



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 416/2023

In the matter between:

CHRISTOFFEL PETRUS WOLMARANS N O	FIRST APPELLANT
EMERENTIA WOLMARANS N O	SECOND APPELLANT
TELLA HARRIS N O	THIRD APPELLANT
VAN WYK WOLMARANS N O	FOURTH APPELLANT
(First to fourth appellants in their capacity as trustees of the Wolmarans Kinder Trust, IT 962/1998)	
CHRISTOFFEL PETRUS WOLMARANS	FIFTH APPELLANT
EMERENTIA WOLMARANS	SIXTH APPELLANT

and

THE STANDARD BANK OF SOUTH AFRICA LIMITED	RESPONDENT
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Neutral citation: *Christoffel Jacobus Petrus Wolmarans N O and Others v The
Standard Bank of South Africa Limited* (416/2023) [2025]
ZASCA 150 (14 October 2025)

Coram: SCHIPPERS, KATHREE-SETILOANE, KOEN and COPPIN
JJA and STEYN AJA

Heard: 10 September 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 14 October 2025

Summary: National Credit Act 34 of 2005 (the Act) – suretyship granted in respect of credit agreement to which Act applies – settlement agreements concluded after debtor and surety defaulted made orders of court – whether Act applies to settlement agreements – whether settlement agreements are supplementary agreements – whether settlement agreements contain unlawful provisions as envisaged in s 90(2)(f) – whether debt enforcement provisions in Chapter 6, Part C of the Act applicable.

Suretyship – whether trust which stood surety in respect of a credit agreement governed by the Act excluded from the provisions of the Act – whether credit provider entitled to conclude settlement agreements to achieve enforcement outside the ambit of the Act – whether surety liable in respect of supplementary agreement. Rescission – of court orders making unlawful supplementary agreements orders of court.

ORDER

On appeal from: Free State Division of the High Court (Daffue J, sitting as a court of first instance):

1. The appellants' application to amend the Notice of Appeal is granted, with no order as to costs.
2. The appeal is upheld, save to the extent set out in paragraph 4 below.
3. The respondent is directed to pay the costs of the appeal.
4. The order of the high court is set aside and substituted with the following:
 - '1. The settlement agreements concluded on 11 February 2019 and 16 October 2020 are declared void insofar as they relate to the applicant's claim against the first to fourth respondents, representing the Wolmarans Kinder trust (the trust), the fifth respondent and the sixth respondent, for any indebtedness of the fifth respondent under account number 040743268;
 2. The claim against the trust and the fifth and sixth respondents, jointly and severally, in respect of account 040743268, is dismissed;
 3. Judgment is granted against the trust for payment of the amount of R2 098 021.87 with interest thereon at the rate of 7.5% per annum calculated from 25 June 2021 to date of payment, both days inclusive, in respect of account number 040727688;
 4. Judgment is granted against the trust for payment of the amount of R1 920 000 with interest thereon at the rate of 8.45% per annum calculated from 25 June 2021 to date of payment, both days inclusive, in respect of account number 371832152;
 5. The further claims against the trust and the fifth and sixth respondents are dismissed.

6. The orders of court dated 21 February 2019 and 12 November 2020 are rescinded and set aside.
7. The further relief claimed by the respondents against the applicant in the counter-application is dismissed.
8. The applicant is directed to pay two thirds of the respondents' costs.'

JUDGMENT

Koen JA (Schippers, Kathree-Setiloane, Coppin JJA and Steyn AJA concurring):

Introduction

[1] This appeal considers the validity, in the light of the provisions of the National Credit Act 34 of 2005 (the Act), of two settlement agreements. The settlement agreements were concluded between the Wolmarans Kinder Trust (the trust),¹ the fifth appellant, Mr Christoffel Petrus Wolmarans (Mr Wolmarans) and his wife, the sixth appellant, Mrs Emerentia Wolmarans (Mrs Wolmarans) (collectively referred to as the appellants) and the respondent, the Standard Bank of Southern Africa Limited (the bank).² The settlement agreements were concluded to resolve disputes arising from various credit agreements which the bank alleged had been breached by the appellants.

¹ The first to fourth appellants are the trustees of the trust.

² The bank is a registered credit provider in terms of the Act. A credit provider is defined in the Act as:
 '(a) the party who supplies goods or services under a discount transaction, incidental credit agreement or instalment agreement;
 (b) the party who advances money or credit under a pawn transaction;
 (c) the party who extends credit under a credit facility;
 (d) the mortgagee under a mortgage agreement;
 (e) the lender under a secured loan;
 (f) the lessor under a lease;
 (g) the party whom an assurance or promise is made under a credit guarantee;
 (h) the party who advances money or credit to another under any other credit agreement; or
 (i) any other person who acquires the rights of a credit provider under a credit agreement after it has been entered into.'

[2] The Free State Division of the High Court (the high court) concluded that the settlement agreements were valid. It granted judgment, based on the second settlement agreement, against the trust in respect of three accounts, namely account numbers 040743268, 040727688 and 371832152.³ A counter-application by the appellants to declare the settlement agreements void, and to set aside two court orders, which made the settlement agreements orders of court, and for various other forms of relief, was dismissed with costs. The appeal is with the leave of the high court.

The scope of the appeal - the amendment of the notice of appeal

[3] When the appeal came before this Court previously, it was postponed due to the appellants' failure, to include in the Notice of Appeal, the relief sought in their counter application. Subsequent thereto, the appellants applied to amend the Notice of Appeal, which amendment the bank unjustifiably opposed, but which was granted.

[4] The amendment provides that the appellants seek an order that the high court's dismissal of the counter application be set aside. In its place they seek orders that: the counter application succeeds; the settlement agreements be declared unlawful and void; the court orders in terms of which the settlement agreements were made orders of court, be rescinded; and that the bank be ordered to pay the costs of the counter-application.'

Background

[5] On 12 October 1999, Mrs Wolmarans signed a suretyship in terms of which she bound herself to the bank for the due performance of all of Mr Wolmarans'

³ Various immovable properties owned by the trust were also declared executable by the high court.

past and future obligations. On 12 July 2004, the trust bound itself as surety and co-principal debtor in favour of the bank in respect of any liability of Mr Wolmarans however arising but specifically including his liability regarding money overdrawn on any account. On 27 July 2004 Mr Wolmarans bound himself as surety in favour of the bank in respect of the trust's past and future debts to the bank.

[6] During 2013 the trust concluded two medium term loan agreements under account numbers 040727688⁴ and 371832152 with the bank. In terms of these agreements amounts of R2 000 000 and R3 500 000 were advanced by the bank to the trust.

[7] Mr Wolmarans has over the years operated various overdraft facilities with the bank. In terms of an overdraft agreement (credit transaction) dated 9 November 2017, this facility was, under account number 040743268, increased to R12 490 000. The debt was repayable in one month and interest would accrue on the balance owing at the bank's prime rate plus 6.05% per annum.

[8] When the appellants defaulted on the agreements, the bank required them to sign a settlement agreement incorporating a power of attorney (the first settlement agreement). It was signed by the appellants on 4 December 2018 and by the bank on 11 February 2019. Its terms will be referred to below.

[9] The appellants defaulted on the first settlement agreement. The bank consequently required them to sign a further settlement agreement and power of attorney (the second settlement agreement). It was signed by the appellants on 29 September 2020 and by the bank on 16 October 2020.

⁴ Wrongly referred to as account 040727668 in the first settlement agreement.

[10] The first settlement agreement was made an order of court on 21 February 2019. The second settlement agreement was made an order of court on 12 November 2020.

[11] In terms of the second settlement agreement, the appellants, whether as principal debtors or sureties, acknowledged themselves to be indebted with interest to the bank in the sum of:

- (a) R7 039 679.87 in respect of account 040743268, but whereas the interest rate in terms of the original credit facility extended to Mr Wolmarans was the bank's prime rate plus 6,05% per annum, it had been varied to a fixed rate of 16.05% per annum on a principal debt of R15 208 655.15 from 25 October 2018 in the first settlement agreement, and was now, in the second settlement agreement, fixed at a rate of 13.05% per annum calculated from 25 August 2020 to date of payment;
- (b) R1 920 000 in respect of account 371832152. The interest rate in terms of the original credit agreement was the bank's prime rate plus 0.5% per annum. This was varied to the bank's prevailing prime rate plus 1.45% per annum on R960 000 and thereafter the prime rate plus 4.50% per annum, from 25 October 2018 to date of payment in the first settlement agreement. The interest rate fixed in the second settlement agreement was 8.45% per annum, calculated from 25 August 2020 to date of payment;
- (c) R2 098 021.87 in respect of account 040727688. The interest rate in terms of the original credit agreement was the bank's prime rate plus 0.5% per annum. This was varied to the bank's prevailing prime rate plus 0.350% per annum on the first R1 750 000 and thereafter the prime rate plus 3% per annum on the remaining balance, from 25 October 2018 to date of payment in the first settlement agreement. The interest rate in the second settlement

agreement was a fixed rate of 7.50% per annum calculated from 25 August 2020 to date of payment; and

- (d) R9 808.08 in respect of account 372912974, with interest thereon at the rate of 13.50% per annum from 25 August 2020 to date of payment.⁵

[12] The original agreements in respect of the accounts referred to in paragraphs 6 and 7 above provided for varying terms of repayment. The first settlement agreement required the appellants to pay the outstanding amounts referred to therein and all legal costs, including the costs of making the first settlement agreement an order of court, within 9 months from the date of its signature. In the second settlement agreement the appellants undertook to reduce the outstanding balances by a minimum of 50% of the total indebtedness within 6 months from the date of its signature, with the remaining balance to be settled within 3 months thereafter.

[13] The settlement agreements further inter alia: recorded that the trust, as owner, had mortgaged various immovable properties as security for its indebtedness; provided for the sale of the immovable properties owned by the trust; recorded that the trust was in default of its obligations; acknowledged that to extinguish its indebtedness, whether entirely or partially, it had to realise the immovable properties; instructed the bank as its duly authorised agent to sell the properties on its behalf; irrevocably and *in rem suam* (for its own sake) granted to the bank, as sole and exclusive agent, the power of attorney to find a willing and able buyer to sell the properties at a purchase price and on such terms and conditions as the bank may in its discretion decide; and authorised the bank to sign on behalf of the trust, any documents necessary to conclude and finalise the sale of the properties, effectively as a form of *parate executie* (immediate execution

⁵ The first settlement agreement also provided for an amount of R613 852.78 in respect of an account 252949056 with interest thereon. The bank did not pursue any claim based on this account or account 372912974 included in the second settlement agreement before the high court.

without judicial oversight).⁶ Both settlement agreements recorded that should the appellants fail to make payment as agreed, the bank could proceed, after seven days' written notice to them, to obtain judgment for the total balance outstanding, with interest and costs, issue a writ of execution and sell the 14 immovable properties owned by the trust.

[14] Provision was made in both settlement agreements for the insertion of a *domicilium* address, but this space was left blank. The first agreement provided for all legal costs, on a party and party basis, including the costs of making the agreement an order of court, to be paid by the appellants. It also provided that if the bank proceeded to obtain judgment, the legal costs would be payable on an attorney and client scale. The second settlement agreement provided that the appellants would be liable for all taxed attorney and own client costs and the costs of making the agreement an order of court.

[15] In the second settlement agreement the appellants also renounced the benefits of the legal exceptions '*non numeratae pecuniae*' (the defence of never having received the loan), '*non causa debiti*' (the defence that there is no underlying cause for the debt), '*errore calculi*' (the defence of an error in calculation), revision of account, no value received and all other exceptions that could be pleaded to the validity or enforceability of the agreement. They also agreed that they would have no claim of whatever nature against the bank, in respect of any act or omission which may arise from acts committed by the bank in order to give effect to the power of attorney and indemnified the bank against any such claims.

⁶ On which see *Absa Bank Limited v Johan Serfontein and Another* [2025] ZASCA 11; [2025] 2 All SA 1 (SCA); 2025 (3) SA 345 (SCA) (*Serfontein*) paras 30-37.

[16] In essence, the first and second settlement agreements: allowed an extension of time to make payment of the credit extended to Mr Wolmarans; provided for different interest rates and terms of repayment; facilitated obtaining judgment on shorter notice; and provided for the disposal of immovable properties of the trust, without judicial intervention and oversight.

[17] In a without prejudice letter sent on behalf of the bank dated 7 April 2021, the appellants were advised that they had ‘failed to comply with conditions’⁷ as stipulated in the second settlement agreement . . .’. They were required to rectify their default within 7 days, failing which the bank would proceed for the full balance outstanding.

[18] On 26 August 2021, the bank launched an application against the trustees of the trust, Mr Wolmarans and Mrs Wolmarans, for judgment jointly and severally, the one or more paying the other(s) to be absolved, in the amounts reflected in the second settlement agreement.⁸ In addition, the bank claimed an order that the 14 immovable properties of the trust be declared specially executable⁹ and that the appellants pay the costs of suit on an attorney and client scale.

[19] The appellants filed a counter-application, seeking an order that both settlement agreements be declared void in terms of ss 89, 90 and 91 of the Act, alternatively declaring that the extension of credit to Mr Wolmarans was reckless, as envisaged in s 83 of the Act. They also sought the rescission of the two court orders in terms of which the settlement agreements were made orders of court. Further, they claimed other relief and disputed the amount of their alleged

⁷ No specific default was identified.

⁸ These amounts are set out in paragraph 11(a),(b) and (c) above.

⁹ It is not necessary to refer to the descriptions of these properties in the light of the conclusion which has been reached in this appeal.

indebtedness. They also sought to invoke the provisions of s 110¹⁰ of the Act and demanded an account of their indebtedness and a debatement thereof.

The high court's judgment

[20] The high court concluded: that the trust is a juristic person as it has more than three trustees;¹¹ that the provisions of the Act do not apply to it as its annual turnover, which was not disputed, exceeds the threshold value of R1 million per annum determined by the Minister for the purposes of s 4(1)(a)(i);¹² and accordingly, that the provisions of the Act do not apply to the medium-term loans concluded by the trust under account numbers 040727688 and 371832152. The high court further found: that the settlement agreements were not supplementary agreements as they did not supplement the original credit agreements; that the settlement agreements were therefore not subject to the provisions of the Act and were valid; and that the appellants had failed to show that the two settlement

¹⁰ Section 110(1) provides:

‘At the request of a consumer, a credit provider must deliver without charge to the consumer a statement of all or any of the following –

- (a) the current balance of the consumer's account;
- (b) any amounts credited or debited during a period specified in the request;
- (c) any amounts currently overdue and when each such amount became due; and
- (d) any amount currently payable and the date it became due.’

¹¹ A ‘juristic person’ is defined in s 1 of the Act to include:

‘... a trust if –

- (a) there are three or more individual trustees; or
- (b) the trustee is itself a juristic person, but does not include a stokvel.’

¹² Section 4(1)(a)(i) provides:

‘Application of Act

(1) 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 an 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 the agreement is made, equals or exceeds the threshold value determined by the Minister in terms of section 7 (1);

...

Section 5 provides for the limited application of the Act to an incidental credit agreement and does not apply to this appeal.

Section 6 provides:

‘The following provisions of this Act do not apply to a credit agreement or proposed credit agreement in terms of which the consumer is a juristic person:

- (a) Chapter 4 – Parts C and D;
- (b) Chapter 5 – Part A – section 89(2)(b);
- (c) Chapter 5 – Part A – Section 90(2)(o);
- (d) Chapter 5 – Part C.’

agreements and the court orders which made them orders of court, should be rescinded and set aside.

[21] As regard enforcement of the terms of the second settlement agreement against Mr and Mrs Wolmarans, the high court concluded that the defence of a failure to comply with the enforcement procedure in s 129¹³ of the Act was available to Mr and Mrs Wolmarans. It expressed the view that ‘[a]lthough a strong argument may be made out that no notice as contemplated by s 129 was required, [it] would rather err on the side of caution and not grant orders against [them] . . .’.

[22] The high court accordingly confined its judgment, in respect of account 040743268, for Mr Wolmarans’ overdraft liability (R8 121 792.19 with interest at 13.05% per annum calculated from 25 June 2021), to the trust. In addition, it

¹³ Section 129 in part provides:

‘Required procedures before debt enforcement

(1) If the consumer is in default under a credit agreement, the credit provider –

(a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and

(b) subject to section 130 (2), may not commence any legal proceedings to enforce the agreement before –

(i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86 (10), as the case may be; and

(ii) meeting any further requirements set out in section 130.

(2) . . .

(3) Subject to subsection (4), a consumer may at any time before the credit provider has cancelled the agreement, remedy a default in such credit agreement by paying to the credit provider all amounts that are overdue, together with the credit provider’s prescribed default administration charges and reasonable costs of enforcing the agreement up to the time the default was remedied.

(4) A credit provider may not reinstate or revive a credit agreement after-

(a) the sale of any property pursuant to-

(i) an attachment order; or

(ii) surrender of property in terms of section 127;

(b) the execution of any other court order enforcing that agreement; or

(c) the termination thereof in accordance with section 123.

(5) The notice contemplated in subsection (1)(a) must be delivered to the consumer-

(a) by registered mail; or

(b) to an adult person at the location designated by the consumer.

(6) The consumer must in writing indicate the preferred manner of delivery contemplated in subsection (5).

(7) Proof of delivery contemplated in subsection (5) is satisfied by –

(a) written confirmation by the postal service or its authorised agent, of delivery to the relevant post office or postal agency; or

(b) the signature or identifying mark of the recipient contemplated in subsection (5)(b).’

granted judgment against the trust in respect of the trust's indebtedness as principal debtor under account numbers 040727688 (R2 098 021.87 with interest at 7.5% per annum calculated from 25 June 2021) and 371832152 (R1 920 000 with interest at 8.45% per annum from 25 June 2021). It declared 12 immovable properties executable (two of the properties which it considered to be primary residences were omitted), but suspended the execution until 31 July 2022. It also awarded attorney and client costs against the trust.

[23] No order was made in respect of the unsuccessful claims against Mr and Mrs Wolmarans. Seemingly, this was an oversight. Counsel were agreed that to achieve finality, this Court should cure this omission by making such order in that regard, as may be appropriate. This will be addressed in the order below.

The contentions of the appellants

[24] In their heads of argument the appellants contended, in brief: that the provisions of the Act, notably ss 89, 90 and 91 of the Act and the enforcement procedures prescribed in s 129 and s 130, apply to the second settlement agreement; that the settlement agreements constitute unlawful supplementary agreements; that the orders making the settlement agreements orders of court should be rescinded; and that the enforcement procedures prescribed by the Act were not complied with. Accordingly, the appellants argued that the monetary judgments should not have been granted by the high court, and the immovable properties should not have been declared executable.

[25] The appellants rightly did not, in argument, persist with disputing the liability of the trust in respect of accounts 040727688 and 371832152. But they persisted with disputing the trust's liability as surety with regard to the indebtedness of Mr Wolmarans in respect of account 040743268.

Discussion

[26] The Act identifies four categories of credit agreements: ¹⁴ a credit facility, ¹⁵ a credit transaction, ¹⁶ a credit guarantee, ¹⁷ and any combination of these. In terms of s 4(1), the Act generally applies to every credit agreement between parties dealing at arm's length and made within or having an effect within, the Republic.

[27] The high court correctly concluded that the trust is a juristic person and that the Act does not apply to the two medium term credit agreements which the trust

¹⁴ Section 8(1) provides that:

‘. . . an agreement constitutes a credit agreement for the purposes of this Act if it is –

- (a) a credit facility, as described in subsection (3);
- (b) a credit transaction, as described in subsection (4);
- (c) a credit guarantee, as described in subsection (5); or
- (d) any combination of the above.’

¹⁵ Section 8(3) provides that a ‘credit facility’ is:

‘An agreement, irrespective of its form but not including an agreement contemplated in subsection (2) or section 4(6)(b), constitutes a credit facility if, in terms of that agreement –

- (a) a credit provider undertakes –
 - (i) to supply goods or services or to pay an amount or amounts, as determined by the consumer from time to time, to the consumer or on behalf of, or at the direction of, the consumer; and
 - (ii) either to –
 - (aa) defer the consumer's obligation to pay any part of the cost of goods or services, or to repay to the credit provider any part of an amount contemplated in subparagraph (i); or
 - (bb) bill the consumer periodically for any part of the cost of goods or services, or any part of an amount, contemplated in subparagraph (i); and
- (b) any charge, fee or interest is payable to the credit provider in respect of-
 - (i) any amount deferred as contemplated in paragraph (a)(ii)(aa); or
 - (ii) any amount billed as contemplated in paragraph (a)(ii)(bb) and not paid within the time provided in the agreement.

¹⁶ Section 8(4) defines a credit transaction as:

‘An agreement, irrespective of its form but not including an agreement contemplated in subsection (2), constitutes a credit transaction if it is –

- (a) a pawn transaction or discount transaction;
- (b) an incidental credit agreement, subject to section 5(2);
- (c) an instalment agreement;
- (d) a mortgage agreement or secured loan;
- (e) a lease; or

...’

Section 8(4)(f) includes in the definition of ‘credit transaction’:

‘any other agreement, other than a credit facility or 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.’

¹⁷ ‘Credit guarantee’ is defined in terms of s 8(5) to mean:

‘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.’

concluded as a consumer.¹⁸ Judgment was correctly granted by the high court in respect of accounts, numbers 040727688 and 371832152.¹⁹

[28] The position regarding the liability of the trust as surety for the indebtedness of Mr Wolmarans in respect of his overdraft facility under account 040743268, is however different. It is not in dispute that the provisions of the Act apply to the underlying credit agreement upon which Mr Wolmarans' liability to the bank under account 040743268 is founded. The issues arising are:

- (a) Whether the Act is applicable to the suretyship in terms of which the trust stood surety for the overdraft indebtedness of Mr Wolmarans.
- (b) Whether the settlement agreements constitute unlawful supplementary agreements as contemplated by s 89(2)(c), s 90(2)(f) and s 91(2) of the Act.
- (c) Whether the bank could conclude the settlement agreements and enforce the second settlement agreement against the trust without first complying with the peremptory debt enforcement provisions of Chapter 6, Part C of the Act.
- (d) Whether the settlement agreements contained provisions that would be unlawful if contained in a credit agreement.
- (e) Whether the court orders, making the settlement agreements orders of court, should be rescinded and set aside.
- (f) Whether the trust's properties should have been declared executable.

These are considered, in turn, below.

¹⁸ A consumer is defined as:

'(a) the party to whom goods or services are sold under a discount transaction, incidental credit agreement or instalment agreement;

(b) the party to whom money is paid, or credit granted, under a pawn transaction;

(c) the party to whom credit is granted under a credit facility;

(d) the mortgagor under a mortgage agreement;

(e) the borrower under a secured loan;

(f) the lessee under a lease;

(g) the guarantor under a credit guarantee; or

(h) the party to whom or at whose direction money is advanced or credit granted under any other credit agreement.'

¹⁹ In their answering affidavit, the appellants also challenged the correctness of the calculation of the balances claimed on the various accounts. The high court concluded in that regard that the appellants' contentions were 'clearly incorrect'. The appellants have not pursued that defence further. Additional defences, for example invoking s 110 in the counter-application in respect of accounts 040727688 and 371832152 likewise fail, because being a provision in the Act, they are not available to the trust. The trust did not persist with these defences.

Is the Act applicable to the suretyship granted by the trust for the indebtedness of Mr Wolmarans in respect of a credit agreement governed by the Act?

[29] It is not in dispute that the suretyship satisfies the definition of a credit guarantee as contemplated in s 8(5) of the Act. Both the agreement in respect of Mr Wolmarans' facility and the suretyship provided by the trust, are therefore credit agreements. The trust, as guarantor under the credit guarantee, is also a consumer as defined.²⁰

[30] Section 4(1)(a)(i) provides that the Act does not apply to a juristic person whose asset value or annual turnover exceeds the value determined by the Minister. It was common cause that the trust has an asset value or turnover which exceeds the value determined by the Minister. The exclusion in s 4(1)(a)(i) is however itself subject to the exclusion in s 6, that certain provisions of the Act, notably ss 89(2)(c) and 90(o), do not apply to juristic persons. Whatever uncertainty there may be, whether the provisions of the Act, excluding ss 89(2)(c) and 90(o), apply to juristic persons only if their turnover does not exceed the value determined by the Minister, is removed by the provisions of s 4(2), which expressly ascribes its existence to providing greater certainty.

[31] Section 4(2) of the Act provides that:

‘For greater certainty in applying subsection (1)²¹

(a) . . .

(b) . . .

²⁰ Paragraph (g) of the definition of ‘consumer’ provides that in respect of a credit agreement to which the Act applies, means –

. . .

((f) the guarantor under a credit guarantee; . . .’

²¹ Section 4(1)(a)(i) provides that the Act does not apply where the consumer is a juristic person whose asset value or annual turnover at the time the agreement is made, equals or exceeds the threshold value determined by the Minister.’

(c) this Act applies to a credit guarantee only to the extent that the Act applies to the credit facility or credit transaction in respect of which the credit guarantee is granted . . .’

In terms of s 4(4)(b), if the Act applies to a credit agreement –

‘(a) . . .

(b) it applies in relation to every transaction, act or omission under that agreement . . .’

[32] The exclusion in s 4(1)(a)(i) does not qualify the unequivocal terms of s 4(2)(c) that the Act applies to a credit guarantee to the extent that the Act applies to the credit facility, or credit transaction, in respect of which the credit guarantee is given. But the provisions of the Act apply only to that extent.

[33] Although both a credit receiver and a credit guarantor respectively, fall within the definition of ‘a consumer’, it is important to keep in mind the following statement made in *Mostert and Others v Firstrand Bank t/a RMB Private Bank (Mostert)*:

‘The definition of “consumer” in s 1 of the NCA includes a guarantor under a credit guarantee. A credit guarantee is a credit agreement that meets all the criteria set out in s 8(5). It suffices to say that s 8(5) includes a suretyship in respect of the obligations in terms of a credit facility or credit transaction. Thus, a surety is a consumer in respect of the credit agreement to which he or she is a party, that is, the suretyship. In terms of s 4(2)(c) the NCA applies to a credit guarantee only to the extent that it applies to a credit facility or credit transaction in respect of which the credit guarantee is granted. A surety may thus remedy a default in respect of the suretyship in terms of s 129(3). The surety is not, however, a consumer in respect of the credit agreement in respect of which the suretyship was granted. The surety may make payment of arrears on behalf of the consumer but that will not always be the case.’²²

When the bank seeks to enforce its claim against the trust, it is enforcing the claim as against a consumer under the credit guarantee, and not as against a consumer of any obligation in terms of the underlying credit transaction. The legal status of a

²² *Mostert and Others v Firstrand Bank t/a RMB Private Bank* [2018] ZASCA 54; 2018 (4) SA 443 (SCA) (*Mostert*) para 28.

credit guarantee is, as concerns the application of the Act, contingent on the legal status of the underlying principal debt.²³

[34] There would be no need to provide for the application of the Act in respect of a credit guarantee, to the same extent as the Act applies to the credit agreement in respect of which it was granted, if the application of the Act would in any event be excluded where the credit guarantor is a juristic person contemplated in s 4(1)(a)(i). Seeking to favour an interpretation that s 4(2)(c) means that the provisions of the Act would only apply to a credit guarantee, if the guarantor is a juristic person with a turnover of less than that determined by the Minister, would be to draw an arbitrary distinction between two categories of juristic person guarantors, and, in context, will also violate the common law nature of suretyship.

[35] The common law position is that a suretyship is an accessory obligation to the principal obligation undertaken by a debtor towards a creditor. Even where a surety accepts liability as surety and co-principal debtor, it does not change the accessory nature of the suretyship and make the surety a co-debtor.²⁴ A credit provider cannot have a valid claim against a surety when it has no valid claim against the principal debtor.²⁵ If the credit agreement concluded by Mr Wolmarans is, or for any reason had become void, unlawful or otherwise unenforceable against him as the principal debtor, because of the application of any provisions of the Act,

²³ *Firststrand Bank Ltd v Carl Beck Estates (Pty) Ltd* 2009 (3) SA 384 (T) (*Carl Beck*) addressed the opposite scenario: a natural person surety for a juristic person's large credit agreement (a mortgage bond) that was not governed by the provisions of the Act.²³ The court held that the Act does not apply to a suretyship if the principal debt is not a credit agreement to which the Act applies. But the contrary would be the case when the underlying debt is governed by the Act. A juristic entity does not shed those rights as surety; rather, its protection under the Act depends on whether the guarantee qualifies in terms of s 8(5) and under s 4(2)(c).

²⁴ *Liberty Group Ltd v Illman* [2020] ZASCA 38; 2020 (5) SA 397 (SCA) para 20.

²⁵ See *Shabangu v Land and Agricultural Development Bank of South Africa and Others* [2019] ZACC 42; 2020 (1) SA 305 (CC); 2020 (1) BCLR 110 (CC), where the Constitutional Court held that a suretyship cannot survive where the underlying obligation is invalid; *Cape Produce Co (Port Elizabeth)(Pty) Ltd v Dal Maso and Another NNO* 2002 (3) SA 752 (SCA), where the SCA held that if a principal debtor was immune from suit for payment because of non-fulfilment of a condition provided for in a subordination agreement, then as long as that endures, the creditor's cause of action is incomplete and that affects proceedings against the surety, as the surety's liability is accessory to that of the principal debtor.

then those provisions of the Act should similarly apply to the credit guarantee, to the same extent that they apply to the credit agreement.

[36] Properly interpreted, the Act applies to the suretyship granted by the trust in respect of the overdraft agreement of Mr Wolmarans. It applies to the same extent that the provisions of the Act, whether it be s 89(2)(c), s 90(2)(f), s 91(2), s 129, s 130, or any other provision, apply to the underlying credit agreement giving rise to his indebtedness in respect of account 040743268.

Were the settlement agreements unlawful supplementary agreements in terms of ss 89(2)(c), 90(2)(f) and 91(2)?

[37] Section 91 provides:

‘Prohibition of unlawful provisions in credit agreements and supplementary agreements

(1) A credit provider must not directly or indirectly, by false pretences or with the intent to defraud, offer, require or induce a consumer to enter into or sign a credit agreement that contains an unlawful provision as contemplated in section 90.

(2) A credit provider must not directly or indirectly require or induce a consumer to enter into a supplementary agreement or sign any document, that contains a provision that would be unlawful if it were included in a credit agreement.’

[38] The bank, as credit provider, required the appellants, as contemplated by s 91(2), to enter into and sign²⁶ the settlement agreements. The bank was not entitled to do so if the settlement agreements were supplementary agreements²⁷ and hence unlawful, or contained provisions that would be unlawful if included in a credit agreement.²⁸

²⁶ The meaning of required to sign was considered in *Serfontein* para 38 to 45. As with the consumers in *Serfontein* the appellants faced the threat of legal proceedings and had no option but to accede. The bank has not argued to the contrary.

²⁷ As contemplated in s 89(2)(c).

²⁸ As provided in s 90.

[39] Section 89²⁹ of the Act provides, in relevant part, that:

‘(2) Subject to subsections (3) and (4), a credit agreement is unlawful if –

...

(c) it is a supplementary agreement or document prohibited by section 91(a)³⁰

...’

[40] The Act does not define what constitutes a supplementary agreement. The phrase has however been interpreted, in the context of the Act, to include any ancillary document or arrangement relating to an existing credit agreement. This Court in *National Credit Regulator v Lewis Stores (Pty) Ltd (Lewis Stores)* observed that an agreement can only be supplementary if it deals with the same subject matter as the main agreement. It held that:

‘The starting point in interpreting the legislation, of necessity, is to give consideration to ‘the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears, the apparent purpose to which it is directed and the material known to those responsible for its production. The *Shorter Oxford English Dictionary* defines ‘supplementary’ as ‘of the nature of, forming, or serving as, a supplement’. ‘Supplement’, in turn, is defined as ‘something added to supply a deficiency; an auxiliary means, an aid;’ or ‘a part added to complete a literary work or any written account or document.’ Giving the term its ordinary English meaning in the context of chapter 5 of the NCA, an agreement can only, in my view, be ‘supplementary’ if it deals with the same subject matter as the main agreement, ie the regulation of the credit and repayment thereof. Examples of supplementary agreements that spring to mind would be documents acknowledging that no representations had been made to the consumer, a waiver of statutory rights or an acknowledgment of receipt of goods in good order and condition.’³¹

²⁹ As in *Serfontein*, sections 89, 90 and 91 in chapter 5 of the Act which are aimed at the protection of the consumer by outlawing certain agreements between credit providers and consumers; prohibiting the inclusion of certain unlawful clauses in those agreements; and prohibiting certain conduct by credit providers, are important in this appeal.

³⁰ The reference in s 89(2) to s 91(a) is incorrect, as the latter subsection is no longer designated as such, but as s 91(2).

³¹ *National Credit Regulator v Lewis Stores (Pty) Ltd and Another* [2019] ZASCA 190; 2020 (2) SA 390 (SCA); [2020] 2 All SA 31 (SCA) (*Lewis Stores*) para 32.

[41] Identifying an agreement as supplementary thus focuses on the agreement's purpose, rather than its formal structure. It requires a direct relationship between the supplementary agreement and the underlying credit arrangement's essential subject matter.³²

[42] In *Serfontein* this Court, applying the *Lewis Stores* test, concluded on the facts of that case that the agreement, an acknowledgement of debt and power of attorney granted as part thereof, similar to the settlement agreements in this appeal, dealt with the same subject matter as the underlying main agreement. The purpose thereof was to record: a concession of indebtedness; that obligations had been defaulted upon; that the amounts outstanding were due and payable; that revised interest rates and a revised repayment schedule would apply, which inevitably affect credit regulation; and that the immovable properties were to be sold.³³

[43] In this matter, the two settlement agreements: modified and added credit terms to the credit agreement applying to Mr Wolmarans' liability; were not simply dispute resolution mechanisms; and dealt with the same subject matter as the main credit agreement concluded by Mr Wolmarans. The underlying credit agreement and the settlement agreements were intrinsically intertwined, with the latter supplementing the former. The underlying credit agreement and the settlement agreements all impacted on the credit provider-consumer relationship, which is regulated by the Act. As with the acknowledgement in *Serfontein*, the settlement agreements are supplementary agreements.³⁴

³² The jurisprudence of this Court establishes that not all settlement agreements or acknowledgments of debt fall within the ambit of the Act. In *Ratlou v Man Financial Services (Pty) Ltd* [2019] ZASCA 49; 2019 (5) SA 117 (SCA) this Court endorsed a purposive approach to determining whether the NCA applies to agreements of compromise. This involves examining the relationship between the underlying *causa* (cause) and the settlement agreement. This Court concluded that the Act was not designed to regulate settlement agreements where the underlying agreements or cause would not have been considered by the Act. In that case, the underlying agreement – a rental agreement for trucks – did not fall within the ambit of the Act because it was a large agreement, hence the subsequent acknowledgment of debt also fell beyond the ambit of the Act.

³³ *Serfontein* fn 6 above para 26.

³⁴ The express terms of the settlement agreements provided that they did not novate the original underlying credit agreements underlying the settlement agreements and reliance could be placed on those agreements. The bank's

[44] Being supplementary agreements and in terms of s 89(2)(c) unlawful, s 89(5) of the Act provides that:

‘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.
- (b) and (c) . . .’

[45] As regards the claim against the trust in respect of the liability of Mr Wolmarans under account 040743268, the settlement agreements therefore fall to be declared void. It was rightly not suggested that there was another order which may be just and equitable. The bank may, if so advised, proceed against the appellants in terms of the underlying credit facility and credit guarantee.

[46] The settlement agreements are not unlawful in respect of accounts 040727688 and 371832152, as s 89 and the other provisions of the Act do not apply to those accounts. No just and equitable order is therefore competent, as regards the liability of the trust as consumer and principal debtor under those accounts.

[47] Since the above conclusions are dispositive of the appeal, insofar as it concerns the claim in respect of account 040743268, it is strictly unnecessary to consider: whether compliance with the enforcement procedure was required in respect of the trust’s liability in respect of that account; and whether the settlement agreements included unlawful provisions and the effect thereof. I accordingly comment only briefly on those issues.

claim in the high court was however not based on the underlying credit agreement, but on the defaults by Mr Wolmarans and the trust, of the terms of the second settlement agreement and must be adjudicated as such.

Could the bank proceed to enforce the settlement agreements without first complying with the peremptory debt enforcement provisions of Chapter 6, Part C of the Act?

[48] The debt enforcement provisions, contained in Chapter 6 Part C (ss 129³⁵ to 133) of the Act, establish a procedural framework designed to protect consumers before credit providers may resort to litigation. They require: first, that consumers receive specific information about their default, so it can be remedied; second, to inform them of their rights to seek debt counselling or alternative dispute resolution by the consumer court or an ombud, thus avoiding legal proceedings; and third, advising consumers of the proposed enforcement action so they understand the consequences of failing to address their default.

[49] The procedures are compulsory.³⁶ Further, s 129 and s 130 further prescribe jurisdictional prerequisites which are required to be satisfied before legal proceedings may commence.³⁷ Legal proceedings will include the bank's applications to make the settlement agreements orders of court, particularly where such applications effectively seek to achieve the same result as contested enforcement proceedings.³⁸

³⁵ Quoted in footnote 13 above.

³⁶ The Constitutional Court in *Sebola and Another v Standard Bank of South Africa Ltd and Another* [2012] ZACC 11; 2012 (5) SA 142 (CC); 2012 (8) BCLR 785 (CC) para 45 remarked that:

'Although section 129(1)(a) says the credit provider "may" draw the consumer's default to his or her notice, section 129(1)(b)(i) precludes the commencement of legal proceedings unless notice is first given. So, in effect, the notice is compulsory.'

³⁷ *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic and Others; Mavava Trading 279 (Pty) Ltd and Others v University of Stellenbosch Legal Aid Clinic and Others* [2016] ZACC 32; 2016 (6) SA 596 (CC); (2016) 37 ILJ 2730 (CC); 2016 (12) BCLR 1535 (CC) (*University of Stellenbosch*) para 22. The Constitutional Court in *University of Stellenbosch* said:

'Both sections 129(1)(b) and 130(1) preclude the credit provider from instituting litigation before satisfying their requirements. The National Credit Act considers compliance with those requirements to be so pivotal to debt collection that it even suspends the exercise of judicial power by the courts to adjudicate disputes arising from credit agreements.'

³⁸ That conclusion is consistent also with the broad scope of the prohibition and the meaning of s 129(1)(b), which was explained by the Constitutional Court in *University of Stellenbosch* paras 22-23, as follows:

'In this regard section 130(3)(a) provides:

"Despite any provision of law or contract to the contrary, any proceedings commenced in a court in respect of a credit agreement to which this Act applies, the court may determine the matter *only if the court is satisfied that*—
(a) in the case of proceedings to which sections 127, 129 or 131 apply, the procedures required by those sections have been complied with."

This interpretation is also consistent with the Constitutional Court’s analysis in *Eke v Parsons*, regarding the status and effect of settlement orders.³⁹

[50] The settlement agreements could not, by providing for enforcement after a period of seven days only, be employed to override fundamental prohibitions of the Act, despite making them orders of court, or, relying on the second settlement agreement specifically, to obtain the relief for which judgment was granted by the high court. Any term, in conflict with the provisions of the Act, is unlawful, and, on the authority of this Court’s decision in *Serfontein*, void. Permitting credit providers to circumvent these requirements through settlement would undermine the purpose of the Act.⁴⁰ The approach by the bank conflicts with the Constitutional Court’s jurisprudence, in for example, *University of Stellenbosch*, that the provisions of the Act and the statutory safeguards it provides must be observed in substance.

[51] That compliance with the enforcement procedures was required is also consistent with the nature of a suretyship. If the enforceability of the credit agreement concluded by Mr Wolmarans can be resisted in terms of the provisions of the Act, then, the surety should also, in the wording of s 4(2)(c) to that extent, likewise be entitled to resist enforcement.

What emerges from the text of this section is the fact that it supersedes “any provision of law or contract to the contrary” and obliges a court to adjudicate a dispute arising from a credit agreement “only if the court is satisfied” that the procedures required by sections 127, 129 and 131 have been complied with. If not, the power to adjudicate remains suspended until there is compliance with the steps set out in the court order that adjourns the proceedings.’

³⁹ *Eke v Parsons* [2015] ZACC 30; 2015 (11) BCLR 1319 (CC); 2016 (3) SA 37 (CC) para 31 held: ‘[t]he effect of a settlement order is to change the status of the rights and obligations between the parties. Save for litigation that may be consequent upon the nature of the particular order, the order brings finality to the *lis* between the parties; the *lis* becomes *res judicata*’.

⁴⁰ The purpose and ambit of the Act is to strike a balance between protecting consumers and fostering a sustainable credit market. As stated in the preamble and s 3, the objectives of the Act include ‘to promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, to protect consumers, and to advance the social and economic welfare of South Africans’. These objectives form the foundation for interpreting every provision of the Act.

The unlawful provisions

[52] Section 90(1) of the Act provides that a credit agreement must not contain an unlawful provision. The settlement agreements contain provisions that would be unlawful if included in the underlying credit agreement and/or the credit guarantee, or are in contravention of the Act. These include:

- (a) Provisions which directly or indirectly defeat the purposes of the Act, in contravention of s 90(2)(a): such as requiring the appellants to pay attorney and own client costs in contravention of s 101(1)(g)⁴¹ of the Act read with the credit regulations; and not obtaining and noting a preferred address for service from the appellants, nor the method of delivery of notices as required by s 129(5) and (6) of the Act.⁴²
- (b) Provisions which directly or indirectly purport to waive or deprive a consumer of any right set out in the Act, or avoid a credit provider's obligation or duty in terms of the Act, in contravention of s 90(2)(b): such as that the bank may proceed to obtain judgment after 7 days' notice to the appellants, which is in breach of s 123,⁴³ 129 and 130, or requiring the appellants to pay costs on the attorney and own client scale in contravention of s 101(1)(g).
- (c) Provisions which purport to waive any common law rights, such as the renunciation of the exceptions *non causa debiti*, *non numeratae pecuniae* and *errore calculi*, in contravention of s 90(2)(c) read with regulation 32(5) of the National Credit Regulations 2006, published in GN R489.

⁴¹ Section 101(1)(g) provides:

'collection costs, which may not exceed the prescribed maximum for the category of credit agreement concerned and may be imposed only to the extent permitted by Part C of Chapter 6.

⁴² Section 129(5) and (6) provide:

'(5) The notice contemplated in subsection (1) (a) must be delivered to the consumer-

(a) by registered mail; or

(b) to an adult person at the location designated by the consumer.

(6) The consumer must in writing indicate the preferred manner of delivery contemplated in subsection (5).'

⁴³ Section 123 provides that a credit provider can only terminate a credit agreement in terms of the provisions of s 129 and 130.

- (d) Provisions purporting to exempt the credit provider from liability for any act, omission or representation by a person acting on behalf of the credit provider, in contravention of s 90(2)(g).
- (e) Provisions allowing for the grant of a power of attorney in advance in respect of any matter related to the granting of credit in terms of the Act, and authorising the bank to sign documents on behalf of the appellants as their agent, appointing the bank as an agent of the appellants for any purpose other than those contemplated in s 102, and permitting the sale of the trust's immovable property without recourse to law,⁴⁴ in contravention of s 90(2)(j).
- (f) Provisions allowing for the sale of the properties in the sole discretion of the bank with no safeguard that the properties are sold at a market related or reasonable price, or to ensure that the number of properties sold will be limited only to so much as is necessary to cover any alleged indebtedness, in contravention of s 90(2)(k).

This list is not exhaustive.

[53] These and similar unlawful provisions in the settlement agreements, are, in terms of s 90(3), void from the date they purported to take effect, being the date of conclusion of the settlement agreements. In terms of s 90(4):

‘In any matter before it respecting a credit agreement that contains a provision contemplated in subsection (2), the court must –

- (a) sever that unlawful provision from the agreement, or alter it to the extent required to render it lawful, if it is reasonable to do so having regard to the agreement as a whole; or
- (b) declare the entire agreement unlawful as from the date that the agreement, or amended agreement, took effect,

⁴⁴ In *Serfontein* fn 6 above paras 35 and 36 it was concluded that a similar provision did not pass muster under the Act and after considering decisions such as that in *Bock and Others v Duburoro Investments (Pty) Ltd and Iscor Housing Utility and Another v Chief Registrar of Deeds and Another* that in our constitutional dispensation deprivation of ownership of immovable property by a creditor without the sanction of a court order is plainly arbitrary and therefore would have the effect of defeating the purposes of the Act as it is inimical to the protection of consumers.

and make any further order that is just and reasonable in the circumstances to give effect to the principles of section 89 (5) with respect to that unlawful provision, or entire agreement, as the case may be.’

[54] The unlawful provisions permeate the settlement agreements, making it impossible to sever the unlawful provisions from the lawful and then leaving an enforceable agreement intact. What would remain after possible severance, would no longer reflect the basis upon which the bank was intending to contract. No reasonable terms of severance have, in any event, been suggested. The settlement agreements are, in their entirety, unlawful and void.

[55] The issue of the unlawfulness of provisions of the settlement agreements does not arise in respect of the enforcement of accounts 371832152 and 040727688, as the provisions of the Act do not apply to them. Severance is not considered further in respect of account 040743268 as it has been found that the settlement agreements are supplementary agreements, hence unlawful in terms of s 90(5) and void.

Should the two court orders making the settlement agreements orders of court have been rescinded and set aside?

[56] The rescission of a judgment, particularly a consent order,⁴⁵ is not granted lightly, as there is a strong public interest in the finality of litigation and the principle that disputes once settled, should remain settled. It brings about finality and is binding on the parties as per s 165(5) of the Constitution, until set aside by a court after due process. The enquiry is whether the appellants have established one of the grounds to set the judgments aside.

⁴⁵ A consent judgment has exactly the same standing and qualities as any other court order - *Moraitis Investments (Pty) Ltd and Others v Montic Diary (Pty) Ltd and Others* [2017] ZASCA 54; [2017] 3 All SA 485 (SCA); 2017 (5) SA 508 (SCA) para 10.

[57] The Constitutional Court has held that for an order to be competent and proper, it must: first, relate directly or indirectly to an issue or *lis* between the parties;⁴⁶ and second, the agreement must not be objectionable, that is, its terms must be capable, both from a legal and a practical point of view, be capable of being included in a court order.⁴⁷ The Constitutional Court in *Eke v Parsons*⁴⁸ emphasised that, in applications to make settlement agreements orders of court, a court must not ‘mechanically’ rubber-stamp a settlement agreement. Furthermore, ‘parties contracting outside of the context of litigation may not approach a court and ask that their agreement be made an order of court’. The agreement sought to be made an order of court must not be objectionable. Its terms must accord with both the Constitution and the law and not be at odds with public policy. Finally, the agreement must hold some practical and legitimate advantage to be made an order of court.⁴⁹

[58] As the settlement agreements in respect of account 040743268 are unlawful in terms of the Act, it was incorrect for the high court to have conferred on them the status of orders of court. At common law and in accordance with the principle of legality, foundational to our constitutional order, these orders cannot survive the challenge of unlawfulness insofar as it concerns account 040743268.⁵⁰

[59] Even if restricted to exclude account 040743268, there is no reason now for the settlement agreements, even in a restricted form, to continue. Events have overtaken any conceivable need there might have been to have any lawful parts of the settlement agreements made orders of court. The high court should simply have set the orders aside.

⁴⁶ *Eke v Parsons* fn 39 above para 25.

⁴⁷ *Eke v Parsons* para 26.

⁴⁸ *Ibid.*

⁴⁹ *Eke v Parsons* para 26.

⁵⁰ If the settlement agreements and the orders granted were confined to the liability of the trust in respect of accounts 040727688 and 371832152, they might have been competent. But they were not thus restricted. They should not have been made orders of court in the form that the orders were granted by the high court.

Declaring the properties of the trust executable

[60] The high court was required to conduct an enquiry in terms of rule 46A. The High Court granted an order declaring 12 of the 14 farms owned by the trust to be ‘specially executable’ to satisfy the judgment debt.

[61] It was concluded above that the bank was required to serve the trust with a s 129 notice before enforcing its obligations. No such notice was given to the trust. In terms of s 130(1), a court may only grant execution, which will include declaring the properties executable, once the consumer (and guarantor) remains in default after the s 129 period.⁵¹

[62] Further, the order of executability was granted in relation to a combined monetary judgment for R12 139 814.10. As concluded above, the judgment of the high court falls to be reduced to the amounts in respect of accounts 040727688 and 371832152 only, which, in monetary terms, is for only slightly more than a third of the capital amount for which the high court had granted judgment.

[63] The facts reveal that the trust has equity which substantially exceeds the total judgment debt. The answering affidavit records that the value of the properties is some R60 million. No break-down of values of individual properties was provided. It is disproportionate to declare all the properties executable to cover the judgment amounts, interest thereon and costs.

[64] This Court was urged, in the interest of finality, to come to its own conclusion regarding whether the properties should be declared executable, and if so, which of the properties should be so declared. We have simply not been provided with sufficient information to reach a properly informed decision in that

⁵¹ No order as contemplated in s 130(4) where procedural requirements have not been met, was issued.

regard. That enquiry is best left to be pursued before and investigated fully in the high court. The bank requires no relief from this Court to do so.

Costs

[65] The application for the amendment to the Notice of Appeal was necessary to place what properly arose for determination in this appeal, beyond doubt. The bank's opposition to correct this mistake, was unreasonable. No order is made as to the costs of that application, which will mean that each party will pay their own costs relating thereto.

[66] The appellants accepted at the outset of their argument that the judgment against the trust in respect of accounts 040727688 and 371832152 was sound and could not be resisted. The arguments thereafter were devoted mainly, if not exclusively, to the bank persisting with its contention that the judgment against the trust as surety in respect of Mr Wolmarans' debt under account 040743268, was correct. In that it failed, and the appellants succeeded. The appellants also succeeded in having the two court orders which made the settlement agreements orders of court rescinded and set aside. Their appeal against the order of the high court declaring the immovable properties of the trust executable also succeeded. The appellants were substantially successful in the appeal. It is appropriate that the bank be directed to pay the costs of the appeal.

[67] Various findings in this judgment require that the order of the high court be varied. The bank was entitled to the judgment against the trust in respect of accounts 040727688 and 371832152. It was not entitled to judgment in respect of account 040743268. It failed with its claims against Mr and Mrs Wolmarans and with its claim to have the immovable properties declared executable.

[68] The high court should have granted the relief in the counter-application that the two court orders making the settlement agreements orders of court, be rescinded and set aside. The appellants did claim additional relief, over and above the rescission of the two orders, some of which was not granted. They however had to pursue the counter-application to obtain the rescission of the two court orders. The respondent throughout persisted with the contention that the orders should not be rescinded. That was still its stance even before this Court. An appropriate costs order is that the respondent be directed to pay two thirds of the appellants' costs of the proceedings before the high court.

Order

[69] The following order is granted:

1. The appellants' application to amend the Notice of Appeal is granted with no order as to costs.
2. The appeal is upheld, save to the extent set out in paragraph 4 below.
3. The respondent is directed to pay the costs of the appeal.
4. The order of the high court is set aside and substituted with the following:
 - '1. The settlement agreements concluded on 11 February 2019 and 16 October 2020 are declared void insofar as they relate to the applicant's claim against the first to fourth respondents, representing the Wolmarans Kinder trust (the trust), the fifth respondent and the sixth respondent, for any indebtedness of the fifth respondent under account number 040743268;
 2. The claim against the trust and the fifth and sixth respondents, jointly and severally, in respect of account 040743268, is dismissed;
 3. Judgment is granted against the trust for payment of the amount of R2 098 021.87 with interest thereon at the rate of 7.5% per annum calculated from 25 June 2021 to date of payment, both days inclusive, in respect of account number 040727688;

4. Judgment is granted against the trust for payment of the amount of R1 920 000 with interest thereon at the rate of 8.45% per annum calculated from 25 June 2021 to date of payment, both days inclusive, in respect of account number 371832152;
5. The further claims against the trust and the fifth and sixth respondents are dismissed.
6. The orders of court dated 21 February 2019 and 12 November 2020 are rescinded and set aside.
7. The further relief claimed by the respondents against the applicant in the counter-application is dismissed.
8. The applicant is directed to pay two thirds of the respondents' costs.'

P A KOEN
JUDGE OF APPEAL

Appearances

For the appellants:	N Snellenburg SC
Instructed by:	Blair Attorneys, Bloemfontein
For the respondent:	P Zietsman SC and J Els
Instructed by:	Phatshoane Henney Inc., Bloemfontein.