IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**NO**
Of Interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

Case No: **3949/2021**

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED Applicant

and

CHRISTOFFEL PETRUS WOLMARANS N.O. 1st Respondent

EMERENTIA WOLMARANS N.O. 2nd Respondent

TELLA HARRIS N.O. 3rd Respondent

VAN WYK WOLMARANS N.O. 4th Respondent
[1st to 4th respondents in their capacities as duly authorised trustees of the
WOLMARANS KINDER TRUST, IT962/1998]

CHRISTOFFEL PETRUS WOLMARANS 5th Respondent
(Identity number: 580507 5033 081)

EMERENTIA WOLMARANS 6th Respondent
(Identity number: 591127 0020 087)

CORAM: JP DAFFUE J

HEARD ON: 17 MARCH 2022

DELIVERED ON: 16 MAY 2022

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 16h00 on 16 May 2022.

I INTRODUCTION

[1] This is yet again another application by a registered bank and credit provider for payment of money due and payable which application is resisted by the principal debtors and sureties, relying on numerous defences allegedly afforded them by the National Credit Act ("the NCA").[1]

[2] *In casu* the matter differs from the usual applications of this kind insofar as the bank seeks relief based on a settlement agreement entered into between the parties which was made an order of court.

II THE PARTIES

[3] The applicant is the Standard Bank of South Africa Ltd, represented before me by Advv P Zietsman SC and J Els, instructed by Phatshoane Henney Inc, Bloemfontein.

[4] The first four respondents cited in the application are the four trustees of the Wolmarans Kinder Trust, IT962/1998 ("the Trust"), they being Christoffel Petrus Wolmarans, Emerentia Wolmarans, Tella Harris and Van Wyk Wolmarans. Christoffel Petrus Wolmarans and Emerentia Wolmarans are cited in their personal capacities as 5th and 6th respondents respectively. Adv JA Augustyn instructed by HSL Du Plessis Inc of Kroonstad, c/o Blair Attorneys, Bloemfontein appeared before me on behalf of the respondents.

III THE RELIEF SOUGHT

[5] The applicant seeks payment against the six respondents jointly and severally based on a second settlement agreement that was made an order of court and in terms whereof three different account numbers in the amounts of R8 121 792.19, R2 098 021.87 and R1 920 000.00 respectively, together with interest from 25 June 2021 to date of payment apply. Interest is charged at different rates in respect of the three different

[1] 34 of 2005

accounts. Orders are also sought that several immovable properties belonging to the 1st to 4th respondents in their capacities as trustees of the Trust be declared especially executable. Costs of suit on an attorney and client scale are sought as well.

IV THE COUNTER-APPLICATION

[6] The main application is not only opposed, but a counter-application was filed containing numerous prayers which I do not intend to quote at this stage, save to say that the main relief sought is an order declaring the entire purported first and second settlement agreements void by virtue of numerous provisions of the NCA, *inter alia* ss 89, 90, 91, 111, 116, and 124. The respondents also seek the rescission and setting aside of the two court orders premised upon the settlement agreements.

V POINT OF DEPARTURE

[7] On 12 October 1999 the 6th respondent signed surety in favour of the applicant for the 5th respondent's past and future debts.[2] On 12 July 2004 the Trust entered into a suretyship agreement with the applicant in respect of the 5th respondent's past and future debts.[3] On 27 July 2004 the 5th respondent entered into a suretyship agreement with the applicant in respect the Trust's past and future debts.[4] These suretyships pre-date the implementation of the NCA, the commencement date thereof being I June 2006. In any event, insofar as the principal debtor in respect of the two medium term loan agreements – the second and third accounts mentioned in paragraph 5 supra - is a juristic person, the 5th respondent as surety in respect of these accounts cannot rely on the protection of the NCA. This was correctly conceded by Mr Augustyn on behalf of the respondents. Notwithstanding this concession and the authorities to be discussed *infra*, Mr Augustyn insisted that the NCA applied to the current account agreement entered into by the 5th respondent, a natural person, in respect

[2] Annexure "RA5", p551
[3] Annexure "RA6", p 563
[4] Annexure "RA7", p 571

of the first account mentioned in paragraph 5 *supra*. On the assumption that this credit agreement falls within the ambit of the NCA, which is correct, he submitted that the Trust as surety has the same defences and rights available to it under the NCA as that afforded to the 5th respondent.

[8] In my view, the point of departure that may cut right through all or most of the defences raised by the respondents is whether or not the NCA is applicable *in casu*. The applicant seeks relief based on the terms of a second settlement agreement which was made an order of court. More is said about this hereunder. It is also pointed out that the Trust has four trustees and is consequently defined as a juristic person in the NCA. The relevant definition contained in s 1 of the NCA reads as follows:

"**'juristic person'** includes a partnership, association or other body of persons, corporate or unincorporated, or 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."

[9] It is also common cause that at any time during the conclusion of the credit agreements featuring in the litigation between the parties, the Trust's annual turnover exceeded R1 million and/or its asset value exceeded R1 million, and therefore, based on the definition of "juristic person" and s 4 of the NCA, this Act is not applicable to the credit transactions between it and the applicant. The relevant sub-sections read as follows:

"4 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);

(ii) the state; or

(iii) an organ of state;

(b) a large agreement, as described in section 9 (4), in terms of which the consumer is a juristic person whose asset value or annual turnover is, at the

time the agreement is made, below the threshold value determined by the Minister in terms of section 7 (1);

(2) For greater certainty in applying subsection (1)-

(a) the asset value or annual turnover of a juristic person at the time a credit agreement is made, is the value stated as such by that juristic person at the time it applies for or enters into that agreement;

(b) ….

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

Sub-section 4(4) relied upon by the respondents, reads as follows:

"(4) If this Act applies to a credit agreement-

(a) it continues to apply to that agreement even if a party to that agreement ceases to reside or have its principal office within the Republic; and

(b) it applies in relation to every transaction, act or omission under that agreement, whether that transaction, act or omission occurs within or outside the Republic." (emphasis added)

As mentioned, the 5th respondent in his personal capacity entered into the current account agreement which is the subject of the first claim – in excess of R8 million - in the notice of motion. The 6th respondent and the Trust signed suretyship agreements in favour of the applicant for the 5th respondent's debt as mentioned above. It is appropriate to quote the definition of" "credit guarantee" now as it will be discussed later:

"'credit guarantee' means an agreement that meets all the criteria set out in section 8 (5)" and ss 8(5) reads as follows:

"(5) 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."

[10] Insofar as the respondents are of the view that the two settlement agreements *in casu* are to be considered against the backdrop of the NCA and the provisions of this Act are applicable thereto, I quote ss 8(4)(f) which, based on a literal interpretation, suggests that all other agreements not mentioned in ss

8(4)(a) to (e) where payment of amounts owing are deferred, fall within the ambit of the NCA:

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

(a) …;

(b) …;

(c) …;

(d) …;

(e) …; or

(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."

[11] The definition of "consumer" in s 1 of the NCA includes a guarantor under a credit guarantee and as shown above, a credit guarantee is a credit agreement that meets all the criteria set out in ss 8(5). Van der Merwe JA pointed out in *Mostert v Firstrand Bank*[5] that the sub-section includes a suretyship in respect of the obligations in terms of a credit facility or credit transaction. Therefore, in relying on the wording of ss 4(2)(c) quoted above, a surety is a consumer in respect of the credit agreement to which he/she/it is a party, to wit the suretyship. However, the surety is not a consumer relating to the credit agreement in respect of which the suretyship applies.

[12] Several years before the judgment of the Supreme Court of Appeal in *Mostert v Firstrand Bank,* Satchwell J summarised the legal principles pertaining to sureties and the NCA with respect correctly in *Firstrand Bank Ltd v Carl Beck Estates (Pty) Ltd*.[6] In that case the second respondent, who bound himself as surety and co-principal debtor for the debts of a company in favour of the bank, unsuccessfully relied on ss 8(5) of the NCA in opposing a summary judgment application. The court held that no credit was advanced to the surety who did not become party to the credit

[5] 2018 (4) SA 443 (SCA) para 28
[6] 2009 (3) SA 384 (TPD) paras 16 -24

agreement between the bank and the first respondent. Consequently, the surety could not claim to be entitled to receive notice in terms of s 129 of the NCA as he was sued as guarantor to the obligations of the first respondent – a juristic person – in terms of a credit transaction to which the NCA did not apply.[7] During the evaluation of the parties' submissions more will be said in this regard.

VI MATERIAL COMMON CAUSE FACTS

[13] On 4 December 2018 – three and a half years ago - at Bethlehem, the respondents as debtors signed a written settlement agreement incorporating a power of attorney which was thereafter signed on behalf of the applicant in Durban on 11 February 2019 (the reference to 2018 is clearly a mistake).[8] The respondents' financial advisor at the time, Mr Willem Petrus Fouche, a retired bank manager who was previously in the employ of First National Bank, co-signed as witness for them. Reference will be made to this person again during the evaluation of the evidence and the parties' submissions.

[14] On 21 February 2019 this first settlement agreement was made an order of court by the then Acting Deputy Judge President MH Rampai under case number 696/2019.[9]

[15] A second settlement agreement was entered into between the same parties, signed by the debtors on 29 September 2020 at Bethlehem and on behalf of the applicant in Durban on 16 October 2020.[10] Again, as in respect of the first agreement, the respondents' financial advisor at the time, Mr Willem Petrus Fouche, co-signed as witness for them.

---

[7] *Ibid*: para 24
[8] Annexure "FA2" p 65 and further
[9] Annexure "FA3" pp 102 and 103
[10] Annexure "FA4", p 104 and further

[16] On 12 November 2020 the second settlement agreement was made an order of court by the Honourable Justice PE Molitsoane under case number 4256/2020.[11] As was the case when the first settlement agreement was entered into, the main purpose was to grant extension of payment to the debtors. After having acknowledged their liability towards the applicant, they undertook to reduce the outstanding balances of the various accounts by a minimum of 50% within six months and to settle the remaining balances within a further period of three months.[12]

[17] Mr HSL Du Plessis, a Kroonstad attorney, came on the scene on 13 April 2021.[13] He was at that stage only instructed by the 4th respondent. According to his instructions the Trust denied its indebtedness in the amounts claimed by the applicant. He confirmed that forensic auditors had been instructed to audit the accounts and furthermore accused the bank of several contraventions of the NCA. The very next day Ms Sebet van Jaarsveld communicated with the applicant's attorney on behalf of 4th respondent without saying a word about the alleged dispute.[14] Further correspondence followed between the parties and on 20 May 2021 Ms Van Jaarsveld confirmed that she was still trying to obtain alternative finance for the Trust and even made the following request in respect of payment to the applicant:

> "Ons wil graag nederig 'n versoek rig dat indien ons die bedrag van R2 200 000.00 teen einde Julie 2021 betaal en sodoende die een term loan saam met die current account finaal sluit die balans van die term loans dan oor 7 jaar paaiemente delg."

Again, the applicant was requested for extension of payment in this email. The respondents indicated that they were trying to apply for credit from FNB and Nedbank in order to take over the debt at a more favourable interest rate.[15]

[18] On 9 June 2021 Mr Van Wyk Wolmarans, the 4th respondent and deponent to the answering affidavit in this application, emailed a letter to Mr Otto of

---

[11] Annexure "FA5", pp 141/2
[12] Paras 5.1.1 & 5.1.2 of annexure "FA4", p 108
[13] Founding affidavit: annexure "FA10", p 155 -157
[14] *Ibid*: p 158
[15] Annexure "RA9", p 583

Phatshoane Henney Inc. Cash flow figures were attached to the email and an extension of payment was sought.[16] Again, not a word was said about any dispute as stated by Mr du Plessis, and equally important, the indebtedness and the *quantum* of indebtedness were not disputed.

[19] At no stage was it anticipated that the respondents, being dissatisfied with the periods of extension of payment granted, or any of the other terms of the settlement agreements, would approach the court for rescission and setting aside of the two court orders and/or the settlement agreements. In fact, they tried to comply with their agreements and even paid off substantial amounts as will be shown hereunder.

[20] On 16 August 2021 Mr Du Plessis made a come-back, writing a comprehensive letter to Phatshoane Henney Inc, relying on several alleged defences on behalf of the respondents.[17] Attached to his email is a forensic audit report pertaining to the farming activities of CP Wolmarans, the 5th respondent. This report shall be dealt with again hereunder, but bright red lights attracted my attention in the first paragraph. I quote:

"During the planned agricultural production period, knowingly November – 2014 to January 2021, the Client detected and suspected several errors and financial "irregularities" on their financial agreements / memoranda of agreements ….." (emphasis added)

[21] On 26 August 2021 the applicant's notice of motion was issued and served thereafter. On 16 September 2021 the respondents gave notice of intention to oppose and also filed their counter-application.[18] The replying affidavit was filed on 20 October 2021. Attached thereto is *inter alia* a letter of demand dated 7 April 2021[19] and sent per email to the respondents, informing them of their failure to comply with the second settlement agreement and the applicant's intention to proceed with further action. On 2 November 2021 Mr Van Wyk Wolmarans, the deponent to the answering affidavit, filed a further affidavit referred to as a "duplying affidavit".

[16] Annexure "FA17", p 166 & also "FA18" & "FA19", pp 167 -170
[17] Annexure "FA27", pp 187 – 190
[18] P 208 and further
[19] P 581/2; the same document appears as annexure "FA6" on p 144 and as is apparent it was also served on the respondents by the sheriff: pp 145 - 150

[22] On 13 December 2021 the applicant's attorneys set the matter down for hearing on 17 March 2022. Heads of arguments were filed by the legal representatives of the parties and may I say, the respondents' counsel really made a meal of it in his 70-page heads of argument.

VII EVALUATION OF THE EVIDENCE, AUTHORITIES AND SUBMISSIONS BY THE PARTIES

[23] A party who bears the *onus* in a civil suit must discharge it on a balance of probabilities. In opposed motion proceedings where final relief is sought, factual disputes must be resolved by applying the well-known *Plascon-Evans* rule, whether the *onus* rests on the applicant or the respondent.[20] *In casu* the applicant seeks relief based on a settlement order entered into between the parties which was made an order of court. Save for some legal argument to be entertained, there are no material factual disputes to resolve in respect of the main application. The respondents, who seek the setting aside of the two settlement agreements and the two court orders issued in terms whereof these agreements were made orders of court, raised numerous issues of a legal and factual nature. They have literally thrown the whole NCA at the applicant. The applicant not only denied that the NCA is applicable, but raised factual disputes and therefore, in adjudicating the counter-application, the *Plascon-Evans* rule will be applied.

[24] I intend to deal firstly with the main application where after the counter-application will be adjudicated.

The main application

[25] Two settlement agreements between the parties have been made orders of court. Neither the order under case number 696/2019, nor the one under

[20] *Heidi Nicole Koch NO & another v Ad hoc Central Authority for the Republic of South Africa & another* (188/2021) [2022] ZASCA 60 (26 April 2022) para 49; Pennello v Pennello 2004 (3) SA 117 (SCA) para 39

case number 4256/2020 has been rescinded. The respondents did not apply for rescission of these orders, incorporating the settlement agreements previously. The first agreement was entered into more than three years ago and the second 18 months ago. In *Eke v Parsons*,[21] Madlanga J writing for the majority, quoted with approval the following *dictum*:

"A compromise once lawfully struck is very powerfully supported by the law, since nothing is more salutary than the settlement of lawsuits." (emphasis added)

In casu no lawsuit had been instituted prior to the first settlement agreement, but it is apparent from the document that the parties had reached a settlement with regard to the debtors' indebtedness.[22] There is in principle no reason why parties may not compromise their disputes before litigation is embarked upon and then request the court to make the settlement agreement an order of court. Insofar as this issue may be contentious, I shall elaborate hereunder.

[26] Once a settlement agreement has been made an order of court, it is an order like any other and will be interpreted like all court orders.[23] Wallis JA expressed himself in the following words in *Moraitis Investments v Montic Dairy*,[24] *inter alia* relying on *Eke v Parsons:*

"For so long as that order stood, it could not be disregarded. The fact that it was a consent order is neither here nor there. Such an order has exactly the same standing and qualities as any other court order. It is res judicata as between the parties in regard to the matters covered thereby. The Constitutional Court has repeatedly said that court orders may not be ignored. To do so is inconsistent with s 165(5) of the Constitution, which provides that an order issued by a court binds all people to whom it applies. The necessary starting point in this case was therefore whether the grounds advanced by the applicants justified the rescission of the consent judgment. If they did not, then it had to stand and questions of the enforceability of the settlement agreement became academic." (Footnotes omitted and emphasis added)

The honourable judge continued later as follows:

---

[21] 2016 (3) SA 37 (CC) para 22
[22] Para 3 of annexure "FA2", p 68
[23] *Ibid*: para 29
[24] 2017 (5) SA 508 (SCA) para 10

"There are two difficulties with this statement. First, the distinction it draws, between judgments 'not passed on the merits of a dispute' and other judgments, lacks any foundation in our jurisprudence. There is no difference in law between an order granted in the case of a default judgment; an order pursuant to a settlement prior to the conclusion of opposed proceedings; or the order in a judgment pronounced at the end of a trial or opposed application. As the Constitutional Court has said, it is an order 'like any other'. Second, the proposition is overbroad and inconsistent with the authorities discussed above. Were it correct, a material, but non-fraudulent, misrepresentation justifying rescission of the agreement of compromise would also justify the rescission of the judgment granted pursuant to that compromise, but that is not the case. Its defect lies in approaching the question from the direction of the agreement instead of from the direction of the judgment. The latter is the correct approach, because the judgment operates as res judicata and precludes a claim based on the agreement. Unless and until the judgment has been set aside, there can be no question of attacking the compromise agreement. It follows that the necessary starting point for the enquiry must be whether there are grounds upon which to seek rescission of the court order. Only then can there be any issue regarding the rescission of the compromise." (Footnotes omitted and emphasis added)

[27] A settlement order changes the status of the rights and obligations between parties and save for litigation that may be consequent upon the nature of the particular order, such order brings finality to the *lis* between the parties. As explained by Madlanga J: "the *lis* becomes *res judicata* (literally, 'a matter is judged'.)"[25]

[28] In *Ratlou v Man Financial Services* the Supreme Court of Appeal recently dealt with the possible applicability of the NCA to settlement agreements. I quote:[26]

"[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."

[25] *Ibid:* para 31
[26] 2019 (5) SA 117 (SCA) para 21; also, *Investec v Roberts & another* [2013] ZAWCHC 25 (18 February 2013) paras 16 & 18

In *Ratlou* the debtor defaulted in respect of certain lease agreements entered into in respect of trucks and trailers whereupon the goods were repossessed and sold. Thereafter the debtor and the surety entered into a settlement agreement – an acknowledgement of debt - with the credit provider in respect of the shortfall. The NCA did not apply to the underlying agreements – these being large transactions - and consequently also not to the suretyship.[27] The court held that the legislature never had the intention to apply the NCA to all settlement agreements in terms which accord with the determination of credit transactions.[28]

[29] Mr Zietsman, although conceding factual differences, requested the court to deal with the matter *in casu* in the same manner as was done by the Supreme Court of Appeal in *Ratlou.* In *Ratlou* the NCA did not apply to the original credit agreements and consequently, the court held that both the principal debtor and the surety, a natural person, were bound by the terms of the settlement agreement. Reliance was placed on ss 8(4)(f). The 5th respondent is a surety for the Trust's indebtedness in respect of the medium term loans and based on *Ratlou* he shall be bound in respect of these debts as agreed to in the settlement agreements. The current agreement concluded by the 5th respondent with the applicant, to wit account number 040743268, in respect of which an amount of over R8 million is claimed, falls within the ambit of the NCA. This is common cause. However, the Trust as a juristic person is a surety for this claim in favour of the applicant.

[30] The respondents' contention that the application should be dismissed due to foreseen factual disputes does not hold water. We are dealing with two settlement agreements which were made orders of court. These court orders are still *in esse*. There are no factual disputes in this regard. As the applicant relies on existing court orders, incorporating settlement agreements, it is entitled to relief unless these orders as well as the settlements agreements could be set aside based on the allegations in the

[27] *Ibid*: paras 12 & 22
[28] *Ibid*: paras 24 & 27

counter-claim. Wallis JA made it clear in *Moraitis supra* that the starting point in disputes as *in casu* is whether there are grounds to rescind the court order. The issues raised by the respondents are based on questions of law which can be adjudicated upon the papers and the factual disputes that have arisen involve the adjudication of the counter-application.

[31] The defence of *functus officio* can only relate to the second settlement agreement and the court order issued as a result. It is the applicant's case that the respondents failed to comply with that order. It is important to note that the second settlement agreement specifically empowers the applicant to obtain judgment in the event of the respondents failing to comply with the agreement. It reads: "The bank may proceed to obtain judgment against the debtors for the full outstanding balance as per paragraphs 4.1 to 4.14 above".[29] Bearing in mind the *dictum* in *Eke v Parsons* which I quoted above, there is just no basis for an argument that the court that granted the second order became *functus officio,* preventing this court from dealing with the present application. Clearly, this litigation is consequent upon the nature of the particular order. Mr Zietsman submitted that the present application was also required to obtain judicial oversight insofar as the applicant seeks an order declaring the various immovable properties specially executable. According to him, although the applicant obtained the right to sell the immovable properties as is apparent from the power of attorney[30] attached to the second (and the first) settlement agreement, it was decided to request a declaratory order to ensure that judicial oversight is achieved. I am satisfied that the previous order, allowing a specific mode of liquidating the Trust assets, cannot stand in the way of this court considering whether the properties should be declared specially executable in accordance with rule 46A. The defence is not meritorious and therefore rejected.

[32] If one considers the amounts involved, there can be no doubt that the Trust, represented by its trustees, conducts business on a grandiose scale. After the recent sale of two farms, the trustees in their representative

[29] Clause 6.3, p 114
[30] Annexure "FA4" and pp 126 – 138 in particular

capacities are still the owners of 14 immovable properties in the district of Bethlehem, in extent in excess of 4 000 hectares and which according to their estimation are worth over R60 million.[31] The total debt of the respondents was in excess of R19.8 million at the time that the first settlement agreement was entered into.[32] This amount was quite significantly reduced upon the sale of two farms as the total debt *ex facie* the second agreement was just less than R12 million. The total amount claimed in these proceedings is R12 139 814.06 plus interest on the different accounts.[33]

The counter-application

[33] Insofar as the counter-application is concerned, the respondents (the applicants in the counter-application: the debtors) can only succeed based on the applicant's version (the respondent in the counter-application: the bank) together with the facts in the respondents' version that are admitted by the applicant, bearing in mind *Plascon-Evans*. I am satisfied that there is no reason to reject the applicant's version for purposes of adjudicating the counter-application. That being the case, it should be the end of the respondents' counter-application. However, I feel obliged to deal with the respondents' version. Before I deal with any of the submissions made pertaining to the NCA or factual disputes raised, it is apposite to point out some of the material averments of the respondents that are so far-fetched and improbable that they may safely be rejected. I agree with the applicant that some averments are blatantly dishonest and made to cloud the issues. I mention the following:

33.1 The forensic audit report by Mr A Pretorius dated 11 August 2021 was attached to the applicant's founding affidavit. I mentioned it above. This is astonishing, bearing in mind the ongoing relationship between the parties during this entire period as will be

[31] Para 2 of the notice of motion: pp 9 -12 and answering affidavit: para 14.3, p 242 & para 16.14, pp 260 - 262
[32] Founding affidavit: annexure "FA2", pp 65 - 86
[33] Para 1 of notice of motion, p 8, read with certificates of balance: pp 181 - 184

explained herein, the settlement agreements entered into, the down-payments and the offers to pay mentioned above.

33.2 According to the 4th respondent, speaking for himself and the other respondents, they were never aware of the provisions of the NCA until alerted thereto by Mr Du Plessis after the second settlement agreement was enter into. At best for them, this is highly improbable, but rather dishonest as stated on behalf of the applicant. The respondents entered into numerous credit agreements over the years. There is no reason to do a research in respect of all the credit agreements before the court. A few examples will do to show that the NCA is clearly referred to in these agreements.[34]

33.3 If they haven't read the credit agreements, their financial advisor, Mr Fouche, the retired bank manager who assisted them when both the settlement agreements were entered into and who signed as witness, as well as the person that tried to arrange credit for them, Ms Sebet van Jaarsveld, who both must also have a solid knowledge of the NCA and its strict requirements, would in all probabilities have explained the legislative issues to them.

33.4 The latest credit agreement entered into is the current account agreement of 20 November 2017 between Mr CP Wolmarans, the 5th respondent, and the applicant.[35] Mr Pretorius stated in his report in respect of the farming activities of Mr CP Wolmarans that financial irregularities and errors were detected in respect of the period November 2014 to January 2021. Clearly, he was provided with wrong information. The impression is created that the agreed limit on the 5th respondent's current account was a mere R7.7 million in respect of the 2015 agreement, whilst it is apparent that on 9 November 2017 the limit was increased to R12

[34] Answering affidavit, annexures "VW5", the one medium term loan, "VW7", the current account agreement, pp 354 & 380
[35] Replying affidavit: annexure "RA1", p 485

490 000.00.[36] Also, the medium term loan no 25-294-586-7 does not even feature in any of the two settlement agreements, but two different credit agreements referred to as medium term loans. The applicant made the point with conviction that the respondents were dishonest when they made their allegations.

33.5 Clearly, the respondents are not in a financial position to service their debts; they had to sell two farms to reduce the debts as mentioned above and they intend to sell two further farms in the hope of settling the applicant's debt *in toto*.

33.6 They alleged that upon payment of the proceeds of the sale of their two farms the balances on the accounts were not reduced, whilst I indicated above how the applicant's total claim was in fact reduced after the first and before the second settlement agreement was entered into. The applicant used the proceeds of the sale to reduce the largest debt, to wit the current account in the name of the 5th respondent. Nothing turns on the complaint that the proceeds were not used to settle the medium term loans as the trustees of the Trust remain liable for all the debts, to wit the medium term loans and the current account, either as principal debtors or as sureties.

33.7 They repeatedly stated that they were induced to sign unlawful agreements and that they did not have the luxury of a legal representative's advice, but failed to take the court in their confidence to explain what was Mr Fouche's role who strangely enough was not called upon to depose to a confirmatory affidavit.

33.8 The respondents made allegations on wrong agreements when dealing with the Trust's medium term loans which they stated were for R2 million and R3.5 million respectively, whilst the

[36] Answering affidavit: para 10, p 234 & replying affidavit: para 10, p 464 & "RA1", p 485; answering affidavit: para 7, pp 230/1 and replying affidavit: para 14, pp 470/1 & "RA1"

correct loan amounts were R4.8 million granted in December 2016 and R3.5 million in respect of the 2013 agreement, the terms of which were amended in 2014.[37]

33.9 The respondents' version that they did not receive any letter of demand after failing to comply with the second settlement agreement is false according to the applicant. Demands were sent on 7 April 2021 by email to Mr Fouche and the 4th, 5th and 6th respondents.[38] The demand was also served by the sheriff as shown.

[34] It is appropriate to remind the reader that a court should not rubber-stamp any agreement placed before it. As Madlanga J put it in *Eke supra*,[39] a court must be satisfied that the order to be made is competent and proper - it should not be mechanical in its adoption of the terms of a settlement agreement. An agreement unrelated to litigation may not be made an order of court, the reason being that parties contracting outside the context of litigation may not approach the court and request that the agreement be made an order of court. The court referred to the example of two merchants that entered into an ordinary commercial agreement and then jointly approached the court to have it made an order of court to provide an effective remedy against possible breach of contract which the court declined to do in *Hodd v Hodd: D'Abrey v D' Abrey.*[40] The Constitutional Court also held that the agreement to be made an order of court shall not be objectionable and its terms must be capable from a legal and practical point of view of being included in a court order, ie its terms must accord with both the Constitution and the law and must not be at odds with public policy. Finally, the agreement must also hold some practical and legitimate advantage.[41] The court also accepted the inherent power of the courts to

[37] Answering affidavit: para 10, p 235 and replying affidavit: para 10, pp 464/5 & "RA2", "RA3" & "RA4", pp 507 – 550; and see also para 30, p 482
[38] Annexure "FA6.1", p 143/4 also attached as "RA8", p 581/2 as well as proof of service by the sheriff, annexures "FA6.2" – "FA6,7", pp 145 - 150
[39] *Eke v Parsons supra:* para 25
[40] 1942 NPD 138
[41] Ibid para 26

protect and regulate their own process as provided for in s 173 of the Constitution.[42]

[35] The respondents did not seek the rescission of either the first or second order on the basis that these orders could not be issued in the absence of a *lis* between them. The aspect was consequently not properly canvassed. I accept that parties cannot and should not be allowed to ask the court as a matter of cause to make their commercial agreements court orders in line with the example reflected in *Eke v Parsons* above. This is not the function of the court. In *casu* the matter is about on all fours with the facts in *Growthpoint Properties Ltd v Makhonya Technologies (Pty) Ltd and Others*.[43] The respondents breached the various underlying agreements and fell in arrears with payments. It is not clear what else was in dispute, but fact of the matter is that they settled the disputes and applicant allowed the respondents further time to settle the debts. I am satisfied that I am now called upon to grant orders flowing from the second court order and therefore the *dictum* of the Constitutional Court does not come into play at this stage. The scenario might have been different if an objection was raised at the stage when the parties requested the court to make the settlement agreement an order of court. Whatever the situation, there is no justifiable ground to rescind any of the two orders.

[36] The respondents averred that the application was prematurely issued insofar as the applicant failed to issue a notice in terms of as 129 of the NCA. In *Eke v Parsons* the defendant also raised this point, but the High Court dismissed it as well as all his other defences. The same defences were then relied upon in his application for leave to appeal to the Constitutional Court. Although limited success was achieved, that court did not grant leave to appeal in respect of the s 129 defence. The facts in *Eke v Parsons* differ from those *in casu* as in that case the plaintiff again brought an application for summary judgment after the defendant had reneged on the settlement agreement which was made an order of court.

[42] Ibid para 27
[43] 2013 (JDR) 0391 (GNP)

In casu, there was no prior litigation between the parties who then agreed in the second settlement agreement that the applicant may proceed with further action in the event of the respondents' failure to comply and after 7 days' written notice. The s 129 defence is obviously only available to the 5th and 6th respondents. Although a strong argument may be made out that no notice as contemplated in s 129 was required, I would rather err on the side of caution and not grant orders against the 5th and 6th respondents at this stage.

[37] More often than not, debtors confronted with claims for payment of their debts raise the reckless credit defence. In many of these instances the debtors who obtained credit to buy luxury vehicles or homes and/or for substantial farming operations, insist on keeping possession of the goods whilst relying on a defence of reckless credit. One would have thought that the defaulting debtors would do the right thing, *i.e.* to return the goods if they are not in a financial position to pay the debts and then raise the defence of reckless credit. I still have to come across the last-mentioned situation. *In casu* it is not the respondents' case that reckless credit was provided when the underlying agreements were entered into. They aver that when the settlement agreements were entered into, the applicant was obliged to conduct the same credit analysis as was required when the respondents applied for credit initially. This is really a fanciful argument without any substance. Again, it is reiterated that neither of the two settlement agreements are credit agreements within the ambit of the NCA.

[38] Issues raised pertaining to "a supplementary agreement" referred to in ss 89 and 91 of the NCA must also be considered. The purpose of the provision in s 89(2) that a credit agreement is unlawful if it is a supplementary agreement or document prohibited by s 91(a) is clear. A consumer should not be required or induced by a credit provider to enter into a supplementary agreement, to wit a separate agreement that contains a provision that would be unlawful if it was included in the credit agreement. The Supreme

Court of Appeal dealt with this aspect in *National Credit Regulator v Lewis Stores (Pty) Ltd.*[44] I quote:

"Section 90(2) lists a number of provisions which would be unlawful if they were contained in a credit agreement and s 91 is directed at preventing a credit provider from circumventing the provisions of s 90 by recording provisions which would be unlawful if included in a credit agreement in a separate supplementary agreement or unilateral document signed by the consumer."

Again, the settlement agreements are not subject to the NCA. These agreements did not supplement any terms of the original credit agreements, but were entered into some time thereafter in order to provide extension of payment. The first agreement made it clear that the parties "have reached a settlement with regard to the indebtedness of the Debtors to the Bank" and the second agreement confirmed that the parties "have reached a new settlement with regard to the indebtedness of the Debtors."[45]

[39] There is no substance in the argument that ss 4(4) applies *in casu*. Firstly, the only agreement that could possibly be effected is the current account agreement. Even so, a literal interpretation would lead to a conclusion that parties to a credit agreement that are in dispute about, for example an outstanding balance due before or after action was instituted for payment, would never be able to settle their dispute in a settlement agreement as those *in casu* and to have that made an order of court if they so wish, unless there is compliance with the NCA. In my view the legislature did not have in mind such unbusinesslike consequences. The context of the provision and purpose of the legislature point in an opposite direction. I am satisfied that the same approach adopted in *Ratlou supra* pertaining to ss 8(4)(f) should apply in this respect.

[40] The respondents also averred that they could not validly have renounced the benefits of the common law exception, *errore calculi*.[46] This allegation is again based on the NCA which is not applicable. Nothing more needs to be said, save perhaps that the calculations provided by Mr Pretorius are

[44] 2020 (2) SA 390 (SCA) at 394 I
[45] "FA2" & "FA4" on pp 68 & 106
[46] Answering affidavit p ……. & *inter alia* "FA4" on p 117

clearly incorrect. This evidence was merely presented in a last-ditch attempt to oppose a water-tight case, a *mala fide* attempt to create a factual dispute as alleged by the applicant.

[41] Relying on the common cause fact that the current account agreement entered into by 5th respondent is an agreement as contemplated in ss 4(2)(c), the respondents averred that the NCA applies to all the credit guarantors (or sureties) who bound themselves to the applicant for this debt. This is incorrect insofar as the Trust is concerned for the reasons mentioned above. Nothing further needs to be said. The 6th respondent bound herself jointly and severally with all the other debtors in the settlement agreements to pay what is due to applicant**.** Insofar as I indicated *supra* that no order shall be made against the 5th and 6th respondents at this stage, it is not necessary to debate this issue any further.

[42] The respondents failed to prove that the two court orders should be rescinded and also that the two settlement agreements should be set aside. They, after being assisted by a former bank manager who is supposed to know the NCA and any defences available to debtors, entered into the agreements. They failed to show that they have *bona fide* defences to the applicant's claims. They failed to show that they are entitled to rescission of judgment, either in terms rule, 31, rule 42 or the common law. Their version is improbable and far-fetched, but in any event, bearing in mind *Plascon-Evans*, they failed to show that the applicant's version stands to be rejected as far-fetched and/or improbable and/or false. They are not entitled to any relief. Their reliance on any of the other sections of the NCA, not specifically dealt with, is without substance. They are also not entitled to discovery at this stage of the proceedings.

[43] Even if the respondents were entitled to rescission of the court orders on any of the grounds relied upon, the settlement agreements remain in place. There is just no justification for an order in terms whereof the settlement agreements should be rescinded and set aside. The applicant's counsel

submitted that even if the court orders are rescinded, the applicant is still entitled to judgment in terms of the prayers contained in the notice of motion based on the second settlement agreement that remain *in esse*.

[44] I was concerned that the applicant had adopted a process of entering into settlement agreements with the respondents in the absence of a *lis* between them and in doing so intended to circumvent the provisions of the NCA and in particular s 129 thereof, being a compulsory pre-debt enforcement process. This aspect may give rise to different and contrasting views as is evident from the arguments of counsel in this case. Mr Augustyn on behalf of the respondents made it clear that s 129, read with s 130, was compulsory and that the entering into of the settlement agreements should be regarded as "debt enforcement" steps. I disagree as it happens each and every day that creditors grant extension to debtors to settle debts that had become due and payable. He perhaps intended to submit that the applications to obtain the two court orders should be regarded as debt enforcement steps. He also submitted that the present application is a debt enforcement mechanism and that a s 129 notice should have been served which the applicant failed to do. Fact of the matter is that I have decided not to make a definite ruling in this regard and consequently no orders will be granted against 5th and 6th respondents.

[45] Finally, I decided to grant a suspension of execution in line with Mr Zietsman's alternative submission. Also, in fairness to the trustees, bearing in mind the apparent total value of all the immovable properties, the outstanding debt in relation to such value and the equity in the farms, the significant down-payments made since the first court order, the present marketing by the trustees of two further farms, the proceeds of which they believe may be sufficient to settle the applicant's debt in full, and finally, insofar as the farms Uitkijk and the Remainder of the farm Mullersvlei are considered the primary residences of the 4th, 5th and 6th respondents, these two immovable properties shall be excluded from the order to be issued. I exclude these properties in the exercise of my discretion notwithstanding my understanding of the legal principles that these properties are not to be

considered primary residences of the judgment debtors, being the trustees in their representative capacities as such of the Trust, the owner of the properties.[47] Rule 46A applies whenever an execution creditor seeks to execute against the residential property of a judgment debtor, *ie* the primary residence of the judgment debtor. In such a case judicial oversight is required and the provisions of sub-rules 8 and 9 kick in to ensure fairness.

VIII CONCLUSION

[46] I conclude that based on the reasoning above, the applicant has made out a proper case for the relief sought in the notice of motion, subject to the suspension of the execution until 31 July 2022 and the exclusion of the two farms that are regarded as the primary residences of the respondents. No reserve price needs to be set insofar as the remainder of the immovable properties are not the primary residences of the judgment debtors. The respondents' claims as contained in the counter-application are devoid of any merit and shall be dismissed with costs.

IX ORDERS

[47] The following orders are issued:

In respect of the main application

(1) Judgment is granted against the first to fourth respondents jointly and severally, the one paying the other to be absolved, in the following terms:

1.1 **IN RESPECT OF ACCOUNT NUMBER 040743268:**

1.1.1 Payment of the amount of **R8,121,792.19**;

[47] Rule 46A and the following judgments with which I respectfully agree: *Investec Bank Ltd v Fraser NO and Others* 2020 (6) SA 211 (GJ) paras 68 – 70 and the unreported judgment, *Nedbank Ltd v Bestbier and Others* (Scholtz Intervening) (12654/18) ZAWCHC 107 delivered on 17 September 2018

1.1.2 Payment of interest on the aforesaid amount at the rate of 13.05% per annum calculated from **25 June 2021** to date of payment, both days included.

1.2 **IN RESPECT OF ACCOUNT NUMBER 040727688:**

1.2.1 Payment of the amount of **R2,098,021.87**;

1.2.2 Payment of interest on the aforesaid amount at the rate of 7.50% per annum calculated from **25 June 2021** to date of payment, both days included.

1.3 **IN RESPECT OF ACCOUNT NUMBER 371832152:**

1.3.1 Payment of the amount of **R1,920,000.00**;

1.3.2 Payment of interest on the aforesaid amount at the rate of 8.45% per annum calculated from **25 June 2021** to date of payment, both days included.

(2) The following immovable properties of the First to Fourth Respondents in their capacities as trustees of the Wolmarans Kinder Trust, IT 962/1998 are declared specially executable:

2.1 The Farm Tevrede 41, district Bethlehem, Province Free State
In extent 288,6442 (two hundred and eighty-eight comma six four four two) hectares
Held by Title Deed No T667/2011;

2.2 The Farm Eenzaamheid 774, district Bethlehem, Province Free State,
In extent 343,7577 (three hundred and forty-three comma seven five seven seven) hectares,
Held by Title Deed No T28464/2002;

2.3 The Farm Mooivlei 1304, district Bethlehem, Province Free State,
In extent 171,3064 (one hundred and seventy-one comma three zero six four) hectares,
Held by Title Deed No T28464/2002;

2.4 The Farm Christiana 1368, district Bethlehem, Province Free State;
In extent 42,8266 (forty-two comma eight two six six) hectares,
Held by Title Deed No T28464/2002;

2.5 The Farm Hebron 1369, district Bethlehem, Province Free State,
In extent 86,9836 (eight-six comma nine eight three six) hectares,
Held by Title Deed No T28464/2002;

2.6 Remainder of the Farm De Rust 1763, district Bethlehem, Province Free State,
In extent 135,6861 (one hundred and thirty-five comma six eight six one) hectares,
Held by Title Deed No T28464/2002;

2.7 Portion 2 of the Farm Brakpan 242, district Bethlehem, Province Free State,
In extent 3024 (three thousand and twenty-four) square meters,
Held by Title Deed No T28464/2002;

2.8 The Farm Eenzaam 1166, district Bethlehem, Province Free State,
In extent 142,8624 (one hundred and forty-two comma eight six two four) hectares,
Held by Title Deed No T28464/2002;

2.9 The Farm Smaldeel 1367, district Bethlehem, Province Free State,
In extent 42,8266 (forty-two comma eight two six six) hectares,
Held by Title Deed No T28464/2002;

2.10 Portion 1 (Eureka) of the Farm De Rust 1763, district Bethlehem, Province Free State,
In extent 135,5876 (one hundred and thirty-five comma five eight seven six) hectares,
Held by Title Deed No T28464/2002;

2.11 Portion 4 of the Farm Brakpan 242, district Bethlehem, Province Free State,
In extent 80,4600 (eight comma four six zero zero) hectares,
Held by Title Deed No T28464/2002;

2.12 Remainder of the Farm Cyferfontein 1090, district Bethlehem, Province Free State,
In extent 288,6465 (two hundred and eighty-eight comma six four six five) hectares,
Held by Title Deed No T22354/2004.

(3) The Registrar of the High Court is authorised and directed to issue a Writ of Execution against the aforesaid immovable properties.

(4) The order declaring the immovable properties specially executable is suspended until 31 July 2022, where after the Sheriff of the Court shall be entitled to immediately proceed with execution in the event of the respondents failing to settle the money judgment in paragraph 1 above.

(5) Costs of suit on attorney and client scale.

In respect of the counter-application:

(6) The respondents' counter-application is dismissed with costs.

J P DAFFUE J

On behalf of the Applicant:	Advv P Zietsman SC and J Els
Instructed by:	Phatshoane Henney Inc BLOEMFONTEIN
On behalf of the Respondents:	Adv JA Augustyn
Instructed by:	Blair Attorneys BLOEMFONTEIN