THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1309/17

In the matter between:

PHASWANA STEPHEN RATLOU **APPELLANT**

and

MAN FINANCIAL SERVICES SA (PTY) LTD **RESPONDENT**

Neutral citation: *Ratlou v Man Financial Services* (1309/2017) [2019] ZASCA 49 (01 April 2019)

Coram: Lewis ADP, Swain and Dambuza JJA and Carelse and Matojane AJJA

Heard: 07 March 2019

Delivered: 01 April 2019

Summary: Lease agreement – whether a settlement agreement constituted a credit transaction in terms of the National Credit Act 34 of 2005 (the NCA) – underlying rental agreements excluded from provisions of the NCA as they were large transactions concluded with a corporate entity and secured by a suretyship – on a literal interpretation of s 8(4)*(f)* of the NCA the settlement agreement constituted a credit transaction – results

of that so absurd that it could not have been intended by the legislature – inimical to the purposes of the NCA – provisions of the NCA did not apply – cross-appeal succeeded.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Wepener J sitting as court of first instance):

1 The appeal is dismissed with costs, such costs to include the costs of two counsel.

2 The cross-appeal succeeds with costs, such costs to include the costs of two counsel.

JUDGMENT

Dambuza JA (Lewis ADP, Swain JA and Carelse and Matojane AJJA concurring):

Introduction

[1] The central issue in this appeal is whether a settlement agreement is governed by the provisions of the National Credit Act 34 of 2005 (the NCA) when the underlying contracts – the rental of trucks to a corporate entity – and a suretyship in respect of the leases – are not governed by the Act. The court a quo held that it was.

[2] On 28 July 2016 MAN Financial Services, SA (Pty) Ltd (MAN) launched an application in the Gauteng Division of the High Court, Johannesburg (high court), (Wepener J), against Phapho Nkone Transport (PNT), a registered company, together with its director, Mr Stephen Ratlou (Mr Ratlou), claiming payment of R4 269 278.79 and interest, based on an acknowledgment of debt. The high court refused to grant judgment on the basis that the settlement agreement was a credit agreement within the meaning of

the NCA and that MAN was obliged to comply with s 129 of that Act, which it had failed to do. The high court granted an order in the following terms:

> '1 . . .
>
> 2 Against the second respondent [the appellant in this appeal, Mr Ratlou]:
>
> 2.1 the settlement agreement annexed as annexure JN13 to the founding affidavit is made an order of court.
>
> 2.2 the application is postponed sine die.
>
> 3 The applicant [the respondent in the appeal Man Financial Services, SA (Pty) Ltd, MAN] may not set this matter down until:-
>
> 3.1 it has complied with the provisions of Section 129(1)(a) as read with Section 130 of the National Credit Act 2005;
>
> 3.2 It has upon completion of the remedies referred to in Section 129(1)(a) of the NCA, if restored to or otherwise, become entitled to resume its application.
>
> 4. The Applicant is to pay the Second Respondent's costs incurred in opposing this application.'

Mr Ratlou obtained leave from this court to appeal against this order. Essentially he only sought to have para 2.1 of the order set aside, that is, the declaration that the settlement agreement was an order of court.

[3] Subsequent to the granting of leave to appeal by this court, MAN obtained leave from the high court to cross-appeal against paras 3 and 4 of the high court order in terms of which it was ordered to comply with the provisions of the NCA and pay the costs of the application.

[4] At the hearing of the appeal, counsel for MAN informed this court that MAN had complied with the relevant portions of the order and had obtained a judgment against Mr Ratlou in the amount claimed. However, it was intent on pursuing the cross appeal, arguing that the settlement agreement on which its claim was based, was not governed by the NCA. I agree that although a judgment by this court on the issue will have no practical effect in so far as the parties are concerned, the finding by the high court that the agreement was governed by the NCA on which paras 3 and 4 of the court order were

founded, raises a discrete legal point of public importance that would affect settlement agreements concluded in the future.[1]

[5] On appeal, the parties were in agreement that a determination of the cross appeal in MAN's favour would dispose of the appeal and entitle MAN to judgment as sought. If the issue was decided in Mr Ratlou's favour MAN would concede the appeal. The cross-appeal will therefore be determined first.

Background

[6] During 2013 Mr Raltlou acquired PNT together with its business. He then became its director. At the time PNT was leasing five heavy duty trucks and trailers from MAN. On 24 October 2013, Mr Ratlou executed a deed of suretyship in favour of MAN to secure the lease agreements relating to the five trucks. Those lease agreements expired sometime during 2014. The suretyship, as a general covering security in respect of PNT's debt to MAN, remained in place.

[7] In December 2014 PNT and MAN concluded seven new rental agreements in relation to seven heavy-duty trucks and trailers hired by PNT at specified monthly rental amounts. A few months after the conclusion of these agreements PNT defaulted on the monthly rentals. On several occasions thereafter Mr Ratlou re-negotiated the rental payment dates, only for PNT to default on the renegotiated payment dates. Ultimately, on 30 April 2015, MAN repossessed the seven trucks and trailers. The amount then outstanding on all the rental agreements was R4 915 043.98. The trucks and trailers were sold to third parties and the proceeds were credited to PNT's rental accounts. However there remained a shortfall in the amount of R4 400 000.

[8] On 28 September 2015, MAN, PNT and Mr Ratlou concluded the settlement agreement (also referred to as an acknowledgement of debt, AOD) in relation to the shortfall. Clauses 4 and 5 of that agreement provided that:

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[1] *Qoboshiyane NO & others v Avusa Publishing Eastern Cape (Pty) Ltd & others* [2012] ZASCA166; 2013 (3) SA 315 (SCA) para 5.

'4. PN Transport [PNT] and Stephen [Mr Ratlou] will jointly and severally the one paying the other to be absolved pay an amount of R4 400.000.00 (Four million four hundred thousand Rand) together with interest at Absa Bank Limited's prime lending rate as publicized from time to time from date calculated daily and compounded monthly from date of signature of this agreement to payment in full.

5. Payment of the aforesaid amounts will be made by way of 60 consecutive monthly payments payable as follows:

5.1 6 x monthly payments of R50 000.00 (fifty thousand Rand) each, the first payment to be made on/or before the 07th day of November 2015, followed by 5 consecutive monthly payments of R50 000.00 each payable on the 07th day of each consecutive month.

5.2 Followed by 54 monthly payments of R98077.00 (Ninety eight [t]housand and seventy seven Rand), payable from the 07th day of May 2016.'

[9] This meant that PNT and Mr Ratlou were to liquidate the outstanding debt in the manner set out above. However they defaulted once more – the payment dates specified in the settlement agreement were again not honoured.

In the high court

[10] On 28 July 2016, MAN instituted the proceedings against PNT and Mr Ratlou, based on the settlement agreement and the suretyship executed in October 2013, for payment of the amount owing. In its defence, PNT pleaded that the rental agreements which formed the underlying causa for the settlement agreement had been 'dependent' on a 'supply agreement' which it had with a mining company, ASA Metal/Dilakong Chrome Mine. The allegation was that in terms of a further oral agreement between the parties (PNT, MAN and Mr Ratlou), if the supply agreement were to cease or collapse, the rental agreements would also come to an end. The contention was that this oral agreement constituted a resolutive condition to the rental agreements. When ASA Metal 'did not honour the supply agreement' the rental agreement ceased and MAN was not entitled to any payment from them.

[11] Regarding the suretyship, Mr Ratlou contended that it was not open to MAN to rely on it as it had been executed in relation to the initial five trucks and their rental agreements which had since terminated. MAN contended that, in its terms, the suretyship was a

continuing agreement and was ‘barely a year old’ when the second batch of trucks was acquired.

[12] The high court correctly found that the original rental agreements did not fall within the ambit of the NCA. This is because they were large agreements concluded with a juristic person. The aggregate quantum of instalments of each agreement exceeded the R250 000 threshold. In addition, because the NCA did not apply to the underlying agreements, it also did not apply to Mr Ratlou’s suretyship. The high court however found that, although the seven rental agreements to which the settlement agreement related did not fall under the NCA, the settlement agreement constituted a new *credit agreement* within the meaning of the NCA. MAN had failed to give prior notice of the impending action to PNT and Mr Ratlou as it was obliged to do in terms of the provisions of s 129 of that Act. By this time PNT was in liquidation, with the result that the court postponed the application as against it, but granted the order as set out above in respect of Mr Ratlou.

[13] In reaching the conclusion that the settlement agreement was a credit transaction, the high court reasoned that, unlike the underlying rental agreements, in the settlement agreement Mr Ratlou was ‘no longer described or bound as surety’. He was liable jointly and severally together with PNT for the amount outstanding. Further, the settlement agreement read that it was in full and final settlement of the applicant’s claims against Mr Ratlou and PNT. It therefore ended the relationship between the parties in so far as the rental agreements and the suretyship were concerned. It was a *transactio* or compromise which created between the parties a new relationship with consequential rights and obligations. None of the parties was entitled to enforce the rights and obligations emanating from the underlying rental agreements.

Submissions on appeal

[14] Mr Ratlou contended that it was not competent for the high court to make the settlement agreement an order of court because none of the parties sought an order in those terms, and he was not warned that an order in those terms would be made. The prejudice he suffered as a result of the court order was that para 2 thereof detracted from the relief granted in terms of paras 3 and 4 of the order. The order was ambiguous and

'self- destructive'. He would now also not be able to raise defences that would have been available to him under the NCA such as 'reckless lending'.

[15] It was not in dispute that at some stage during the proceedings in the high court MAN had, by way of an amendment to its notice of motion, sought to have the settlement agreement declared an order of court. However, by the time of the hearing of the application, the proposed amendment had been abandoned.

[16] In the cross-appeal, MAN conceded that on a literal interpretation of s 8(4)*(f)* of the NCA the settlement agreement met the definition of a credit transaction. That section provides that:

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

…

(a) …

(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 –

(a) the agreement; or

(b) that amount has been deferred.'

However it was submitted that, where, as in this case, the underlying causa to the settlement agreement did not constitute a credit agreement as envisaged by the NCA, the agreement did not fall within the ambit of the NCA.

[17] Counsel for MAN also submitted that in any event the settlement agreement was a credit guarantee to which the provisions of the NCA did not apply for the reasons stated by this court in *Shaw & another v McKintosh & another*.[2]

[18] Mr Ratlou persisted in the argument that the settlement agreement, as a new and independent contract, extinguished the underlying causa and Mr Ratlou's status in relation

[2] *Shaw & another v McKintosh & another* 2019 (1) 308.

to the debt was altered to that of a co-principal debtor. The provision of the NCA therefore applied.

Discussion

[19] Mr Ratlou argued that the underlying causa for the compromise in the form of the settlement agreement cannot be examined for the purposes of determining whether the acknowledgment of debt falls within the parameters of the NCA. This is simply because the underlying causa has been extinguished by the compromise. The argument is artificial. If the underlying causa did not fall within the parameters of the NCA, then its compromise in terms of the settlement agreement, cannot logically result in the agreement being converted to one that does.

[20] In this regard the express reference in the AOD to the underlying causa – the rental agreements is of vital significance. Clause 3 of the AOD provides that the agreement is 'in full and final settlement of MFS's [Man Financial Services] claims against PN Transport and Stephen [Mr Ratlou] with regard to the agreements listed' therein.[3] It was not in dispute that the accounts listed in the AOD related to the rental agreements. The compromise therefore remained linked to the underlying causa, being the rental agreements. The artificiality of ignoring them is self-evident.

[21] A purposive interpretation and not a literal interpretation of s 8(4)*(f)* of the NCA is required because it is quite clear that the NCA was not aimed at settlement agreements. Its application to them will have devastating effect on the efficacy and the willingness of parties to conclude settlement agreements and thereby curtail litigation. .

[22] As is evident from the portion of the settlement agreement set out above it provided for payment of the amount owed in deferred instalments and interest was payable in terms thereof. As I have said, on a literal interpretation the settlement agreement meets the definition of a credit transaction. This is so even though the underlying lease agreements did not constitute credit agreements as: they were large agreements; the rental was payable in advance and not deferred; ownership of the trucks would not pass to PNT at

[3] At para 8.

the end of the lease term; and Mr Ratlou's suretyship was not governed by the NCA. Further, on a literal interpretation of s 8 (4)*(f)* of the NCA, a settlement agreement concluded in relation to a delictual claim would immediately fall within the ambit of the NCA. As submitted on behalf of MAN this could never have been the intention of the legislature. The consequence would be absurd for agreements of settlement in respect of non-contractual claims.

[23] The purposes of the NCA are set out in s 3 of that Act. Section 2 thereof provides that the NCA must be interpreted in a manner that gives effect to such purposes. Under s 3 the purposes of the Act are 'to promote and advance the social and economic welfare of South Africans, to promote fair, transparent, competitive, sustainable, responsible, efficient effective and accessible credit market and industry and to protect consumers.' Therefore the NCA is concerned with the advancement of money or granting of credit in the main, to individual consumers.[4]

[24] MAN's reliance on three cases in which our courts have used the purposive approach in determining whether the NCA was applicable to settlement agreements, is well placed. In *Grainco (Pty) Ltd v Broodryk NO & others*[5] the court found that although the settlement agreement referred to deferral of payment and interest the agreement did not constitute a credit transaction because the underlying transaction was a damages claim in respect of which the plaintiff, by agreement, afforded the first, second, and third defendants deferrement of payment. It was held that the transaction did not fall within the business of moneylending and the furnishing of credit, in the ordinary sense of the word. The NCA was not intended to encompass an underlying causa of the postponement of payment of damages.

[25] In *Hattingh v Hattingh*[6] a settlement agreement in which two brothers terminated their business relationship and provided for payment of R6,6 million in annual instalments of R734 000,00 together with interest on the capital was found not to fall within the ambit of the NCA. The court found specifically that there had been no credit provider-consumer relationship. This and the parties' intention viewed against the background of the objects

[4] See the preamble to the NCA.
[5] *Grainco (Pty) Ltd v Broodryk NO & others* [2009] ZAFSHC 143; 2012 (4) SA 517 (FB).
[6] *Hattingh v Hattingh* [2010] ZAFSHC 173; 2014 (3) SA 162 (FB).

of the NCA showed that it could not have been the intention of the Legislature that an agreement such as the impugned agreement should be regarded as a credit agreement. Although the one brother, prima facie, fell within the definition of a credit provider as intended in the NCA it could not – given the purpose and the context of the NCA – have been the intention of the Legislature that the brother would be regarded as a credit provider subject to the obligations imposed by the NCA.

[26] In *Ribeiro & another v Slip Knot Investments 777 (Pty) Ltd*[7] it is found that the underlying causa remained extant despite settlement and that the two agreements were interdependent. In this case the underlying agreement was a damages claim pursuant to the repossession and re-sale of the vehicles. There was also no credit provider – consumer relationship and the settlement agreement and the underlying agreements were interdependent. There can only be one conclusion, that the NCA was not designed to regulate settlement agreements where the underlying agreements or cause, would not have been considered by the Act.

[27] Having found that the legislature never had the intention that the NCA be applicable to all settlement agreements in terms which accord with the determination of credit transactions, in particular to the agreement concluded by the parties in this case, it is not necessary to deal with the alternatives to MAN's main argument. I may, however indicate, in respect thereof as well, that the effect of the sudden unintended conversion of a non-consumer/non-credit provider relationship into one governed by the NCA and the chill effect that would have on settlement of disputes would still hold considerable weight. As was submitted on behalf of MAN, parties who were never credit providers, such as a once off lesser, would suddenly find themselves unable to enforce the terms of their settlement agreement, for want of registration or due assessment or a lessee for creditworthiness.

[28] Consequently the settlement agreement in this appeal did not fall within the ambit of the NCA. MAN had no obligation to comply with the provisions thereof prior to enforcing its terms. It will be recalled that the parties agreed that a determination of the cross appeal in MAN's favour, namely that the acknowledgement of debt did not constitute a credit

[7] *Ribeiro & another v Slip Knot Investments 777 (Pty) Ltd* [2010] ZASCA 174; 2011 (1) SA 575 (SCA).

transaction as defined in the NCA, would dispose of both the appeal and the cross appeal in MAN's favour.

[29] The following order is granted:

1 The appeal is dismissed with costs, such costs to include the costs of two counsel.

2 The cross-appeal succeeds with costs, such costs to include the costs of two counsel.

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N Dambuza

Judge of Appeal

APPEARANCES

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