

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 PRACTICE NOTE

A. THE NAMES OF THE PARTIES AND THE CASE NUMBER

- 1 The details of the parties and case number appears from the heading above.

B. NATURE OF APPEAL

- 2 This is an application for leave to appeal against the judgment and order of the Supreme Court of Appeal handed down on 1 April 2019 (*"the judgment"/ "the order"*).

- 3 The applicant ("*Ratlou*") seeks leave to appeal against the whole of the order.

C. ISSUES FOR ARGUMENT

- 4 The issues to be determined are:
- 4.1 those identified in the practice note of *Ratlou*, at paragraph 3 a- b ;and
- 4.2 whether the conclusion of a compromise extinguishes the factual matrix underpinning the conclusion of the compromise, to such an extent that the Court, in assessing the compromise, is precluded from having regard to the underlying factual matrix; and
- 4.3 whether *Ratlou*, who was a credit guarantor (a surety), in terms of the underlying rental agreements concluded between Phapho Nkone Transport (Pty) Ltd ("*PNT*") and the respondent ("*MAN*"), remained a credit guarantor, pursuant to the conclusion of the settlement agreement; and
- 4.4 whether it was the intention of the legislature, that compromises, settling disputes falling outside the purview of

the National Credit Act, 34 of 2005 (*“the NCA”*), can render the NCA of application to such a compromise.

**D. PORTIONS OF THE RECORD THAT ARE TO BE READ,
FOR THE DETERMINATION OF THE MATTER**

5 The entire record is relevant and needs to be read. Please note that the applicant (Ratlou) has failed to include MAN’s answering affidavit in the application for leave to appeal. He has been requested to ensure that the record is corrected.

E. ESTIMATED DURATION

6 The argument will be completed within a day.

F. SUMMARY OF ARGUMENT

7 MAN concedes that the settlement agreement meets the definition of a credit transaction in terms of section 8(4)(f) of the NCA (if Ratlou’s liability is not that of credit guarantor), but submits that a *transactio* of this nature, where the underlying *causa* is not governed by the NCA, does not fall within the ambit of the NCA.

8 The NCA is concerned with consumer credit and more particularly the advancement of money or granting of credit. The purpose was not

to govern compromises arising out of commercial transactions or other monetary obligations not governed by the NCA.

- 9 MAN submits that 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 to the compromise concluded between the parties.
- 10 MAN submits that a Court is entitled to consider the background facts pertaining to a compromise for purposes of determining the applicability of legislation, such as the NCA, to the relationship.
- 11 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 by MAN), 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.
- 12 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. Section 4(2)(c) of the NCA specifically excludes the settlement agreement in respect of Ratlou, because the underlying obligations arising from the rental agreements were not regulated by the NCA.

- 13 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. MAN accordingly contends, that since no money was advanced and no credit was granted to Ratlou pursuant to the settlement agreement, Ratlou was a credit guarantor as was the case with the rental agreements where Ratlou bound himself as surety.
- 14 The NCA was never intended to, and does not, regulate settlement agreements where the underlying dispute has nothing to do with the credit industry.
- 15 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 irrespective of the origin of the liability.

- 16 Such an approach will traverse most fields of law and would impact on settlement agreements relating to, *inter alia*, shareholder disputes, delictual claims and labour disputes.
- 17 If such settlement agreements are found to be governed by the NCA the creditor will be required to register as a credit provider before concluding the settlement agreement, it will need to perform a creditworthiness check prior to concluding the settlement agreement (in cases where the debtor is already in a precarious financial position evinced by the default leading to the institution of proceedings) which will invariably constitute the granting of reckless credit, exposing the creditor to an order that the settlement agreement is void *ab initio*.
- 18 The creditor under a settlement agreement will also be subjected to further administrative burdens such as providing regular statements of account, complying with procedures prior to enforcing the debt in the settlement agreement, and paying registration and annual renewal fees as a credit provider.
- 19 If the settlement agreement is declared void *ab initio* 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.

- 20 If prescription does not come into play and settlement agreement is declared void *ab initio* the creditor will have to pursue its claim based on unjust enrichment, negating the intention behind the settlement of disputes, namely to render same *res iudicata*. A new and most likely more onerous claim will arise upon concluding the compromise.
- 21 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 judiciary.
- 22 MAN does not oppose the application for condonation, and does not take issue with this Court's jurisdiction.

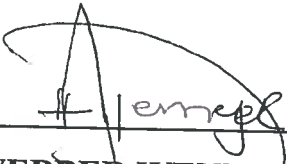
G. LIST OF AUTHORITIES

- 23 The list of authorities is annexed to this practice note.

ANDRÉ GAUTSCHI S.C.

CHRISTO VAN DER MERWE

Chambers
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13 August 2019



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