IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: 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

RESPONDENT'S WRITTEN ARGUMENT

A. INTRODUCTION

1 The respondent (**"MAN"**) relies on the definitions referred to by the applicant (**"Ratlou"**) in his written submissions, unless otherwise appearing from these written submissions.

2 MAN takes no issue with the events described under the headings *"salient facts"* and *"litigation history"* in the written submissions of Ratlou[1], save to deny that Ratlou ceased being a credit guarantor upon the conclusion of the settlement agreement (**"the settlement agreement"**) as contended for in paragraph 5 of the written submissions of Ratlou[2].

3 The suretyship agreement concluded by Ratlou, in terms of which he bound himself, jointly and severally, as surety and co-principal debtor, with PNT in favour of MAN, is hereinafter referred to as "**the suretyship**".[3]

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1 Pages 1 - 8, paragraph 1 - 4, paragraph 5 save for the last sentence thereof and par 5 – 15.

2 Page 3 the last sentence of paragraph 5.

3 The suretyship, volume 1, page 50, para 1.

4 The rental agreements, concluded between 10 and 29 December 2014, by PNT are referred to as **"the rental agreements**".[4]

5 It is common cause that the rental agreements did not constitute credit agreements regulated by the NCA.

6 The rental agreements by their nature, cannot constitute credit agreements, as the rental was payable in advance (no deferral)[5] and at the end of the lease term, ownership would not pass to PNT[6] [7].

7 The rental agreements were in any event large agreements (R250,000 or over) that were concluded with a juristic person, PNT, and therefore excluded pursuant section 4(1)(b) of the NCA.[8]

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4 The rental agreements, volume 1, pages 17 to 49.

5 Volume 1 page 17. The first rental was payable on the commencement date and thereafter each month's rental was to be paid on that same date. All the rental agreements had the same term.

6 Volume 1 page 33, clause 6.1 – 6.2 of the terms and conditions of the rental agreements.

7 **ABSA TECHNOLOGY FINANCE SOLUTIONS (PTY) LTD v MICHAEL'S BID A HOUSE CC AND ANOTHER 2013 (3) SA 426 (SCA)** at par 17 and 32

8 Section 4(1) of the NCA:

"Subject to sections 5 and 6, this Act applies to every credit agreement between parties dealing at arm's length and made within, or having effect within, the Republic, except –

(a) a credit agreement in terms of which the consumer is –

(i) a juristic person whose asset value or annual turnover, together with the combined asset value or annual turnover of all related juristic persons, at the time that the agreement is made, equals or exceeds the threshold value determined by the Minister in terms of section 7 (1) [which is R1 million];

(ii) …

(iii) …

(b) a large agreement, as described in section 9(4), in terms of which the consumer is a juristic person whose asset value or annual turnover is, at the time the agreement is made, below the threshold value determined by the Minister in terms of section 7(1)".

8 The suretyship constituted a credit guarantee, as defined in the NCA, but was not regulated by the NCA, as it guaranteed payment by Ratlou in respect of the underlying rental agreements that were themselves excluded from the ambit of the NCA. Section 4(2)(c) and 8(5) of the NCA provides for this.[9] [10]

9 PNT defaulted on the rental agreements, which resulted in both PNT and Ratlou being liable to MAN for an amount of R4,915,043.98.[11] This resulted in the parties concluding the settlement agreement on 28 September 2015, for payment by PTN and Ratlou of an amount of R4,400,000.00 by way of monthly instalments, together with interest.[12]

10 PTN and Ratlou defaulted on the settlement agreement, resulting in the application that served before the Court of first instance, which led to the order by Wepener J[13],wherein it was found that the settlement agreement constituted a credit transaction governed by the NCA.

11 On 1 April 2019, the Supreme Court of Appeal **("the SCA")** delivered its unanimous judgment by Dambuza JA (**"the SCA judgment"**) which

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9 Section 4(2)(c) of the NCA is quoted in paragraph 46 below.

10 Section 8(5) is quoted in paragraph 44 below.

11 Founding affidavit in court *a quo*, volume 1, page 6, para 5.5.

12 Suretyship, volume 1, page 59, para 4.

13 Wepener J order, volume 2, page 147 - 159. Judges will be referred to thus, for the sake of brevity and without intending any disrespect.

overturned the order by Wepener J and found that the settlement agreement was not a credit transaction governed by the NCA.[14]

12 The crisp issue before this Court is therefore whether the settlement agreement constitutes a credit agreement that is governed by the NCA, in circumstances where the underlying rental agreements and suretyship were not governed by the NCA.

B. COMPROMISE

A compromise does not extinguish the underlying factual matrix

13 Ratlou submits that the settlement agreement constitutes a compromise, which has the effect of extinguishing the underlying *causa*, and therefore prevents an interrogation of the underlying factual matrix for purposes of assessing whether the settlement agreement is governed by the NCA.

14 Ratlou therefore submits, that the underlying factual matrix is irrelevant for purposes of assessing whether the settlement agreement constitutes a credit agreement governed by the NCA and submits that the settlement agreement must be considered in isolation and divorced from the facts that gave rise to it.[15]

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14 The SCA judgment, volume 3, pages 192 and 193, paras 28 and 29.

15 Page 27 paragraph 43 of the written submissions of Ratlou.

15 The submission on behalf of Ratlou is wrong because it misstates the effects of a compromise. Ratlou confuses the underlying *causa* that a party relies on for purposes of a cause of action, with the underlying factual matrix that must be assessed to determine the relationship that exists between the parties. A compromise extinguishes the former for the limited purpose of relying on the underlying *causa*, but not the latter for purposes of assessing the underlying factual matrix to determine whether the NCA applies or not.

16 The fact that regard must be had to the underlying factual matrix that gives rise to a settlement agreement was recently recognised by this Court in the matter of *Buffalo City Metropolitan Municipality v ASL Construction (Pty) Ltd*.[16] This matter related to the challenge of a contract that had been awarded, following a tender process that did not comply with section 217 of the Constitution. The appeal relating to the legality of the awarded tender was before this Court when the parties to the dispute settled the matter, sought to withdraw the appeal, and sought instead to make the settlement agreement an order of court.

17 After assessing the underlying factual matrix that gave rise to the settlement agreement, namely an unlawful contract emerging from a tender that fell

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16 2019 (4) SA 331 (CC).

foul of section 217 of the Constitution, this Court in *Buffalo City* declined to make the settlement agreement an order of court. Theron J held:

> *"There is no explanation in the withdrawal application as to how this settlement agreement cures the alleged defects in the Reeston contract. For reasons that will be detailed in this judgment, the Reeston contract was awarded to the respondent in breach of s 217 of the Constitution and is unlawful. This inconsistency with the Constitution cannot be cured by a settlement agreement. For this reason alone, the settlement agreement does not meet the Eke requirements for making it an order of court and is unlikely to be a lawful agreement that accords with the Constitution. The resultant order, if made by this court, will be inconsistent with the Constitution."*[17]

18 In the same way that this Court in *Buffalo City* considered the underlying factual matrix that gave rise to the settlement agreement, for purposes of assessing compliance with section 217 of the Constitution, it is necessary for the Court in this matter to consider the underlying factual matrix that gave rise to the settlement agreement, to determine whether the NCA applies

17 *Buffalo City supra*, para 30.

or not. The settlement agreement cannot be assessed in isolation, as Ratlou submits.

19 Although not entirely clear from the *Buffalo City* judgment, it appears that the settlement agreement was one in full and final settlement of various proceedings and, if so, constituted a compromise.

20 It is established law that a compromise only extinguishes the underlying *causa* for purposes of instituting legal proceedings, and defences arising therefrom. In *Road Accident Fund v Ngubane*[18], the Supreme Court of Appeal endorsed the following 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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18 2008 (1) SA 432 (SCA) at para 12.

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 not entitled to go behind the compromise and raise defences to the original cause of action when sued on the compromise."[19]

(Emphasis provided)

21 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 [or compromise] 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."[20]

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19 983 (4) SA 379 (E) at 383E-H.

20 1978 (1) SA 914 (A) at 921C-E.

22 The purpose of a compromise is therefore to bring an end to the *lis* between the parties and to render the dispute *res iudicata*.[21]

23 A compromise is after all, still a contract, to be interpreted *"as a whole and the circumstances attendant upon its coming into existence.*[22]*"* 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 to, for instance, interpret the compromise or to assess which legislative regime applies.

24 Perhaps the best way to dispel the submission by Ratlou that a Court, considering a compromise, is precluded from examining the underlying causa, is to apply a converse set of facts. If a consumer concludes a credit agreement, governed by the NCA and compromises that claim, on terms that excludes the operation of the NCA, can a credit provider escape the consequences of the NCA and the protection afforded to a consumer in terms of the NCA, based on the proposition that the Court is precluded from assessing the underlying causa, simply because same is extinguished by the compromise. The answer must be, a resounding no.

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21 *Eke v Parsons* 2016 (3) SA 37 (CC) at para 31.

22 *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18.

25 The authorities relied upon by Ratlou[23] do 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 and assess the underlying factual matrix.

26 The SCA *in casu* therefore appropriately interrogated the underlying rental agreements for purposes of determining whether the NCA governs the settlement agreement or not. It was correctly held by Dambuza JA that "*[the] artificiality of ignoring them is self-evident*".[24]

27 Once the Court is satisfied that it ought to have regard to the underlying facts for determining whether the settlement agreement falls within the ambit of the NCA, it leads to the inescapable conclusion that the settlement agreement is not governed by the NCA for the same reason that the rental agreements and the suretyship that gave rise to it were excluded.

28 When the misconception that a compromise extinguishes the underlying factual matrix (as opposed to an underlying *causa* for purposes of instituting proceedings) is dispelled, the cases of *Grainco* and *Hattingh*, become relevant to this argument.

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23 Ratlou's written argument page 24, footnotes 43 and 44; and page 25, footnote 45.

24 The SCA judgment, volume 3, page 190, para 20.

29 In the matter of *Grainco (Pty) Ltd v Broodryk NO & Others*[25] it was held that where the underlying transaction which gave rise to an acknowledgement of debt was not a money-lending transaction but rather a claim for damages, the legislature could not have intended such a transaction to fall within the ambit of the NCA, and it was therefore not governed by the NCA.

30 Similarly, in the matter of *Hattingh v Hattingh*[26] where two parties concluded an agreement to terminate their business relationship (which is not dissimilar to a compromise), and despite the fact that the agreement appeared to constitute an credit agreement in terms of sections 8(1)(b) and 8(4)(d) of the NCA, there was no credit provider and consumer relationship and the legislature could never have intended for the NCA to apply. It was held that the NCA did not apply.

31 Ratlou attempts to distinguish the current matter from *Hattingh* on the basis that the compromise in this matter relates to the payment of a debt owed by a consumer to a financial institution, which is the very purpose that the NCA is directed towards. In the matter *in casu*, there was no granting of credit as the underlying agreements were rental agreements and the claim consequent

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25 2012 (4) SA 517 (FB) at paras 7.3 to 7.5.

26 2014 (3) SA 162 (FB) at paras 25 and 26.

upon cancellation of same (as to be repaid in terms of the settlement agreement), is a damages claim.

32 Even if one were to accept (for argument's sake) that there was a granting of credit to PNT in terms of the rental agreements, then section 4(1)(a)(i) and 4(1)(b) the NCA specifically excludes same from its operation.

33 Once the Court accepts that it may have regard to the underlying facts to determine whether the NCA applies to the settlement agreement or not, that is the end of the enquiry and the application for leave to appeal and the appeal ought to be dismissed. It is not necessary to consider the further arguments that are set out below as to why the settlement agreement is not regulated by the NCA.

The settlement agreement retained the underlying factual matrix

34 Only in the event that this Court departs from the well-established principles and its approach in *Buffalo City* to find that a compromise extinguishes both the underlying *causa* and the underlying factual matrix, does it then become necessary to consider whether the settlement agreement expressly retained the factual substratum relating to the rental agreements and the suretyship.

35 We recall 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."*[27]

36 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.*"[28]

37 This invites an enquiry as to whether there is anything in the settlement agreement, either express or implied, that reserves the position *qua* the applicability of the NCA.

38 The settlement agreement refers to the rental agreements as the genesis of the parties' obligations. It goes on to list each of them by reference to their account numbers.[29] This is a clear indication that the parties intended to preserve the factual substratum that gave rise to the settlement agreement.

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27 *Ngubane supra*, para 12.

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

29 The settlement agreement, volume 1, page 58, para 3.

39 The Court *a quo* correctly found that the express reference in the settlement agreement to the underlying rental agreements is "*of vital significance*". Because of this express reference, the compromise remained linked to the underlying rental agreements.[30]

40 Similarly, in the matter of *Ribeiro and Another v Slip Knot Investments 777 (Pty) Ltd*[31], the parties concluded a settlement agreement, which had as its genesis two loan agreements and a suretyship. The court *a quo* took cognisance of the recordal in the settlement agreement that "*the obligations and undertakings as accepted by the sureties in terms of the agreement have as their origin the initial undertakings and obligations attributable to the sureties in the initial loan agreements*". The SCA agreed with the court *a quo* that the respondents retained the obligation to guarantee the underlying debt, and the settlement agreement in respect of the respondents was therefore a credit guarantee to which the NCA did not apply. It also reasoned that if it was not a credit transaction at the time that the settlement agreement was concluded, it could not become one after the principal debtor was released from its obligations as this would result in the settlement agreement being valid at the time that it was concluded, but becoming void once the principal debtor discharged its obligations, which would be absurd.

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30 The SCA judgment, volume 3, page 190, para 20.

31 2011 (1) SA 575 (SCA) at paras 12 and 13.

41 Ratlou attempts to distinguish *Ribeiro* from the current matter on the basis that the settlement agreement contained an express recordal that it did not novate the underlying agreements.[32] For the reasons mentioned above, this is only relevant to a litigant's ability to rely on the underlying loan agreements and suretyship as a cause of action in legal proceedings, but not for purposes of determining whether the NCA applies to the settlement agreement or not. The distinction is therefore without merit.

42 It is absurd to suggest, as Ratlou does, that MAN intended to afford him additional rights arising under the NCA by concluding the settlement agreement, to those which existed under the rental agreements and the suretyship which he was in breach of.

43 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.

C. THE EFFECT OF THE SETTLEMENT AGREEMENT

44 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*

32 Ratlou's written argument, page 43, para (i).

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."

(Emphasis provided)

45 Two requirements must therefore be satisfied:

45.1 in the first instance, a person must undertake to satisfy the obligation of another consumer; and

45.2 secondly, the underlying obligation must be one that is regulated by the NCA.

46 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"

(Emphasis provided)

47 The settlement agreement cannot be both a credit transaction and a credit guarantee insofar as Ratlou is concerned. Section 8(4)(f) of the NCA defines

a credit transaction as "*any other agreement, other than a credit facility or credit guarantee*".

48 In other words, once the settlement agreement with regard to Ratlou fits within the definition of a credit guarantee, it cannot also constitute a credit transaction.

49 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 Ratlou undertook to satisfy the obligations of PTN under the rental agreements was likewise excluded from the NCA

50 It is also common cause that Ratlou was not a party to the rental agreements.[33]

51 Ratlou contends that this Court must not have regard to the rental agreements or the suretyship because those obligations were "*extinguished*" when the settlement agreement was concluded, which resulted in his obligations to MAN changing from accessory in nature to joint and several.[34] This is both factually and legally incorrect.

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33 Ratlou written submissions at pages 28 – 29 paragraph 46a and paragraphs 47-48

34 Supporting affidavit in the application for leave to appeal to the Constitutional Court, volume 3, page 235, para (iii).

52 It is factually incorrect because the nature of Ratlou's obligations under both the suretyship and the settlement agreement remained the same, namely that Ratlou undertook or promised to satisfy the obligation of PNT to MAN.

53 The suretyship expressly states the following:

> *"[I], the undersigned, PHASWANA STEPHEN RATLOU,… bind [myself] as [surety] and co-principal [debtor] jointly and severally together with PHAPHO NKONE TRANSPORT (PTY) LTD"*[35]
>
> (Emphasis provided)

54 The settlement agreement similarly states:

> "*PN Transport and Stephen [Ratlou] will jointly and severally the one paying the other to be absolved pay an amount of… [sic]*"[36]
>
> (Emphasis provided)

55 Ratlou's submissions on this point are also flawed in law because he incorrectly relies on common law principles relating to suretyships, without

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35 The suretyship, volume 1, page 50.

36 The settlement agreement, volume 1, page 59, para 4.

appreciating that the NCA defines a "*credit guarantee*" and how it should be treated under the NCA. The two concepts and the principles that apply to each are not interchangeable. The terms "*surety*" and "*suretyship*" do not even appear in the NCA. Ratlou's reliance on the cases of *Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron*[37] and *Jans v Nedcor Bank Ltd*[38] does not alleviate Ratlou's difficulties, in fact it exacerbates them. These cases deal with common law principles relating to suretyships, whereas the current matter relates to the definition and regulation of a credit guarantee (as defined) under the NCA.

56 The process of determining whether the settlement agreement constitutes a credit guarantee in terms of the NCA involves a simple factual enquiry, which is established by the legislation itself. If one person seeks to satisfy the obligations of another, it will constitute a credit guarantee for purposes of the NCA. This does not mean that the credit guarantee will be regulated by the NCA – it may be excluded in terms of section 4(2)(c) thereof.

57 This is the very approach that the Supreme Court of Appeal took in *Shaw and Another v Mackintosh and Another*, where the following was held in a unanimous decision:

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37 1978 (1) SA 462 (A) at 471C-G. This matter pre-dated the NCA.

38 2003 (6) SA 646 (SCA) at para 9. This matter dealt with the question of prescription and pre-dates the NCA.

"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."[39]

> *"It is clear that the appellants were not granted any loan nor was any credit advanced to them and neither were they parties to the historical agreement between Mabili and Mackintosh concluded in 2009."*[40]

58 Ratlou attempts to draw a distinction between the facts in the current matter and those in *Shaw* on the basis that *Shaw* was not dealing with a compromise,

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39 2019 (1) SA 398 (SCA) at para 10.

40 *Shaw supra*, para 12.

which allegedly changed the nature of Ratlou's obligation from one that was initially accessory to PNT, to one that became joint with PNT.[41] This distinction is, with respect, irrelevant.

59 In *Shaw* it was held that:

> *"The agreement expressly stated that the sum of R2 million was advanced to Mabili and not the appellants. That brings the obligations of the appellants squarely within s 8(5)."*[42]

60 Similarly, the settlement agreement expressly identifies the rental agreements as the source of the indebtedness, being the rental agreements to which only PNT was a party. Borrowing the words from *Shaw, "that brings the obligations of* [Ratlou] *squarely within s 8(5)"*.

61 The only way that Ratlou's submissions on this point can succeed is if this Court:

61.1 departs from the approach it took in *Buffalo City* and 'closes its eyes' to the underlying factual matrix that gave rise to the settlement agreement; and, in addition to that,

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41 Ratlou's written argument, page 37, paras 62 to 64.

42 *Shaw supra*, para 12.

61.2 ignores the reference in the settlement agreement to the rental agreements and the fact that the indebtedness arose from the rental agreements concluded with PNT, not Ratlou.

62 If this Court were to do so, it would result in parties, who would otherwise be subjected to the NCA, concluding settlement agreements in a manner that subverted the NCA. If Ratlou's submissions are accepted, as soon as a settlement agreement is concluded, a court would be prevented from interrogating the underlying factual matrix to determine whether the NCA ought to govern the relationship between two parties or not - it would be confined to the text of the settlement agreement before it. With respect, this could never be the case.

D. THE INTENTION OF THE NCA

63 Ratlou 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

(ii) the amount that has been deferred."

64 If the submission that the settlement agreement is a credit guarantee insofar as Ratlou is concerned, is rejected, then the settlement agreement, on a literal interpretation, may fall within the definition of a credit transaction under section 8(4)(f) of the NCA.

65 The enquiry is however not limited to a literal interpretation of the above section.

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

66.1 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;[43]

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43 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).

66.2 a credit guarantee, where the credit agreement it serves to secure or guarantee is not regulated by the NCA;[44] and

66.3 a credit agreement between parties that are not dealing at arm's length with one another.[45]

67 It is therefore incorrect to read section 8(4)(f) of the NCA in isolation, as Ratlou seeks to do. This would impermissibly result in the other provisions contained in the legislation being ignored.

68 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.[46] This much is stated in section 2(1) of the NCA, which reads:

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

69 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,*

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44 Section 4(2)(c) and 8(5) of the NCA.

45 Section 4(1) read with 4(2)(b) of the NCA.

46 *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC) at paras 36-37.

transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers…"

(Emphasis provided)

70 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.

71 When the legislation is considered holistically, the NCA therefore 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.

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

73 MAN's argument on this point is consistent with the approach taken by our courts in, *inter alia*, the matters of *Grainco* and *Hattingh*.

74 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 PNT, as guaranteed by Ratlou, and to provide the mechanism for doing so.

75 Ratlou 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.

76 If Ratlou's argument is accepted and the appeal is upheld, every settlement agreement in terms of which payment is deferred and any interest, charge or fee is payable will constitute a credit transaction. The origin or cause of the amount deferred becomes irrelevant.[47]

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

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47 Affidavit in support of the application for leave to appeal to the Constitutional Court, volume 3, page 221, para 7(k).

78 If such settlement agreements are classified as credit agreements that are governed by 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 that they ever enter into.[48] It will need to perform a creditworthiness check prior to concluding the settlement agreement.[49] In cases where the debtor is already in a precarious financial position, which in many cases is the very reason why legal proceedings are instituted in the first place, the conclusion of such a settlement agreement would almost by definition result in the granting of reckless credit. Failure to adhere to these requirements will render any settlement agreement void *ab initio*.[50]

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48 *De Bruyn NO and Others v Karsten* 2019 (1) SA 403 (SCA) at para 28.

49 Section 81(2) of the NCA:

"A credit provider must not enter into a credit agreement without first taking reasonable steps to assess—

(a) the proposed consumer's—

(i) general understanding and appreciation of the risks and costs of the proposed credit, and of the rights and obligations of a consumer under a credit agreement;

(ii) debt re-payment history as a consumer under credit agreements;

(iii) existing financial means, prospects and obligations; and

(b) whether there is a reasonable basis to conclude that any commercial purpose may prove to be successful, if the consumer has such a purpose for applying for that credit agreement."

50 Section 89(5)(a) of the NCA:

"If a credit agreement is unlawful in terms of this section, despite any other legislation or any provision of an agreement to the contrary, a court must make a just and equitable order including but not limited to an order that—

(a) the credit agreement is void as from the date the agreement was entered into;"

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

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

81 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 it 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.

82 The creditor under a settlement agreement will also be subjected to further administrative burdens such as providing regular statements of account;[51]

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51 Section 108(1) of the NCA:

"A credit provider must offer to deliver to each consumer periodic statements of account in accordance with this section."

complying with procedures prior to enforcing the debt in the settlement agreement;[52] and paying registration and annual renewal fees as a credit provider.

83 Contrary to the intended purpose of a compromise, namely to bring an end to the *lis* between the parties and to render the dispute *res iudicata*, a new and most likely more onerous claim will arise upon concluding the compromise.

84 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 justice system.

85 The steps that may be taken to avoid the application of the NCA, in paragraph 33 of Ratlou's written submissions[53], comprise a convenient hindsight exercise providing no solace to litigants who already settled their disputes, post the commencement of the NCA.

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52 Sections 129 and 130 of the NCA.

53 Page 18 – 21 of the Ratlou written submissions.

86 The risk of prescription of the settled claim is manifest, more so in light of the prohibition to seek payment of prescribed debts[54] (which may well apply if the claim is to be pursued based on unjust enrichment).

87 The example given in paragraph 33 a of Ratlou's written submissions[55], ignores that fact that no compromise rendering the dispute *res iudicata*, is achieved on the postulated scenario. The compromise will serve no purpose.

88 The prospective scenario raised in paragraph 33 b-d of Ratlou's written submissions that when concluding a settlement agreement, a creditor should forego interest that arises *ex contractu* in favour of *mora* interest, thereby avoiding the consequences of the NCA, is devoid of merit.[56] There are numerous difficulties with this proposal:

88.1 It does not cure the conundrum for creditors who embodied *ex contractu* interest in existing settlement agreements; and

88.2 *Mora* interest only arises in the event of default. As long as the

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54 Section 126B (1) *(b)*

"No person may continue the collection of, or re-activate a debt under a credit agreement to which this Act applies-

(i) which debt has been extinguished by prescription under the Prescription Act, 1969 (Act 68 of 1969); and

(ii) where the consumer raises the defence of prescription, or would reasonably have raised the defence of prescription had the consumer been aware of such a defence, in response to a demand, whether as part of legal proceedings or otherwise."

55 Ratlou's written argument, page 18 paragraph 33 a.

56 Ratlou's written argument, page 19 – 20 paragraph 33 b-d and page 35, para 58.

debtor makes timeous payment of the deferred payments, no interest will be payable.

88.3 The underlying *causa* which is being compromised may entitle the creditor to *ex contractu* interest, which may be an important aspect of that particular relationship. An example of this is if the underlying transaction is a rental agreement (such as the ones under consideration), the commercial viability of which depends on the contractual interest component. If a creditor is prevented from settling a dispute with a debtor because the finance arrangement that was previously not regulated by the NCA becomes regulated once compromised, it will stifle any potential settlement of the dispute.

88.4 Forgoing of *ex contractu* interest, where same was contractually agreed on the extinguished cause of action, will promote inconsistent treatment of credit providers, *contra* the purpose of the NCA, in section 3 (b)[57]. Ratlou effectively argues that a credit provider in circumstances such as the present, must take its medicine for pursuing the laudable exercise of settling disputes.

[57] *(b)* ensuring consistent treatment of different credit products and different credit providers;

88.5 The trigger for the application of the NCA to a settlement agreement which incorporates a deferred payment is not limited to a situation where *ex contractu* interest is charged. The NCA would also apply if the deferred payment of the settlement amount attracts a charge or fee (such as legal costs incurred[58]. In such scenarios, compromises between creditors and debtors would similarly be stifled.

88.6 The solution relied in paragraph 33 e[59], insofar as capitalisation is concerned, is undoubtedly still interest. The fact that interest is embodied in a pre-determined capital sum, does not change its nature. Similarly, a creditor, who incorporates historic *ex contractu* accrued interest in the capital sum recorded in a compromise, will still be charging interest, even if only pursuing statutory interest or even no additional interest pursuant to the compromise.

88.7 Although some settlement agreements such as divorces, maintenance claims and delictual claims may be settled without commercial interest, or may be exempted from the operation of the NCA, such is undoubtedly not the case in all instances.

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58 *Carter Trading (Pty) Ltd v Blignaut* 2010 (2) SA 46 (ECP) at par 16 – 17.

59 Ratlou's written argument, page 20-21 paragraph 33 e.

89 The fact remains, the solution of statutory interest or no interest punted by Ratlou means that a creditor to a settlement agreement, will either have to forgo interest (and perhaps also previously accrued interest) or claim statutory simple interest. It cannot be disputed, that the solutions proffered by Ratlou will stifle if not eliminate prospects of settlement, as a creditor would probably be financially worse off if it intends to settle.

90 To this end, the Court *a quo* correctly cautioned against "*the effect of the sudden unintended conversion of a non-consumer/non-credit provider relationship into one governed by the NCA and the chilling effect that would have on settlement of disputes*".[60]

E. CONCLUSION

91 MAN's arguments are summarised below:

91.1 A compromise only 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 is consistent with the approach that this Court took in the *Buffalo City* case, which entitles a court to consider the

60 The SCA judgment, volume 3, page 192, para 27.

background facts pertaining to a compromise for purposes of determining the applicability of legislation, such as the NCA, to the relationship. It is also consistent with the approach in *Endumeni* which permits a court to interrogate the underlying factual matrix for purposes of interpreting a contract.

91.2 Even if a compromise ordinarily 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 or not.

91.3 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 Ratlou has undertaken and promised to satisfy the obligations of another, namely PNT.

91.4 The fact that the settlement agreement may meet the literal definition of a credit transaction under section 8(4)(f) of the NCA (subject to the qualification in the previous paragraph), does not automatically mean that it constitutes a credit agreement that is regulated by the NCA. Section 4 of the NCA lists the types of credit agreements that the legislature decided not to regulate under the NCA. To the extent that there is any uncertainty as to what types of credit agreements ought to be 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 balances the rights and interests of both credit providers and consumers[61]. No money was advanced and no credit was granted to Ratlou pursuant to the settlement agreement. The NCA never intended to, and does not, regulate settlement agreements where the underlying dispute has

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[61] *"**3 Purpose of Act***

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, by-

(a) …
(b) ensuring consistent treatment of different credit products and different credit providers;
(c) …
(d) promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers;
(e) …
(h) providing for a consistent and accessible system of consensual resolution of disputes arising from credit agreements; and
(i) providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements."

nothing to do with the credit industry. The NCA never intended to stifle the settlement of disputes between parties that are not otherwise regulated under the NCA.

92 We submit that the application for leave to appeal and the appeal ought to be dismissed with costs on the attorney and client scale[62], including the costs of two counsel.

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13 August 2019

62 This is provided for in the settlement agreement, volume 1, page 59, para 6.2.