will not always fall within the ambit of the NCA except in the rare instances where the parties agreed that the debtor would pay the creditor a capital amount in instalments together with commercial interest at an agreed rate.

The principles and nature of the compromise in casu

(i) *a shareholder loan or other credit agreement between a juristic person, as consumer, and a person who has a controlling interest in that juristic person, as credit provider;*

(ii) *a loan to a shareholder or other credit agreement between a juristic person, as credit provider, and a person who has a controlling interest in that juristic person, as consumer;*

(iii) *a credit agreement between natural persons who are in a familial relationship and—*

(aa) *are co-dependent on each other; or*

(bb) *one is dependent upon the other; and*

(iv) *any other arrangement—*

(aa) *in which each party is not independent of the other and consequently does not necessarily strive to obtain the utmost possible advantage out of the transaction; or*

(bb) *that is of a type that has been held in law to be between parties who are not dealing at arm's length;*

[35] It is common cause between the parties that the agreement relied upon by MAN constitutes a compromise or *transactio*. In *Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd and others*[40], the Appellate Division quoted *Estate Erasmus v Church 1927 T.P.D. 20* where it was stated:

"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 to the dangers of losing."[41]

[36] The principles, effect and consequences of compromises in general will apply tothe compromise *in casu*. The compromise extinguished the rental agreements and rendered any dispute pertaining to or arising from the said agreements, *res iudicata*[42] MAN is precluded

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40 1978 (1) SA 914 (A) at 921C – D

41 See also the judgment of the Court of first instance at **2/151/20 – 2/153/22**.

42 *Van Zyl* fn 37 *supra* at 669H – 670A.

from relying on the rental agreements by going behind the compromise.[43]

[37] The effect of a compromise is best demonstrated by comparing it to a novation:

a. a compromise is a substantive contract which exists independently of the cause that gave rise to the compromise; it creates a new self-standing agreement which materially alters the rights and obligations of the parties. It is a settlement of litigation or envisaged litigation and is not affected by the invalidity of the original obligation;[44]

b. In the case of novation, the parties replace a valid contract with another. If the original contract is shown to be invalid, the novated contract will be of no effect; the original invalid contract taints the novated contract.

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43 *Road Accident Fund v Ngubane* 2008 (1) SA 432 (SCA) at 437A – 437E.

44 *Amler's Precedents of Pleadings* Eighth Edition 89 – 90 and LAWSA Vol 19 Second Edition par 241.

[38] From the abovementioned, it is clear that, with a novation, the original or underlying *causa* still plays a pivotal role. The opposite is true in the case of a compromise: the original or underlying *causa* is replaced all together with a new fresh cause. 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.[45]

[39] In applying the abovementioned principles, it is clear that a compromise will constitute an independent cause of action; a properly worded compromise can constitute a liquid document for the purposes of a provisional sentence summons.

[40] It is submitted that a compromise being an independent cause of action should be distinguished from any other form of agreement, which would constitute an **inter-dependent** cause of action. The effect of the former is self-explanatory: a compromise exists free and

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45 *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* fn 43 *supra* at 437A – D; *Amler's Precedents of Pleadings* Eighth Edition 89 – 90 and *LAWSA* Vol 19 Second Edition par 241.

independent from any of the obligations on which it was based and the validity of its underlying cause does not affect the validity of it.

[41] The effect of the latter was explained by the Appellate Division in *Adams v SA Motor Industry Employers Association.* [46] Interdependency is explained as a new additional obligation that coexists with the original obligation without extinguishing it.[47] It is interdependent because the parties intended the rights under the original agreement to remain alive. The Appellate Division 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 was 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.[48]

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46 1981 (3) SA 1189 (A).

47 *Adams* fn 46 *supra* at 1198A – B.

48 *Adams* fn 46 *supra* at 1199G – 1200A.

[42] The fact that a compromise is an independent cause of action and not an inter-dependent cause of action, illustrates, with respect, the error in the reasoning of the Supreme Court of Appeal. The learned Dambuza JA held with reference to the preceding rental agreements that "*[the] artificiality of ignoring them is self-evident*".

[43] It is submitted that the underlying *causa* should be ignored when dealing with the compromise because a compromise is independent and not inter-dependent; the compromise extinguished its underlying *causa*. The origin of the debt in the compromise is irrelevant. This holds true in the current instance especially in light of the fact that Ratlou was not even a party to the preceding rental agreements.

[44] MAN argues, however, that a compromise is, after all, still a contract, to be interpreted "*as a whole and the circumstances attendant upon its coming into existence.*"[49] MAN submits that, notwithstanding any compromise between the parties, a court is entitled to take cognisance of factors beyond the compromise itself

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[49] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18; MAN's opposing affidavit in the application for leave to appeal para 24.

for purposes of assessing whether the NCA applies to the transaction.

[45] MAN's argument raises the question whether the Court is entitled to look behind a compromise to alter or remove rights that Ratlou acquired through the compromise or as a result thereof. It is submitted that the current exercise is more than simple interpretation that empowers the Court to look at the surrounding circumstances; it has a material impact on Ratlou's rights and obligations that he acquired with the compromise. The difference between looking at context to provide meaning to a concept contained in an agreement or to ascertain the purpose of the agreement on the one hand and looking at previous agreements extinguished through compromise to alter existing rights on the other hand, is obvious.

[46] Ratlou's role, rights and obligations were altered significantly by the compromise:

a. Ratlou was not a party to the rental agreements and became a party to the compromise;

b. Ratlou obtained additional rights that he did not have as surety to the rental agreements in that he gained the protection of the NCA.

[47] If the underlying rental agreements are considered to the extent proposed by MAN, Ratlou loses the rights he had gained when he entered into the independent compromise; a compromise that extinguished the underlying rental agreements and suretyships. Ratlou's initial liability to MAN was accessory to the principal liability and became a principal obligation, jointly and severally.[50]

[48] The Appellate Division held in *Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron*[51] 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

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50 Compromise at 1/59/3 – 1/59/7; See also the judgment of the Court of first instance at **1/53/23 – 2/153/25**.

51 1978 (1) SA 463 (A) at 471C – G.

ordinarily available to the surety against a creditor; it does not make the surety a party to the main agreement.

[49] In *Jans v Nedcor Bank Ltd*[52], the Supreme Court of Appeal endorsed the view adopted in *Neon and Cold Cathode* and recognised the difference between surety and co-principal debtor on the one hand, and a co-principal debtor on the other hand.

[50] The reference in the compromise to the rental agreements does not alter the independent nature of the compromise; it does not revive or preserve the rights and obligations of the parties imposed on them in terms of the rental agreements. It is a reference only. The parties did not state expressly that the compromise did not constitute a novation of the said rental agreements. This is the key difference between the current matter and the authority relied on by MAN. For example, in the *Ribeiro*-matter[53] the parties expressly stated that the subsequent agreement did not amount to a novation of pre-existing agreements.

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52 2003 (6) SA 646 (SCA) at [9].

53 *Ribeiro* fn 25 *supra* at 579D – E

The intention and purpose of the NCA

[51] 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*".[54]

[52] In *De Bruyn NO and Others v Karsten*[55], 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. The said Court cautioned that 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.

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54 *Kubyana* fn 18 *supra* at [19].

55 2019 (2) SA 403 (SCA) at [25] and [27].

[53] 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.[56] 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.[57]

[54] MAN argues that the NCA seeks to regulate the credit market and industry and to protect consumers that obtained credit pursuant to a credit agreement. MAN refers to the definition of a "consumer" as defined in the NCA as a party who received credit pursuant to a credit agreement that falls to be regulated by the NCA.[58]

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56 *Kubyana* fn 18 *supra* at [18].

57 *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].

58 MAN'S opposing affidavit in the application for leave to appeal at paras 38 and 39.

[55] Ratlou argues 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 or settlement agreement if it contains certain provisions or, proverbially, *"ticks all the boxes"*:

a. 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.*";

b. "credit" is defined in s 1 as a deferral of payment of **money owed to a person**(own emphasis).

[56] From the abovementioned, it is clear that the legislator does not consider the origin of the debt as a factor except in terms of the exclusions expressly listed in the NCA, for example agreements not concluded at arm's length, stokvel's, *et cetera*. It follows therefore that as soon as an amount of money is owed by one person to

another and the repayment of that amount of money has been deferred coupled with the fact that interest is payable by agreement between the parties on the amount deferred and none of the express exclusions listed in the NCA is applicable, the agreement will fall within the ambit of the NCA. The origin of the amount of money owed whether contractual, delictual or based upon unjust enrichment is irrelevant. The NCA will apply unless it is expressly excluded.

[57] In the *De Bruyn*-matter[59], the Supreme Court of Appeal stated that to conclude that the NCA does not apply to once-off transactions, or to those who are not regular participants in the credit market, is, however attractive and sensible it may sound, not being true to the text and the context of the statute; to do so would be to substitute what is justifiably seen as regulatory overreach with judicial overreach. The Supreme Court of Appeal lamented the dismal drafting of the NCA and heeded this Court's advice given by the honourable Justice Cameron in *National Credit Regulator v Opperman and Others*[60] that the wording of the provision of the

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59 Fn 55 *supra* at para [27].

60 2013 (2) SA 1 (CC).

statute should be accepted, the drafting error acknowledged and be left to Parliament to correct.[61]

[58] The bottom-line is this: the NCA will not apply to settlement agreements if the creditor does not claim additional interest; this is also the prevailing situation in the credit market. To put it differently, a creditor is free to claim *mora* interest but if a creditor claims interest *ex contractu,* he /s she does so at his / her own risk.

Whether the compromise constitutes a credit guarantee that falls outside the NCA

[59] MAN contends that the compromise constitutes a "*credit guarantee*"[62] in terms of s 8(5) of the NCA on the basis that Ratlou

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61 *De Bruyn* fn 55 *supra* at para [27].

62 ***S 8 Credit Agreements***

...

(5) 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.

undertook in terms of the compromise to satisfy PNT obligations towards MAN.[63] In support of its argument, MAN relies on the judgment by the Supreme Court of Appeal in *Shaw & Another v Mackintosh and Another*.[64] In the *Shaw*-matter, the Supreme Court of Appeal stated that 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.

[60] MAN's argument presupposes the following:

a. the debt in question was, from the outset, only PNT's obligation and never that of Ratlou;

b. Ratlou's obligations remained accessory to PNT's obligations.

[61] If the abovementioned is accepted, Raltou's argument that the compromise materially altered his rights and obligations, is correct. It also correct then that Raltou only became a party to the relationship between MAN and PNT with the compromise.

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63 MAN'S opposing affidavit in the application for leave to appeal at paras 51 and 52.

64 *Shaw* fn 26 *supra*.

[62] The express wording of the compromise does not support MAN's argument. The compromise states that "*In full and final settlement of MFS's* [MAN] *claim against* ***PN Transport and Stephen*** [own emphasis]..." [65] According to the express wording of the compromise, the debt was both PNT's and Ratlou's.

[63] 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.*"[66] *Shaw* is distinguishable from the current matter; the parties *in casu* expressly agreed in the compromise that the debt is both Ratlou's and PNT's.

[64] The compromise *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.

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65 Annexure "JN13" at **1/5816 – 17**.

66 *Shaw* fn 26 *supra* at 401I – J, para [10].

Authorities relied on by MAN

[65] In the Court of first instance and the Supreme Court of Appeal, MAN relied on the authorities *Grainco (Pty) Ltd v Broodryk NO & Others*[67], *Hattingh v Hattingh*[68], *Ribeiro & Another v Slip Knot Investments 777 (Pty) Ltd*[69]. The Court of first instance held that the authorities relied on, are distinguishable; the Supreme Court of Appeal held that MAN's reliance on these authorities were well placed.[70] It is submitted that the Court of first instance correctly held that the said authorities are distinguishable.

[66] 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*.

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67 *Grainco* fn 23 *supra*.

68 *Hattingh* fn 24 *supra*.

69 *Ribeiro* fn 25 *supra*..

70 SCA Judgment at **3/191/14 – 17**.

[67] 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;[71]

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*";[72]

iii. the parties retained their respective roles: the sureties signed the acknowledgement of debt as sureties and not

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71 *Grainco* fn 23 *supra* at 524B.

72 *Grainco* fn 23 *supra* at 522A.

as principal debtors;[73] 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:

1. the learned Judge in *Grainco* compared the matter before him to the facts in *Bridgeway Ltd v Markam*[74]. 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.*[75] The Supreme Court of Appeal criticized the view adopted in *Bridgeway* to the effect that a court, in determining the nature of the contract, "*must scrutinise the whole course of the parties' dealings*";

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73 *Grainco* fn 23 *supra* at 521E – G.

74 2008 (6) SA 123 (W).

75 2013 (3) SA 426 (SCA) at [19] and [20].

2. *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.[76] 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*[77]. In *Carter,* an acknowledgement of debt

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76 *Hattingh* fn 24 *supra* at 165G – I.

77 2010 (2) SA 46 (EC).

was found to be a credit agreement in terms of the NCA. At [16] of the *Hattingh*-judgment, the learned Van ZylJ stated that the agreement in *Carter* was a "*dokument wat tipies is aandit 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 verhoudingtussen die partyereguleer, voortpruitenduit die besluit van die partye om die besigheiden sake wat hullevir 'die afgelope' dekades in samewerking met mekaargedoen het, tebeëindig...*"[78]

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:*

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78 *Hattingh* fn 24 *supra* at 174A – B.

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.[79] 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.[80]

ii. The abovementioned interdependency was a reference to the interdependency as explained in *Adams v SA Motor Industry Employers Association.*[81] The said interdependency referred to an acknowledgement of debt that **did not constitute a compromise.** The acknowledgement of debt referred to therein created a

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79 *Ribeiro* fn 25 *supra* at 579D – E.

80 *Ribeiro* fn 25 *supra* at 580C – D.

81 *Adams* fn 46 *supra*.

new additional obligation that coexisted with the original obligation without extinguishing it.[82] It is interdependent because the parties intended the rights under the original agreement to remain alive.[83]

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 constituted a credit guarantee in the proper sense of the term. It was for this reason that Supreme Court of Appeal found in *Ribeiro* that the NCA was not applicable to the agreement.

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82 *Adams* fn 46 *supra* at 1198A – B.

83 *Adams* fn 46 *supra* at 1199B – C.

E. CONCLUSION

[68] 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. 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.

[69] The settlement agreement complies in all respects with the provisions of Section 8(4)(f) of the NCA. The Court of first instance was therefore correct in its finding that MAN was obliged to comply with the provisions of Section 129 of the NCA. It is common cause that MAN did not comply with the aforementioned provisions.

[70] This Court is therefore called upon to pronounce on important legal principles:

70.1. If this Court finds that the settlement agreement complies with the provisions of the NCA, in other words that the settlement agreement *"ticks all the boxes provided for in the NCA"* then this appeal must succeed.

70.2. In the event that this Court finds that the compromise (i.e. the settlement agreement) constitutes nothing more than a

"revival" of the underlying *causa*, then the NCA will not find application.

70.3. It is common cause that the settlement agreement constitutes a compromise.

[71] The test is not what the effect of this Court's judgment would be in the event that a finding is made in accordance with the Court of first instance's judgment. It is a matter of legality, not a matter of comfort. Once it is found that the settlement agreement complies in all respects with the NCA, then the NCA is applicable and no room exists to escape the consequences of the NCA.

[72] Parties who conduct business at arm's length should not be discouraged as a result of the Court of first instance's judgment to enter into settlement agreements. The purpose of the NCA was carefully formulated and "*crafted*" by the legislator, which is evident from the pre-amble of the NCA, i.e.:

"To promote a fair and non-discriminatory market place for access to consumer credit and for that purpose to provide for

the general regulation of consumer credit and improved standards of customer information; to promote black economic empowerment and ownership within the consumer credit industry; to prohibit certain unfair credit and credit-marketing practices; to promote responsible credit granting and use and for that purpose to prohibit reckless credit granting; to provide for debt re-organization in cases of over-indebtedness .....".

[73] Parties, specifically credit providers, should be alert to the manner in which they enter into and conclude agreements, including settlement agreements. Not all settlement agreements will necessarily fall within the ambit of the NCA, as suggested during argument in the Supreme Court of Appeal. The argument that parties will be reluctant or discouraged to enter into settlement agreements in the event that preference is given to the Court of first instance's judgment, is fundamentally misconceived and without any merit. It is, with respect, not this Court's duty or obligation to *"find a solution"* for the purported predicament that will ensue if the Court of first instance's judgment prevail. This judgment should signal a message to the legislature to consider an amendment, or

amendments, to the NCA. Convenience and general acceptable commercial practices should not triumph over legality, i.e. the applicability of the NCA.

[74] In the premise, we submit that a proper case has been made out and that this appeal should succeed.

DATED AT PRETORIA ON THIS 5TH AUGUST 2019.

F W BOTES SC

D D SWART

COUNSEL FOR APPLICANT