REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: YES

30 January 2025
DATE

[redacted]
SIGNATURE

Case Number: **2016/8629**

In the matter between:

ABSA BANK LIMITED Applicant

and

SHEREEN GOOLAM Respondent

Flynote : Sleutelwoorde

Section 8(4)(f) of the National Credit Act, Act 34 of 2005 ("NCA") - definition of "credit agreement" – settlement agreement novating underlying cause of action - underlying cause subject to the NCA – on purposive interpretation of NCA wording of section 8(4)(f) to be applied literally – settlement agreement a credit agreement as defined in the NCA;

Sections 80 to 83 of NCA - reckless credit – settlement agreement novating credit agreement subject to the NCA - on purposive interpretation of NCA reckless credit provisions not applicable to such settlement agreements – question whether reckless credit provisions apply to settlement worsening the consumer's position left open.

Sections 129 and 130 of the NCA - settlement agreement novating underlying cause of action - underlying cause subject to the NCA – sections 129 and 130 applicable – sections to be complied with when credit provider applies for

judgment on the strength of the novating settlement agreement – appropriate order in terms of section 130(4)(b) to be granted

Costs – non-compliance with section 129 of the NCA – consumer being fully aware of rights, raising non-compliance purely as a dilatory defence, and failing to exercise rights in terms of NCA pending finalisation of action – consumer also not indicating intention to exercise rights in terms of NCA in future - consumer not genuinely interested in making use of remedies provided by the NCA - such conduct an opportunistic abuse of the process of court, an abuse of rights and constitutes a delaying tactic – in court's discretion consumer deprived of a costs order.

Headnote : Kopnota

In this matter, the applicant, ABSA Bank Ltd, instituted action in March 2016 against the respondent, Ms S Goolam, for payment of the full outstanding balance, agreed interest and costs in terms of two mortgage loan agreements which were subject to the National Credit Act ('NCA"), also claiming an order declaring an immovable property (being the respondent's primary residence) specially executable on the basis that the property was specially hypothecated in terms of two mortgage bonds registered over the property.

In the action, the applicant revealed in the particulars of claim that the credit agreements could not be located, and attached secondary evidence to the particulars of claim, being information contained in the applicant's computer system and blank standard terms and conditions that would have been applicable.

Shortly after the action was instituted, in April 2016, the parties concluded a settlement agreement expressly providing that the settlement agreement was a novation of the underlying credit agreements, and incorporated certain terms and conditions attached to the agreement by reference. It was agreed that the full outstanding balance in terms of the agreements referred to in the particulars of claim was due and payable, but that the respondent was afforded the opportunity to pay the admitted amount in instalments. It was agreed that interest would be payable on the outstanding balance.

The agreement provided that upon default the respondent consented to judgment and that the property could be declared specially executable.

By agreement the settlement agreement was made an order of court during April 2016. However, the court order did not constitute an executable judgment and in essence was a mere recordal of the fact that the settlement agreement was concluded.

Upon the respondent defaulting in terms of her obligations, the applicant brought the present application during 2020 (some four years after the conclusion of the settlement agreement) for judgment in accordance with the settlement agreement, as well an order declaring the property specially executable. The application was simultaneously an application in terms of Uniform Rule 46A for permission to execute against the respondent's residential property.

The respondent initially raised the defence that the settlement agreement was void *ab origine* due to a misrepresentation. She also denied having concluded any loan agreement with the applicant. She also brought a counter-application for the

setting aside of the settlement agreement and the order incorporating the agreement. These defences, as well as the counter-application, were patently baseless and premised on false evidence. During the hearing of this matter these defences were jettisoned, and the counter-application was abandoned.

Before the hearing of the matter the respondent was granted leave to deliver a supplementary affidavit in which the following additional defences were raised:

- If it is held that the respondent concluded the initial credit agreements, that no credit assessments were done by the applicant prior to the conclusion thereof, that she was unemployed at the time, and that such agreements constituted reckless credit in terms of the NCA, and that her obligations ought to be set aside in terms of section 83;
- That the settlement agreement falls within the definition of a credit agreement in section 8(4)(f) of the NCA, and is subject to the Act;
- That the reckless credit provisions of the NCA apply to the settlement agreement, that she was similarly unemployed when the agreement was concluded and that no credit assessment was done prior to the conclusion of this agreement. Therefore, she contended that her obligations in terms of the settlement agreement ought to be set aside in terms of section 83 of the NCA;
- That the applicant failed to comply with section 129 of the NCA prior to the launching of the present application, which was allegedly premature in terms of section 130; and
- That the application failed to comply with Rule 46A, in that no valuation under oath by a registered professional valuer was attached in support of the application, as required by the practice in the Gauteng Division.

Held, as to whether the reckless credit provisions of the NCA were applicable to the original agreements

The agreements were concluded after the NCA was promulgated, but before the reckless credit provisions in the Act became operative. In terms of Schedule 3 to the NCA (transitional provisions) the reckless credit provisions were expressly excluded from operating retrospectively.

Consequently, the respondent's challenge in relation to the original credit agreements had to fail.

Held, as to whether the settlement agreement was a credit agreement in terms of section 8(4)(f) of the NCA

The correct approach is to first determine whether on a purposive interpretation the agreement falls within the definition of a credit agreement. A secondary inquiry is whether on a purposive interpretation specific sections of the NCA apply to the agreement.

The terms of the settlement agreement *in casu* fell squarely within the definition of a credit agreement in section 8(4)(f) in that an amount that previously became

fully due and payable by the respondent was deferred and it was agreed that interest would be payable in respect of such amount.

Where the settlement agreement was a novation of the original credit agreements, a purposive interpretation of the NCA does not result in a need to deviate from the express language of section 8(4)(f). To the contrary, a finding that the settlement agreement was not a credit agreement in terms of section 8(4)(f), would have the absurd result that the NCA could be circumvented with impunity.

The present matter is to be distinguished from the situation where the settlement agreement did not novate the underlying cause of action and merely provided respite for the consumer. In this case the NCA is on a purposive interpretation not applicable to the settlement agreement at all, because the relationship between the parties is still regulated by the NCA which is applicable to the underlying agreement.

This matter must also be distinguished from the situation where the underlying causa is not subject to the NCA. In such cases it is now trite law that the NCA does not apply.

Consequently, it was held that the settlement agreement *in casu* was a credit agreement as defined in section 8(4)(f).

Held, as to whether the reckless credit provisions were applicable to the settlement agreement

In accordance with the purpose of the Act, as set out in section 3, the reckless credit provisions in NCA apply at the stage when a credit grantor has to decide whether to grant credit to the consumer, i.e. before the conclusion of an initial credit agreement.

One of the purposes of the Act is "*providing for a consistent and accessible system of consensual resolution of disputes arising from credit agreements"*. Accordingly, the Act provides in section 129 for a mechanism whereby parties may resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date, before the debt is enforced by legal action. This is a form of settlement.

Whilst the legislature made provision for a settlement between the parties, it expressly provided that such settlement must be the result of the parties resolving the dispute by agreement. There is no requirement that the credit provider must conduct a credit assessment before entering into a settlement agreement.

One of the purposes of the NCA is "*providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements*".

If the reckless credit provisions of section 80 to 83 of the NCA are to be made applicable to settlement agreements, it would stifle the resolution of disputes and / or agreements to bring arrears up to date as provided in section 129. It would also frustrate the object of the Act.

In the present matter, the settlement agreement relieved the obligations resting on the consumer for a period of time, suspended the possible execution against the hypothecated property, and provided for a payment plan directed at the

consumer fulfilling her obligations. The application of the reckless credit provisions to this kind of agreement would be senseless.

The question whether a settlement agreement making the consumer's obligations more onerous would be subject to these provisions was left open.

Consequently, it was held that the reckless credit provisions in the NCA was not applicable to the settlement agreement *in casu*.

Held, as to whether sections 129 and 130 of the NCA was applicable to the settlement agreement

The settlement agreement was a novation of the original cause of action and brought the original action to an end. The settlement agreement constituted a new cause of action, which had to be enforced by new legal proceedings.

The debt-enforcement provisions contained in the NCA, in particular Section 129 and 130 are prima *facie* applicable to the application *in casu*.

Having regard to the purpose of the NCA, there is no reason why a consumer should not be afforded the express opportunity created by section 129 and 130 to negotiate a further restructuring of his or her obligations, to set the debt review provisions of the NCA in motion or resolve disputes by way of the mechanisms mentioned in section 129.

Consequently, the applicant should have complied with section 129 and 130 of the NCA before this application was launched and failed to do so.

Held, as to the appropriate order in terms of section 130(4)(b) of the NCA

In the event of non-compliance with the provisions of sections 129 and 130, section 130(4)(b) obliges the court to adjourn the matter and make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed.

The purpose of section 129 is to resolve disputes between the parties, though an alternative dispute resolution agent, consumer court or ombud. The purpose of the section is also to enable the consumer to use the mechanisms, including referral to a debt counsellor, to develop and agree upon a plan to bring the payments under the agreement up to date. In the absence of any dispute which the consumer intends resolving through these mechanisms, or in the absence of an intention to put the agreement through a mechanism to restructure the obligations with the intention that the agreement will ultimately be fully complied with, demanding that section 129 should be complied with, is nothing but fruitless formalism. It was never the purpose of the NCA to facilitate formalism which would not benefit the consumer in any way.

In the present matter, the respondent raised non-compliance purely as a dilatory defence. She failed to indicate any intention to implement any of the remedies referred to in section 129. Moreover, she stated that she was unemployed and

impecunious. As such, she is clearly unable to co-operate with the development of a plan to restructure payments with a view on eventually paying the full debt.

It is clear that suspension of the action or application, coupled with an order regulating future proceedings, would serve no purpose but to delay the matter, increase the legal costs and waste valuable court resources.

However, section130(4)(b) compels this court to suspend proceedings and to make an appropriate order.

No purpose will be served to order the delivery of a section 129 notice, as the respondent is already aware of her rights. It will suffice to afford the respondent the opportunity to exercise the remedies referred to in section 129 and make orders regulating future proceedings.

Held, as to compliance with Uniform Rule 46A

Due to the fact that judgment was not granted, the application cannot proceed. In any event, the applicant failed to comply with the provisions of Rule 46A, and the application was postponed with leave to supplement.

Held, as to the question of costs

The respondent initially raised defences to the main application which not only had no merit but was clearly based on false evidence. She falsely denied having concluded the loan agreements and / or passing the mortgage bonds over her property. Her counter-application was based on the same false evidence and had no merit. Consequently, she was ordered to pay the costs of the counter-application.

By raising the section 129 and 130 defence the respondent was evidently fully aware her rights in terms of section 129 and 130. She failed to make use of these rights and simply awaited the hearing of the matter. While raising the dilatory defence that section 129 had to be complied with, she did not indicate what she would have done, had the credit provider complied with section 129. Nor did she indicate what she intended to do in future. At the same time, the respondent also failed to comply with her obligations.

The conclusion is inescapable that the consumer is abusing the process of court and is abusing her rights in terms of the NCA, contrary to the purpose of the NCA, to execute a stratagem to delay the matter and to totally avoid complying with her obligations.

Accordingly, despite the respondent being successful in opposing the main application, in the exercise of the court's discretion the respondent should be deprived of a cost order. An order was granted that each party should pay its own costs.

ORDER

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(1) The respondent's counterapplication is dismissed with costs on Scale B;

(2) The applicant's application for judgment is hereby suspended in terms of Section 130(4)(b) of the National Credit Act and postponed *sine die*;

(3) The applicant's application in terms of Rule 46A is postponed *sine die*;

(4) The respondent is hereby granted leave to refer the settlement agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties hereto resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date, within 15 days from the date this order is granted.

(5) If, the respondent fails to comply with the order in paragraph (4) above, or the proceedings referred to in paragraph (4) are terminated, the applicant is granted leave to deliver a supplementary affidavit within 20 days after such non-compliance or termination, in which at least the following aspects must be addressed:

    (a) The failure by the respondent to comply with the order contained in paragraph (4) above, alternatively the termination of the proceedings referred to therein;

    (b) A detailed calculation of the limit of the respondent's liability in terms of section 103(5) of the National Credit Act; and

    (c) Compliance with rule 46A.

(6) The respondent shall be entitled to deliver an answering affidavit to the aforesaid supplementary affidavit within 20 days, whereafter the applicant shall be entitled to reply within 15 days.

(7) Should the respondent fail to deliver an answering affidavit as provided above the applicant shall be entitled to enrol the matter on the unopposed roll.

(8) Should an answering affidavit be filed, the matter shall be enrolled on the opposed motion roll.

(9) Each party is ordered to pay its own costs in relation to the applicant's application to date.

JUDGMENT

D Marais AJ

The applicant's claim

[1] In this opposed application the applicant, ABSA Bank Ltd, seeks an order for judgment against the respondent, Ms S Goolam, for payment of the amount of R1 568 641.29 with interest and costs, as well as an order declaring an immovable property (being the respondent's primary residence) specially executable "in terms of Rule 46A".[1] The applicant also requested the court to set a reserve price if the property is sold in execution.

Basis of applicant's claim

[2] The applicant's application is based on a settlement agreement, dated 5 April 2016, which was concluded between the parties after the applicant instituted action on 10 March 2016 against the respondent for payment of the outstanding balance in terms of two mortgage loan agreements concluded in 2006 and 2007, secured by a first and second mortgage bond, in terms of which the respondent's residence was specially hypothecated as security for the debt. It is evident from the second loan agreement that an additional loan was granted, which was consolidated with the first loan.

[3] The settlement agreement, which was made an order of court on 21 April 2016, provided that the respondent acknowledged liability for the amount, interest and costs claimed in the summons. The respondent acknowledged that she was liable on the basis of the agreements relied upon by the applicant in the summons. However, the parties agreed that the settlement agreement was a novation of the original loan agreements between the parties. Furthermore, the

[1] I shall later in this judgment deal with the interaction between applications to declare immovable property specially executable (on the basis that the property constitutes real security, the property having been specially hypothecated), Uniform Rule 46, and applications for permission to execute against the primary residence of a person in terms of Uniform Rule 46A.

parties attached two documents to the agreement containing terms and conditions that would be applicable to the respondent's indebtedness, which were incorporated by reference.

[4] The respondent was afforded the opportunity to pay the agreed amount, interest and costs in instalments, failing which the full balance would become due and payable. In the event of default, the respondent also consented to judgment for the amount agreed upon and agreed that the hypothecated property can be declared specially executable.

[5] It is to be noted that the mortgage bonds contained provisions that the bonds would cover the respondent's indebtedness from any cause whatsoever and would not be affected by any intermediate settlement.

[6] In the present application the applicant alleges that the respondent failed to comply with the terms of the settlement agreement, entitling it to the relief claimed herein. The applicant did not contend that the court order incorporating the settlement agreement constituted a judgment for payment of the outstanding balance in itself. Its approach was that the applicant still needed to obtain a judgment, based on the consent to judgment contained in the settlement agreement. As such, the court order making the settlement agreement an order of court was a mere recordal of the fact that the settlement agreement was concluded, and did not constitute an executable judgment.

The initial defence raised by the respondent and counter-application

[7] In her answering affidavit, the respondent alleged that her late husband handled all their financial affairs, and when the applicant took steps to enforce the loan agreements and mortgage bonds (allegedly already having scheduled a sale in execution) her husband presented a document to her for signature (being the relevant settlement agreement), which she signed without having read the content. She was allegedly assured by her husband that the document recorded that the matter was resolved with the applicant, and that the property would not be sold. She alleged that she subsequently established that she signed a settlement agreement, after her husband passed away and the applicant

contacted her for payment. The respondent also denied having concluded any loan agreement with the applicant.

[8] The respondent alleged that the settlement agreement was induced by the misrepresentation that the document recorded that the matter was resolved, and that the property would not be sold. Although the respondent seeks to suggest that the representative of the applicant who was present when she signed the document failed to inform her of the exact nature of the document, it is clear that her version was that it was her husband who made the misrepresentation to her.

[9] The respondent also launched a counter-application, seeking a declarator that the settlement agreement is void *ab initio,* and an order setting aside the order that made the agreement an order of court. This application was based on the same allegations set out in her answering affidavit.

[10] The applicant denied having made any misrepresentation to the respondent regarding the settlement agreement. In the summons the plaintiff indicated that the loan agreements could not be found, and as secondary best evidence attached blank copies of its standard loan terms and conditions that were applicable to the loan agreements concluded with the respondent. In the replying affidavit, the applicant stated that the agreements were located in the interim and attached copies of the agreements.

[11] The respondent's denials of the fact that she had concluded two loan agreements with the applicant, and caused two mortgage bonds to be registered over her immovable property were false and opportunistic. The evidence was overwhelming that she did execute the various documents. However, in view of the conclusion of the settlement agreement the respondent's false denials are academic as far as the merits of this matter is concerned.

[12] Furthermore, the defence based on the alleged misrepresentation was without merit. Apart from the fact that the alleged representations fell short of being a misrepresentation, the applicant cannot be held responsible for the actions on the part of the respondent's husband.

[13] In any event, during the hearing of this matter Mr Laher, acting on behalf of the respondent wisely indicated that no reliance would be placed on the alleged misrepresentation and that the respondent would not persist with the counter-application for the setting aside of the agreement or court order.

Alternative defences raised by the respondent

[14] The respondent subsequently, represented by new attorneys, brought an application to deliver a supplementary answering and at the same time delivered such affidavit. An order was granted on 13 February 2023, permitting the affidavit in terms of rule 6(5)(e). The applicant, in turn, delivered an affidavit in reply to this affidavit.

[15] In her supplementary affidavit the respondent contended that if it is held that she did conclude the loan agreements with the applicant on 29 September 2006 and 24 April 2007, they were "credit transactions" as defined in the National Credit Act, Act 34 of 2005 ("the NCA"). It was alleged that these agreements were concluded after the commencement of the NCA. She alleged that she was unemployed at the date of the agreements, that she would not have been able to pay the agreed instalments, and that the agreement constituted the granting of reckless credit as envisaged in section 80 of the NCA. It was contended that an order should be granted in terms of section 83, setting aside her obligations in terms of the agreements.

[16] It was also contended by the respondent that the settlement agreement itself constituted a credit agreement in terms of the NCA and that the applicant did not conduct any affordability assessment before the agreement was concluded. At the time, the respondent allegedly was still unemployed, and it was contended that that the settlement agreement also constituted reckless credit.

[17] Furthermore, it was contended that the applicant failed to comply with sections 129 and 130 of the NCA prior to launching the present application for judgment.

[18] In reply the applicant admitted that the loan agreements fell within the ambit of the NCA but drew attention to the fact that the reckless credit provisions of the NCA only became operative on 1 June 2007 (after the relevant loan agreements

were concluded) with the result that affordability assessment were not necessary and the reckless credit provisions are not applicable to the two loan agreements.

[19] The applicant baldly denied that the settlement agreement constituted a credit agreement in itself or that the applicant failed to comply with the provisions of the NCA. The applicant did not present any evidence that an affordability assessment was done at the time the settlement agreement was concluded, and it must be accepted on the papers before court that such assessment was not done.

Reckless credit contention in relation to initial loan agreements has no merit

[20] The respondent's reckless credit-contention in relation to the initial loan agreements has no merit. Whilst parts of the NCA commenced on 1 June 2006, the reckless credit provisions in the Act, contained in Part D of Chapter 4, only commenced on 1 July 2007. Schedule 3 to the NCA, containing transitional arrangements, provided that this part of the NCA has retrospective operation only to the extent that it does not concern reckless credit.

Summary of remaining issues

[21] In summary the remaining issues in this matter were the following:

a. Did the settlement agreement constitute a credit agreement in terms of the NCA?

b. Was the applicant obliged to conduct an affordability assessment and / or refrain from granting credit recklessly when the settlement agreement was concluded, and did the applicant grant credit recklessly in the process?

c. If it is concluded that the settlement agreement was a credit agreement in terms of the NCA, and it constituted a form of reckless credit, what remedy should be granted in terms of section 83 of the NCA?

d. Was the applicant obliged to comply with section 129 and 130 of the NCA before launching the present application? If so, what are the consequences of non-compliance?

e. As the property to be declared specially executable and in respect of which the applicant seeks leave to execute against in terms of Rule 46(A) is the respondent's primary residence, has the applicant complied with the provisions of Rule 46A?

Is the settlement agreement a credit agreement as defined in the National Credit Act?

[22] At the outset it needs to be emphasised that this matter does not concern the situation where the credit provider has instituted action after complying with section 129 and parties settle the matter in terms of an agreement which is not a novation of the original cause of action and merely provide for the enforcement of the original obligations, or merely provide some respite for the consumer in relation to the original obligations. In my view, in such cases the NCA remains applicable to the underlying agreement, and the consumer retains the protection afforded by the Act for that reason, and not because the NCA is particularly applicable to the settlement agreement. The contrary would lead to absurd consequences. However, this court is not called upon to decide this issue.

[23] On the facts before the court, the respondent concluded two loan agreements subject to the NCA but defaulted in her obligations in terms of those agreements. Consequently, the full outstanding balance due in terms of these agreements became due and payable in terms of acceleration clauses in the agreements. The applicant duly complied with the provisions of section 129 and 130 of the NCA, and after the respondent failed to make use of her remedies in terms of the NCA, claimed the full outstanding balance, with interest and costs. It also sought an order declaring the respondent's immovable property specially executable.

[24] It is of importance that the applicant stated in the particulars of claim that neither the original loans agreements, nor copies thereof could be located, and the applicant relied on secondary best evidence, by relying on information contained in its computer system and blank standard terms and conditions. As such, the applicant's claim was constructed on a rather unsteady foundation.

[25] This set the stage for the conclusion of the settlement agreement shortly after the action was instituted.

[26] The settlement agreement recorded that the respondent acknowledged that she concluded the loan agreements referred to in the summons with the applicant. The parties attached the terms and conditions of the loan agreement to the settlement agreement and incorporated the terms thereof by reference into the settlement agreement.

[27] The respondent admitted that she was liable towards the applicant for the accelerated amount claimed (R1 568 641.29), interest (at 8% per annum calculated and capitalised monthly) and costs on the attorney and client scale. She also acknowledged that the applicant was entitled to an order declaring her immovable property specially executable.

[28] The respondent agreed to liquidate this admitted indebtedness in instalments of R5000.00 per month for a number of months, whereafter the instalments would increase to R19 800.00. It was agreed that if the respondent failed to comply, the full balance would become due and payable immediately, and that the respondent consented to judgment and agreed to an order declaring the property specially executable.

[29] The parties also agreed that the agreement novated and replaced the terms of the agreement between them. As stated, the parties attached standard loan terms and conditions to the settlement agreement, which was incorporated by reference.

[30] Although the inclusion of a novation clause in a settlement agreement in respect of an agreement subject to the NCA would in the normal course not necessarily be prudent, as will be evident from this judgment, but in view of the lack of direct evidence of the conclusion of the loan agreements, the conclusion of a new agreement novating the original agreement was a reasonable and prudent safeguard of the applicant's rights.

[31] In section 8(4)(f) a credit transaction, to which the NCA applies, are *inter alia* defined as follows:

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

(f) 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."

[32] In view of the fact that the full outstanding balance of the respondent's indebtedness had become due and payable before the action was instituted and the settlement agreement concluded, the settlement agreement undoubtedly contained a deferment of the respondent's debt and provides for payment of interest in respect of such debt. On a literal interpretation of section 8(4)(f) of the NCA the settlement agreement falls squarely within this definition.

[33] This court is obliged to interpret the NCA in accordance with principles applicable to the interpretation of legislation, contracts and other written instruments. The general principle is that interpretation is a unitary process, whereby the language used, the purpose of the legislation or document, the context in which certain provisions appear and the surrounding circumstances leading to the creation of the document are all taken into consideration in deriving the meaning of a document. In this regard, a sensible interpretation ought to be preferred over an insensible or unbusinesslike one, or one that undermines the apparent purpose of the document. [2]

[34] Section 2(1) of the NCA provides that the Act must be interpreted to attain the purposes set out in section 3.

[35] The purpose of the NCA is stated in section 3, which reads as follows:

"*The purposes of this Act are to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers, by*
(a) promoting the development of a credit market that is accessible to all South Africans, and in particular to those who have historically been unable to access credit under sustainable market conditions;
(b) ensuring consistent treatment of different credit products and different credit providers;
(c) promoting responsibility in the credit market by

[2] *Natal Joint Municipal Pension Fund v Endumeni Municipality Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA); *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bp*k 2014 (2) SA 494 (SCA)

(i) encouraging responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by consumers; and

(ii) discouraging reckless credit granting by credit providers and contractual default by consumers;

(d) promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers;

(e) addressing and correcting imbalances in negotiating power between consumers and credit providers by

(i) providing consumers with education about credit and consumer rights;

(ii) providing consumers with adequate disclosure of standardised information in order to make informed choices; and

(iii) providing consumers with protection from deception, and from unfair or fraudulent conduct by credit providers and credit bureaux;

(f) improving consumer credit information and reporting and regulation of credit bureaux;

(g) addressing and preventing over-indebtedness of consumers, and providing mechanisms for resolving over indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations;

(h) providing for a consistent and accessible system of consensual resolution of disputes arising from credit agreements; and

(i) providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements."

[36] The question whether a settlement agreement which, on a literal interpretation, falls within the definition of a credit agreement in the NCA is subject to the Act has been considered in a number of decisions. In *Ratlou v Man Financial Services SA (Pty) Ltd*[3] the Supreme Court of Appeal had occasion to consider a settlement agreement which fell within the definition in section 8(4)(f) where the underlying agreement was not subject to the Act. The court held that on a proper interpretation of the Act, the settlement agreement was not subject to the Act.

[37] In *Ratlou* the court regarded it as vitally important that the settlement agreement contained a reference to the underlying agreement (which was not subject to the NCA) and recorded that the agreement was a settlement of the issues relating to that agreement.[4] The court also remarked that 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.[5] In this context the court made the following general remark:[6]

[3] *Ratlou v Man Financial Services SA (Pty) Ltd* 2019 (5) SA 117 (SCA)
[4] Par 20
[5] Par 19
[6] Par 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 a devastating effect on the efficacy and the willingness of parties to conclude settlement agreements and thereby curtail litigation.*"

[38] The court then referred to several other cases where a purposive interpretation was applied to reach the conclusion that the settlement agreement was not subject to the Act, despite the fact that its terms fell squarely within the Act. These were all cases where the antecedent causes were not subject to the NCA. In *Grainco (Pty) Ltd v Broodryk NO and Others*[7] the underlying cause was a claim for damages. In *Hattingh v Hattingh*[8] the settlement agreement embodied an agreement between two brothers in terms of which a business relationship was terminated. *Ribeiro and Another v Slip Knot Investments 777 (Pty) Ltd* [9] also concerned the settlement of a claim for damages.

[39] Apart from being bound by the *ratio decidendi* in *Ratlou*, I agree that it was never the intention of the legislature in enacting the NCA to make the NCA applicable to settlement agreements where the issue in dispute does not fall within the ambit of the NCA. The contrary would indeed result in absurd results. One of the absurd results is that settlement agreements would often be invalid, because the one party (notionally being in the position of a credit provider) is not registered in terms of the NCA as a credit provider.[10]

[40] The *dictum* quoted above must be read in context. The statement that the NCA was not aimed at settlement agreements, must be understood as referring to settlement agreements where the underlying *causa* was not subject to the NCA. The court did not deal with the situation where the underlying *causa* fell within the ambit of the NCA. The court qualified its judgment by remarking that it found (earlier in the judgment) that the legislature never had the intention that the NCA be applicable to *all* settlement agreements.[11]

[41] Where the settlement agreement is concluded pursuant to an agreement between the parties which is subject to the National Credit Act, and the terms of

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[7] *Grainco (Pty) Ltd v Broodryk NO en Andere* 2012 (4) SA 517 (FB)
[8] *Hattingh v Hattingh* 2014 (3) SA 162 (FB)
[9] *Ribeiro and Another v Slip Knot Investments 777 (Pty) Ltd* 2011 (1) SA 575 (SCA)
[10] Section 40(4) of the NCA.
[11] See par 27 of the judgment.

the settlement on a literal interpretation falls within the definition of a credit agreement in the Act, there is in my mind no reason why the court should deviate from a literal interpretation, where the agreement is a novation of the original cause of action. The contrary would lead to absurd consequences. The most glaring consequence is that this would result in the provisions of the NCA being circumvented with impunity.

[42] I have not been referred to any decided case where a court dealt with the issue as to whether a settlement agreement is subject to the NCA, where the underlying *causa* is a credit agreement to which the Act applies.

[43] I take heed of the caution issued in *Ratlou* that the conclusion of settlement agreements should not be stifled by a prospect that the NCA would be applicable to such agreement. This is particularly apposite in cases where the underlying cause does not fall within the ambit of the NCA.

[44] In matters where the NCA is applicable, different considerations apply. Consumers would be hesitant to conclude settlement agreements where the effect of the settlement would be that the protective measures contained in the NCA will no longer be applicable. As a matter of policy, it would be highly undesirable to allow a settlement agreement to thwart the clear purpose of the NCA.

[45] Conversely, a credit provider will be reluctant to conclude a settlement agreement if all the provisions of the NCA will be applicable to the agreement. In this context, settlement agreements are more often than not concluded in circumstances where the consumer has defaulted, and the credit provider was constrained to issue a summons. At the point in time, the consumer is probably hopelessly overindebted and will not qualify for credit. A full affordability assessment will probably reveal this. If the NCA is fully applicable to these settlement agreements, the overwhelming majority of the agreements would constitute reckless credit. If that is the case, no prudent credit provider will conclude a settlement agreement with a defaulting consumer, even if the effect of the settlement agreement is to relieve the consumer's burdens. The effect of

this would be that the credit provider will be forced to not extend compassion to the consumer, and to enforce the original credit agreement strictly.

[46] The provisions of section 129 and 130 of the NCA is directed at affording the consumer the opportunity to negotiate the restructuring of his or her obligations prior to action being instituted. This may result in the conclusion of a settlement agreement, in which the consumer's obligations are restructured, invariably to the benefit of the consumer. The same considerations as set out above apply to these agreements.

[47] I am of the view that the correct approach is that the court should first decide whether the NCA is applicable to the transaction in question and then decide whether on a proper and purposive interpretation of the NCA certain specific provisions of the NCA are applicable to such transaction. It may transpire that the NCA has limited effect on the particular transaction.

[48] It is contended that the reckless credit provisions of the NCA are applicable to the settlement agreement *in casu*. I am of the view that on a proper interpretation of the NCA, such provisions are not applicable to the settlement agreement *in casu*. This will be fully dealt with hereunder.

[49] Other provisions of the NCA should on a proper interpretation be applicable, notably provisions that limit the recovery of exorbitant interest and costs.

[50] In my view the application of over-indebtedness and debt review provisions, as well as the debt-enforcement provisions, to the settlement agreement are eminently within the purpose of the NCA. Although this court only needs to decide the latter aspect of the Act, there is interplay between the debt-enforcement provisions, and the over-indebtedness provisions in the Act.

[51] Consequently, I am of the view that if the various provisions of the NCA is purposively interpreted, the should be no reason why credit providers or consumers should be discouraged from concluding settlement agreements.

[52] Furthermore, to the extent that the NCA will be applicable to a settlement agreement, such agreement is no different from the credit agreement originally

concluded between the parties; if the agreement falls within the purpose and express purview of the Act, the parties have no choice but to accept the obligations imposed upon them by law. If they do not wish to be bound by such obligations, they are free to desist from concluding the agreement.

[53] Consequently, I hold that the settlement agreement *in casu* is a credit agreement in terms of the NCA.

Reckless credit contention in relation to settlement agreement

[54] One of the main objects of the NCA is to promote responsible credit granting and to that end, the prevention of reckless credit granting.

[55] Section 80 of the NCA provides that a credit agreement is reckless if, at the time that the agreement was made, or at the time when the amount approved in terms of the agreement is increased:

a. the credit provider failed to conduct an assessment as required by section 81(2), irrespective of what the outcome of such an assessment might have concluded at the time; or

b. the credit provider, having conducted an assessment as required by section 81(2), entered into the credit agreement with the consumer despite the fact that the preponderance of information available to the credit provider indicated that (i) the consumer did not generally understand or appreciate the consumer's risks, costs or obligations under the proposed credit agreement; or (ii) entering into that credit agreement would make the consumer over-indebted.

[56] Section 81(1) provides that when applying for a credit agreement, and while that application is being considered by the credit provider, the prospective consumer must fully and truthfully answer any requests for information made by the credit provider as part of the assessment required by this section.

[57] Section 81(2) provides that a credit provider may not enter into a credit agreement without first taking reasonable steps to assess the prospective consumer’s understanding of the risks associated with the proposed credit and

the rights and obligations thereunder, the consumer's credit history, and current financial position.

[58] Section 81(3) prohibits a credit provider from granting credit to a prospective consumer recklessly.

[59] Section 83(1) makes provision for a declaration by the court or tribunal that an agreement constitutes reckless credit, while section 83(3) makes provision for the following remedies consequent upon such declaration:

a. the setting aside all or part of the consumer's rights and obligations under that agreement, as the court determines just and reasonable in the circumstances; or

b. suspending the force and effect of that credit agreement in accordance with subsection (3)(b)(i).

[60] In accordance with the purpose of the Act, as set out in section 3, these provisions apply at the stage when a credit grantor has to decide whether to grant credit to the consumer, i.e. before the conclusion of an initial credit agreement. It refers to the "proposed credit" and the "prospective consumer".

[61] One of the purposes of the Act is "*providing for a consistent and accessible system of consensual resolution of disputes arising from credit agreements"*. Accordingly, the Act provides in section 129 for a mechanism whereby parties may resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date, before the debt is enforced by legal action.

[62] In my view, "*a plan to bring the payments under the agreement up to date*" is nothing but a form of settlement.

[63] Whilst the legislature made provision for a settlement between the parties, it expressly provided that such settlement must be the result of the parties resolving the dispute by agreement. There is no requirement that the credit provider must conduct a credit assessment before entering into a settlement agreement.

[64] One of the purposes of the Act is "*providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements*".

[65] To echo the sentiments in *Ratlou*, if the reckless credit provisions of section 80 to 83 of the Act are to be made applicable to settlement agreements, it would stifle the resolution of disputes and / or agreements to bring arrears up to date as provided in section 129. It would also frustrate the object of the Act mentioned in the previous paragraph.

[66] In the present matter, the settlement agreement relieved the obligations resting on the consumer for a period of time, suspended the possible execution against the hypothecated property, and provided for a payment plan directed at the consumer fulfilling her obligations. The application of the reckless credit provisions to this kind of agreement would be senseless, and I hold that it was not intended that the reckless credit provisions would be applicable where the settlement agreement was to the benefit of the consumer.

[67] It must be emphasised that this court is not called upon to decide whether the reckless credit provisions would on a proper interpretation be applicable to settlement agreements where the consumer's obligations are made more onerous, for instance, where the interest rate is increased, and / or the instalments are increased and / or punitive costs and / or collection costs not previously agreed are imposed.

[68] In the premises, although the NCA is generally applicable to the settlement agreement *in casu*, I hold that the reckless credit provisions are not applicable to the settlement agreement herein.

[69] Therefore, the respondent's contention that the settlement agreement constitutes reckless credit in terms of the NCA, with the resultant consequences, must fail.

[70] The third question set out above, therefore falls by the wayside.

Was the applicant obliged to comply with the provisions of section 129 and 130 before launching the application?

[71] Section 129(1)(a) requires the credit provider to propose by notice 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.

[72] Section 130(1) provides that a credit provider may only approach a court for the enforcement of a credit agreement if the consumer was at least 20 business days in arrears, and at least 10 days have elapsed since the delivery of a section 129 notice.

[73] In terms of section 129(5) the notice has to be delivered by either registered mail or by delivery to an adult person at the address designated by the consumer. In terms of section 129(7) delivery by registered mail is sufficiently proven by written confirmation by the postal service or its authorised agent, of delivery to the relevant post office or postal agency, while in the case of physical delivery by the signature or identifying mark of the recipient.

[74] For a variety of reasons, I am of the view that the protection afforded by section 129 of the NCA to consumers is illusory. However, the present matter does not present an opportunity to discuss this issue.

[75] Turning to the present matter, the settlement agreement was a novation of the original cause of action and brought the original action to an end. The settlement agreement constituted a new cause of action, which had to be enforced by new legal proceedings.

[76] The agreement provided that the respondent consented to judgment in the event of non-compliance, and that the agreement would be made an order of court. During the hearing the applicant's counsel was requested to address the question whether the order incorporating the agreement did not already amount to an executable judgment. The applicant's approach was, correctly, that the

order did not amount to an executable judgment and that the present application was necessary.

[77] This application for judgment was brought several years after the conclusion of the settlement agreement.

[78] The debt-enforcement provisions contained in the Act, in particular Section 129 and 130 are *prima facie* applicable to the application *in casu*.

[79] Having regard to the purpose of the Act, there is no reason why a consumer should not be afforded the express opportunity created by section 129 and 130 to negotiate a further restructuring of his or her obligations, to set the debt review provisions of the NCA in motion or resolve disputes by way of the mechanisms mentioned in section 129.

[80] Consequently, the applicant should have complied with section 129 and 130 of the NCA before this application was launched and failed to do so.

[81] In the event of non-compliance with the provisions of sections 129 and 130, section 130(4)(b) obliges the court to adjourn the matter and make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed.

[82] In her supplementary affidavit in which this issue is raised, the respondent simply raised non-compliance of section 129 as a defence, describing the application as premature. It is now trite that non-compliance with section 129 is at best a dilatory defence, having regard to the provisions of section 130(4)(b).

[83] The purpose of section 129 is to resolve disputes between the parties, though an alternative dispute resolution agent, consumer court or ombud. The purpose of the section is also to enable the consumer to use the mechanisms, including referral to a debt counsellor, to develop and agree upon a plan to bring the payments under the agreement up to date. In the absence of any dispute which the consumer intends resolving through these mechanisms, or in the absence of an intention to put the agreement through a mechanism to restructure the obligations with the intention that the agreement will ultimately be fully complied

with, demanding that section 129 should be complied with, is nothing but fruitless formalism. It was never the purpose of the NCA to facilitate formalism which would not benefit the consumer in any way.

[84] In the present matter, the respondent raises non-compliance purely as a dilatory defence. She failed to indicate any intention to implement any of the remedies referred to in section 129. Moreover, she stated that she was unemployed and impecunious. As such, she is clearly unable to co-operate with the development of a plan to restructure payments with a view on eventually paying the full debt.

[85] It is clear that suspension of the action or application, coupled with an order regulating future proceedings, would serve no purpose but to delay the matter, increase the legal costs and waste valuable court resources.

[86] Be that as it may, section130(4)(b) compels this court to suspend proceedings and to make an appropriate order.

[87] No purpose will be served to order the delivery of a section 129 notice. The respondent is already aware of her rights. It will suffice to afford the respondent the opportunity to exercise the remedies referred to in section 129 and make orders regulating future proceedings.

The applicant's application in terms of Rule 46A

[88] In the absence of a judgment, the applicant's application in terms of Rule 46A can obviously not proceed.

[89] In any event, the applicant's application did not comply with the provisions of rule 46A. There is no indication that the application was served on the local municipality who has an interest in the application. The applicant also failed to support its application by an affidavit incorporating a valuation of the property by a registered professional valuer as required by the rule, read with binding case law applicable in this Division.[12]

[12] *SB Guarantee Co (Pty) Ltd v De Sousa and Two Similar Cases* 2024 (6) SA 625 (GJ)

[90] This matter was allocated for hearing at 11h30 on 28 November 2024. Literally one minute before the hearing of the matter the applicant unilaterally uploaded onto CaseLines a valuation report which was ostensibly commissioned by a commissioned of oaths, as well as a document reflecting the current balance owing to the municipality. Apart from the fact that the court was not asked for permission to submit further evidence, the respondent was not afforded the opportunity to respond to it. This was contrary to the provisions of Rule 6, and the basic tenets of our law. No notice of these documents could be taken in favour of the applicant.

[91] An aspect to which no reference has yet been made, is that the applicant also sought an order that if the reserve price set by the court is not met, that the property may be sold to the highest bidder. This is entirely in conflict with Rule 46A, which provide for a procedure whereby the court may be approached for a reconsideration if the reserve price was not met at the sale in execution.

[92] To the extent that the applicant has not complied with Rule 46A, the rule authorises the court to postpone the matter and call for further evidence.

Prima facie contravention of section 103(5) of the NCA

[93] The applicant also uploaded a certificate of balance on 28 November 2024, which reflected that the respondent was allegedly indebted to the applicant in the amount of R3 118 935.22 plus further interest at the rate of 9.5% per annum. This indicates that the maximum amount allowed by section 103(5) of the NCA will be reached soon, if not already reached. It shows that the applicant will contravene section 103(5) by continuing to charge interest without limitation. It will be apposite to require the applicant to demonstrate to the court when the matter is re-enrolled that section 103(5) is not contravened and to indicate what the appropriate limitation to the applicant's claim should be (both in terms of amount and further interest), having regard to the date of default and the costs and interest debited after such date. An appropriate limitation should be incorporated in any future order for judgment.

The question of costs

[94] It is trite that costs are in the discretion of the court, which discretion should be exercised judicially. Whilst the costs normally follow the result, the court has the discretion to deviate from this general principle. The court may in appropriate circumstances deprive a successful party of its costs or even order a successful party to pay the costs.

[95] The respondent initially raised defences to the main application which not only had no merit but was clearly based on false evidence. She falsely denied having concluded the loan agreements and / or passing the mortgage bonds over her property. Her counter-application was based on the same false evidence and had no merit. To the credit of her counsel, Mr Laher, who argued the matter competently, the respondent did not persist with her ill-founded defences and counter-application. The issues were confined to those dealt with above.

[96] The respondent should be ordered to pay the costs of the counter- application.

[97] The respondent was successful in contending that the settlement agreement is subject to the NCA, and that the applicant should have complied with section 129 and 130 before launching the application. She was unsuccessful in persuading the court that the reckless credit provisions of the NCA was applicable to the agreement and to set aside her obligations in terms of section 83.

[98] I have already alluded to a perturbing aspect of the respondent's conduct and approach in the present matter. The respondent raised the section 129 and 130 defence and is evidently fully aware her rights in terms of section 129 and 130. The matter took years to finalise. Meanwhile, while the respondent was fully aware of her right to make use of the over-indebtedness and debt review provisions of the Act, she failed to make use of these rights and simply awaited the hearing of the matter. The fact that the applicant failed to comply with section 129 and 130 entitled her to apply to be declared over-indebted and for debt review in terms of section 86(1).[13] In terms of section 86(2) she would only have been prohibited from applying for debt review if the applicant had complied with

[13] See the discussion above.

section 130, and by implication, section 129. While raising the dilatory defence that section 129 has to be complied with, she did not indicate what she would have done, had the credit provider complied with section 129. Nor did she indicate what she intended to do in future. At the same time, the respondent also failed to comply with her obligations.

[99] The conclusion is inescapable that the consumer is abusing the process of court and is abusing her rights in terms of the NCA, contrary to the purpose of the NCA, to execute a stratagem to delay the matter and to totally avoid complying with her obligations.

[100] In my view the respondent was only nominally successful due to the express provisions of section 130 of the NCA.

[101] Accordingly, in the exercise of my discretion I am of the view that costs should not be granted in favour of the respondent, despite to some extent being successful in opposing the applicant's application.

Order

[102] In the circumstances the following order is granted:

(1) The respondent's counterapplication is dismissed with costs on Scale B;

(2) The applicant's application for judgment is hereby suspended in terms of Section 130(4)(b) of the National Credit Act and postponed *sine die*;

(3) The applicant's application in terms of Rule 46A is postponed *sine die*;

(4) The respondent is hereby granted leave to refer the settlement agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties hereto resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date, within 15 days from the date this order is granted.

(5) If, the respondent fails to comply with the order in paragraph (4) above, or the proceedings referred to in paragraph (4) are terminated, the applicant is granted leave to deliver a supplementary affidavit within 20 days after such non-

compliance or termination, in which at least the following aspects must be addressed:

(a) The failure by the respondent to comply with the order contained in paragraph (4) above, alternatively the termination of the proceedings referred to therein;

(b) A detailed calculation of the limit of the respondent's liability in terms of section 103(5) of the National Credit Act; and

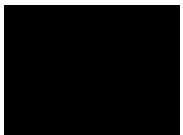
(c) Compliance with rule 46A.

(6) The respondent shall be entitled to deliver an answering affidavit to the aforesaid supplementary affidavit within 20 days, whereafter the applicant shall be entitled to reply within 15 days.

(7) Should the respondent fail to deliver an answering affidavit as provided above the applicant shall be entitled to enrol the matter on the unopposed roll.

(8) Should an answering affidavit be filed, the matter shall be enrolled on the opposed motion roll.

(9) Each party is ordered to pay its own costs in relation to the applicant's application to date.



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DAWID MARAIS

ACTING JUDGE OF THE HIGH COURT

JOHANNESBURG

For the Applicant:	AJ Reinecke instructed by Tim du Toit & Co Inc
For the Respondent:	A Laher instructed by Nadeem Mahomed Attorneys

Date of hearing:	28 November 2024
Date of judgment:	30 January 2025