

SOUTH AFRICA / JUDGMENT

Adam and Another v Moosa (A20/2023) [2024] ZAWCHC 117 (19 April 2024)

[2024] ZAWCHC 117

COURT

Western Cape High Court, Cape Town

BEFORE

Ndita, Henney, Nziweni

CASE / FILE NUMBER

A20/2023

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IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

REPORTABLE

Appeal

case no: A20/2023

Court

a quo case no: 8869/21

In

the matter between: MEHBOOB
ADAM
First Appellant
MOHAMED
AMIEN
MUKADAM
Second Appellant
and
MYMOENA
SULIMAN
MOOSA
Respondent

Delivered: This 19th day of April 2024 by email to the parties.

JUDGMENT

NDITA, J

- [1] This appeal turns first on the interpretation of an Acknowledgment of Debt (“AOD”) signed by the First and Second Appellants in favour of the Respondent in respect of monies lent to an entity known as Cream Magenta (Pty) Ltd and second, whether the aforesaid acknowledgment of debt constitutes a contract of intercessio. Third, it must be considered whether the National Credit Agreements Act 34 of 2005 (“NCA”) applies to the agreement.

The parties

- [2] The First Appellant is an adult male businessperson conducting same at Unit 17 The Pavillon Central Park Est, Century City, Cape Town. The Second Appellant is also an adult male person residing at 3 Coghill Mews, Sunset Links, Milnerton.
- [3] The Respondent is an adult female person. She describes herself as a housewife. She is married to Mr Fharhaad Ali Moosa.

Factual

background

- [4] The factual background germane to the determination of this appeal as gleaned from the First Appellant’s answering affidavit is largely undisputed and may be summarised thus: The First Appellant is involved in the business of property development through an entity Mehboob Adam Parow (Pty) Ltd. The First and Second Appellants and or entities under their control have been involved in a number of developments together on a joint venture basis. A development of Erf 1[...], R[...], J[...] (‘the property’) was one such joint venture development. The Respondent’s husband, Mr Moosa, is a retired engineer and is well-known to the First Appellant and was at some stage engage by him as his ‘man of the ground’ in Johannesburg in his property developments. Mr Moosa oversaw the day-to-day operations. According to

the First Respondent, Mr Moosa approached him with the proposal that he (Mr Moosa) be made responsible for the day-to-day running of the property development business at the behest of the First Appellant. Subsequent thereto, the First and Second Appellants agreed that Mr Moosa oversee

certain aspects of their then on-going property development on their behalf. Because of this arrangement, the Appellants were in regular contact with Mr Moosa. The papers reveal that the parties regularly held discussions regarding future development opportunities. Towards the latter part of 2015, the discussions culminated in the exploration of the possibility of acquiring and developing of the property in question and the raising of the finance to that end. The aforesaid project required capital. The First Appellant avers that Mr Moosa advised them that the Respondent had some money available to invest on the property and the parties agreed that they would obtain a loan from the Respondent. This was an oral agreement. The Respondent was represented by her husband during the discussions and up to the stage of the conclusion of the agreement. It was agreed that the Appellants would acquire the property through a special purpose vehicle. Cream Magenta 101 (Pty) Ltd ("the Company"), became the entity created specifically for this purpose. According to the First Appellants, it was the intention of the parties that they would be co-directors of the newly formed Company. It is common cause that the Appellants were not parties to the agreement, which later became known as "the Loan Agreement" in their personal capacities. However, it later transpired that only the First Appellant was registered with the Companies and Intellectual Property Commission ("CIPC") as a director. On 29 September 2015, the Second Appellant cited himself as the nominee purchaser on the offer to purchase.

- [5] It is not in dispute that the Respondent loaned the Company an amount of R3,5 million, which amount was used to partly fund the purchase of the property. The Respondent transferred the loan amount directly to attorneys responsible for transferring the property as part payment of the amount of R6,9 million which was the purchase price of the property. The parties agreed that the Respondent would be repaid the amount loaned from the proceeds of the sale of property after it had been developed.
- [6] The First Appellant avers that there were glitches with the development of the property which were due to the economic downturn as well as an oversupply of stock of similar stock and rising building costs. The development they had envisaged when they acquired the property was no longer feasible.
- [7] About two or three years after the acquisition of the property there was no meaningful progress concerning its development, and Mr Moosa understandably became anxious if it would be able to meet its financial obligation of repaying the loan granted to it by the Respondent. According to the First Appellant, because the loan had investment features; the Respondent could only achieve any return, on the successful completion of the development. When it became clear that another similar development initiated by the Applicants in the same street had failed, Mr Moosa suggested to the Appellants that they conclude an acknowledgment of debt, in terms of which the Company acknowledged its

indebtedness to the Respondent. According the First Appellant, Mr Moosa advised them that the Respondent had funds she could put towards the development of the property. He [Mr Moosa] also suggested that the AOD differ from the Loan Agreement in two respects, namely: -

7.1 That it be recorded that the Respondent would only receive the cash compensation for the 'opportunity costs' she incurred by advancing funds to the Company in lieu of taking transfer of a unit in the development.

7.2 The Respondent would be repaid on an earlier date of the completion of the development project.

[8] These propositions were acceptable to the Appellants who also were equally anxious about the viability of the development. After further discussions with Mr Moosa, the Appellants agreed to conclude the AOD on the terms suggested by Mr Moosa but they deny that the aforesaid agreement would render them personally liable. The First Appellant explains that his company, Mehboob Adam Parow (Pty) Ltd had retained the services of a person with legal training, Mr Jason Minnaar ("Mr Minaar"), who then prepared the AOD using a previous template and incorporating the terms they (the first and second appellant and Mr Moosa) had agreed to. Thus, the AOD came into being.

[9] Given that the entire appeal turns on the AOD, I find it necessary to cite the entire provisions thereof:

"ACKNOWLEDGMENT OF DEBT"

We the undersigned, Mehboob Adam (5504195017088)

&

Mohamed Amien Mukadam (7312205118088)

On behalf of Cream Magenta 101 Pty Ltd ("the borrower") do hereby acknowledge the borrower to be truly and lawfully indebted to

Mymoena Moosa (5001030169085)

("the Lender")

in the amount of R3 500 000.00 (Three million Five Hundred Thousand Rand) ("the capital amount") in respect of monies lent by the Lender to the Borrower.

1. We hereby confirm that the opportunity cost of R20 000.00 (Twenty Thousand Rand) per month calculated from December 2015 until the date that the settlement amount is settled is payable to the Lender.
2. We agree that the Capital Amount will be paid at the earlier date of either the sale of the subject property Remainder of Erf 1[...]

R[...] or the 31st of October 2020 whichever comes first. It is agreed that the accrued opportunity costs will be paid on the date of payment of the capital amount.

3. Should any amount not be paid on due date same shall bear an additional opportunity cost at 3% above the prime bank commercial overdraft

lending rate charged by the Lenders [sic] bankers to its best rate customers on an unsecured basis from time to time, which interest

shall be calculated on a monthly basis and capitalised. In the case of the dispute as to the rates so payable, the rate shall be

certified by any Manager or Assistant Manager of any branch of the said bankers, whose decision shall be final and binding on the

parties.

4. . . .

5. No extension of time or other indulgence granted by the Lender to us in respect of our obligation would constitute a waiver of the Lender's rights to enforce compliance with the terms hereof nor will constitute a novation of this agreement.

6. We agree that a certificate signed by the Lender reflecting the amount of the Borrower's indebtedness to the Lender and the fact that the same is due and payable shall be binding upon us and shall be valid and enforceable as a liquid document against for the purposes of the Lender obtaining provisional sentence or judgment against us.

7. We hereby choose the domicilium citandi et executandi [Mehboob Adam] at 3 Coghill Mews Sunset Links Milnerton 7440; [Mohammed Amien Mukadam] 11 Monarch Road Baronetcy Platteklouf 7550.

8. . . .

9. We hereby renounce the benefits of the legal exceptions 'non numeratae pecuniae', 'no - causa debiti', 'errori calculi', 'revision of accounts' 'no value received', and all other exceptions which could be pleaded to the validity of enforceability of this Agreement, the full meaning and effect of which have all been explained to us and we are acquainted therewith.

10. In terms of section 45 of the Magistrate's Court Act 1944, as amended, we consent to the jurisdiction of the Magistrate Court in respect of any action or proceedings which may be instituted against me in terms in terms of or arising out of this Agreement.

Notwithstanding, the Borrower will be entitled, in her discretion, to institute any action or proceedings against us in terms of or arising out of this agreement in any High Court which has jurisdiction.

11. This Agreement will also be binding on our estates, executors, administrators, heirs, and successors in title.”

[10] The First Appellant states that nine months after executing the AOD, Mr Moosa wrote to both stating the following:

“Salaams Mehboob/Amien

As you are both aware, a substantial amount is owing to Mymoena. As such, she requires additional security for her loan to Cream Magenta.

Accordingly, I have attached a suretyship agreement which she requires to be signed. Please return a signed copy to me as soon as possible.

Regards,

Farhaad

[11] The First Appellant states that before he could respond to the above email, Mr Moosa, on 24 July 2020, sent another email which reads as follows:

I refer to the email below as well as our telephonic discussions held yesterday and today with Amien.

Mymoena and I have been more than accommodating in terms of the monies which are owed to us respectively.

In an attempt to avoid any impasse, please return a signed copy of the Suretyship agreement to me by no later than close of business on Monday, 27 July 2020.

Farhaad”

[12] According to the First Appellant, he was not privy to any discussions between Mr Moosa and the Second Appellant. He contends that if Mr Moosa understood the AOD to be imposing personal liability on both of them, then there would be no need for additional security by way a suretyship. Put in another way, the First Appellant suggests that there never was an intention that the AOD render him personally liable and the need to execute a personal suretyship shows that Mr Moosa himself did not believe that the Second Appellant was already personally liable under the AOD. Nonetheless, Mr Minnaar [Appellants’ legal representatives] responded to Mr Moosa’s email in the following manner:

“Dear Farhaad

I trust you are well. We acknowledge receipt of your correspondence requesting additional security for your wife Mymoena’s loan to Cream Magenta 101 Pty Ltd. The acknowledgment of debt doesn’t allow for any additional security to be provided by Mr Adam and Mr Mukadam.

The shareholders of Cream Magenta have always acknowledged [sic] the amounts contained in the agreement (Acknowledgment Debt) which was signed in October 2019 was due to your wife. The company remains firmly committed to ensuring that the loan together with the opportunity costs due are paid by the 31st of October 2020.

Please feel free to contact me should you need to discuss this matter in more detail.”

- [13] The First Appellant emphasised in the answering affidavit that he and the second appellant in signing the AOD, and operating as directors were only acknowledging the Company’s indebtedness to the Respondent. This, in his opinion is clear because the AOD reflects the Company as the Borrower. Furthermore, nowhere in the AOD did he ever acknowledge personal indebtedness. Simply put, the AOD, according to the First Appellant lacks the essential elements for personal liability. In addition, the reference to “Borrowers”, “judgment against us” and “proceedings against us” are mere careless mistake of the drafters which cannot be elevated to anything more as the context and intention of the parties is clear from the context in which it was signed as alluded to by in the preceding paragraphs. Insofar as the first appellant is concerned, the mistakes alluded to are attributable to careless use of a precedent.
- [14] The First Appellant states that he made payment of an amount of R1, 750,000 to the respondent. It is undisputed that this amount is half of the capital sum the Respondent advanced to the company. This payment is annexed to the First Appellant’s founding affidavit. The First Appellant asserts that he made the payment from his personal funds it was not an acknowledgment of his personal liability but was made on behalf of the company. He states that he was not obliged to make such payment and shall seek reimbursement from the Company.
- [15] Regarding the fact that the Second Appellant is not reflected as a registered director in the CIPC, he states that he became aware of this position later. According to his evidence, he had instructed the Company auditors who were responsible for the secretarial work to attend to it many years ago and was not aware that they had not done so. He further states that for the many years they have been operating the company, he, the Second Appellant and Mr Moosa on the basis that the former were co-directors and shareholders.
- [16] Mr Jason Minnaar, the General Manager of Mehboob Adam Parow (Pty) Ltd deposed to a confirmatory affidavit wherein he affirms as true and correct the contents of the second appellant’s answering affidavit relating to the email exchanges and the drafting of the AOD relied upon by the respondent.

The Second Appellant’s answering affidavit

[17] The Second Appellant in the answering affidavit denies that by signing the AOD, he ever intended to be personally liable to the respondent. aligns himself with the defences raised by the First Appellant. He raises a further ground on the basis of which he claims that the Respondent's claim ought to have been dismissed. He asserts that the AOD is unlawful and void for want of compliance with the National Consumer Credit Act for the following reasons:

17.1 In terms of sections 8(1)(b) read with 8(4)(f) of the NCA, the payment of the loan capital allegedly owed by him to the respondent would be deferred on the basis that interest is payable by him to the respondent in respect of the amount so deferred.

17.2 The respondent is not a registered credit provider as contemplated in section 40 of the NCA and was not a credit provider when the AOD was signed.

17.3 In terms of section 40(1) of the NCA, the respondent was required to be a registered credit provider in order to lawfully conclude a credit agreement with him.

17.4 Section 89(2) of the NCA provides that if a credit agreement is unlawful in terms of section 89 (as the AOD would be if he was personally a party thereto, which he denies), then despite any provision of the common law, any legislation or provision of an agreement to the contrary, a court must order that the credit agreement is void as from the date the agreement was entered into.

[18] According to Second Appellant, for all these reasons, the AOD is void and unlawful and as such he cannot be held personally liable based on it.

The replying affidavit

[19] Responding to both Appellants' answering affidavits, the Respondent denies that any of the defences raised by them have any merit. She states that their averments to the effect that they did not unconditionally and unequivocally accept personal liability is contradicted by the established facts.

[20] It will be recalled that the Respondent attached to the founding affidavit proof of payment of the amount of R1 750 000.00 to her from the First National Bank. The Respondent states that the proper context of the payment which leaves no doubt that it was intended to discharge a personal liability by the First Appellant is evident from the WhatsApp message sent by the First Appellant before he made the payment. It reads as follows:

"Salaams Farhaad – Trust you well, like you – I received some monies from Amien!"

I wish to repay my capital portion of 50 Percent of Capital of loan towards Cream Magenta back. Amount R1,750 million.

Please provide bank details!

My holding cost amount I wish to pay.

Insha-Allah before due date!

Thanking you.

Please forward banking details

Regards

Mehboob Adam”

[21] The Respondent’s replying affidavit reflects that upon receipt of the above message, the Respondent’s husband responded with her details. On 11 August he responded to the above request thus:

“Dear Fharhaad

I hope you and the family are all well.

As requested, the banking details for Mymoena’s account is:

...

Please let us know once the transfer has been made so that we can look out for it and confirm receipt.”

[22] According to the Respondent, the WhatsApp communication is consistent with the express terms contained in the AOD as the First Appellant therein confirms both personal liability and his indebtedness for the Additional Opportunity costs. Furthermore, so further avers the Respondent, the First Appellant’s version that he made the payment on behalf of the Company, (an entity in respect in which he had always been a sole director) and would recover his payment from it because his own version is that the latter was facing significant challenges and was financially distressed.

[23] The Respondent further points out that given that the Second Appellant was never a director of Cream Magenta, he could never have signed the AOD on behalf of the Company, he could only conclude the AOD in his personal capacity. Put in another way, the Second Appellant is, on these papers completely unrelated to the Company.

[24] Regarding the applicability of the NCA, the respondent denies that it is the loan agreement falls within the provisions and scope of the NCA because:

24.1 the money was loaned to a juristic entity.

24.2 Cream Magenta’s turnover and/or annual asset value is in excess of R1 million.

[25] In short, if the NCA does not apply to the Loan Agreement, it equally does not apply to the Respondents as signatories to the AOD which flows from the Loan Agreement.

[26] To the Appellants' assertion that had she [the Respondent] believed that they were personally liable under the AOD, then there would have been no need to require them [the Appellants] to execute a deed of suretyship; the Respondent retorts that her understanding was that the latter document was going to provide her with additional security and not that the AOD was insufficient.

The submissions before this court

[27] The Appellants contend that the preamble to the AOD clearly shows that the Appellants could never have intended to personally bind themselves and were instead acknowledging the debt on the basis of their shareholding in Cream Magenta. According to the Appellants, the interpretation accorded to the AOD by the court a quo constitutes a misdirection when regard is had to the operative terms of the AOD:

"We, the undersigned, Mehboob Adam [the First Appellant] . . . & Mohamed Amien Mukadam [the Second Appellant] . . . on behalf of Cream Magenta 101 (Pty) Ltd ("the Borrower"), do hereby acknowledge the Borrower to truly and lawfully indebted to Mynoena Moosa, [the Respondent] . . . ; (the Lender") . . . in the amount of R3 500 000.00 ... ("the capital amount") in respect of monies lent and advanced by the Lender to the Borrower."

[28] According to the Appellants, the characterisation by the court a quo of the above clause of the agreement as being no more than a preamble to the document and that other provisions were subordinate is an incorrect interpretation. According to the Appellants, this is so because, the said characterisation by the court a quo, renders the AOD inconsistent with the other words used in the document as a whole, the circumstances attendant upon its coming into existence and the subsequent conduct of the parties. The result of this approach, so continue the Appellants, is an interpretation that is unbusinesslike as it gives undue weight to the WhatsApp message sent by the First Appellant after having paid half of the amount of the loan.

[29] The Appellants further contend that the court a quo failed to consider that the following investment features of the Loan Agreement that were critical in making an assessment of the correct interpretation which had to be accorded to the AOD:

29.1 the Appellants would acquire and develop the Property in the name of the Company – ultimately, of which they would be the directors and shareholders.

29.2 the Respondent would loan R3,5 million to the Company, payable out of the proceeds generated by the sale of the units.

29.3 in lieu of the interest, the Respondent would be given a unit within the development.

[30] The Appellants further contend that the court a quo did not have sufficient regard to the context, namely that it is Mr Moosa who suggested that the parties conclude the AOD in terms of which the Company acknowledged its indebtedness to the Respondent and even proposed fundamental changes to the document to the effect that interest be paid in cash rather than Respondent's acquisition of a unit in the development. To this end, the first Appellant states the following in his answering affidavit:

"21. Mr Moosa suggested that the proposed acknowledgement of debt differ from the loan agreement in two respects:

21.1 First, to record that the [Respondent] would receive cash compensation for the opportunity costs she had incurred by advancing funds to the Company in lieu of taking transfer of a unit in the development (which was in lieu of interest) . Essentially, the [Respondent] wanted to be paid interest in cash.

21.2 Secondly, the [Respondent] wanted to be repaid on the earlier of an agreed date and the completion of the development,

22. While material, not least of all because they removed the /investment type features from the Loan Agreement, both of the above-mentioned variations to the Loan Agreement were understandable. We were then all concerned about the viability of the development. We were uncertain about when we would be in a position to break ground, if ever, and, if we were able to complete the development, what type of returns we would achieve.

23. Out of a sense that it was the correct thing to do, and after some back and forth with Mr Moosa, the Second [Appellant] and I, as representatives of the Company agreed to conclude an acknowledgment of debt on the terms suggested by Mr Moosa. I must emphasise this. It was never intended by anyone that the AOD would render me or the Second [Appellant] personally liable to the [Respondent]. The AOD was intended as (and is, in fact) a written recordal of the Loan Agreement, subject to certain specified variations."

[31] Counsel for the Respondent contended that the court a quo correctly upheld that the AOD constitutes an intercession. According to this contention, this finding is borne out by the fact that the Respondent successfully applied for the winding up of Cream Magenta based on the AOD. Regarding the interpretation of the AOD, it was further argued on behalf of the Respondent that based on the common cause facts, the conduct of the parties, and the provisions of the AOD, there can be no doubt that the appellants were correctly found to have been personally liable. Furthermore, with regard to the second appellant, given that he was never the director, shareholder, or officer of Cream Magenta the assertion that he signed it on behalf of the Company falls flat. This, on a very basic level is so because a company, being an artificial person, cannot act on its own but only through the medium of directors and officers and that its business affairs must be managed by or under the direction of the board. Furthermore, the first appellant never took any steps to ratify his conduct. Insofar as the First Appellant is concerned, the argument advanced, as was the case in the court a quo is that it is clear from his conduct, namely that he paid what he

considered to be his half of the capital sum as outlined in the summary of substantial facts. Furthermore, the First Appellant's contention that he intended to recover the payment from Cream Magenta is devoid of merit in that he knew that the Company faced a financial "predicament" and "challenge".

[32] According to the Respondent, another issue which lends credence to the interpretation that the Appellants personally bound themselves is to be found in the First Appellant's alleged unequivocal admission that the amount he was repaying his 'capital portion of fifty percent of Capital amount loan towards Cream Magenta back'. He further states that 'My holding cost amount I wish to pay Insha-Allah before due date!'

[33] The Respondent emphasise that the court a quo correctly interpreted the provisions of the AOD and there is no reason to disturb the finding as the conclusion is supported by the facts and the legal authorities referred to by the learned judge.

Analysis

[34] The analysis of the issues for determination must commence with the interpretation of the AOD and thereafter the application of the provisions of the NCA.

Interpretation of the AOD

[35] The principles relating to interpretation are restated in *Natal Joint Municipality Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) as follows:

'[18] . . . The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so would in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one in fact they made. The inevitable departure is the language of the provision itself read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'

- [36] In interpreting the AOD, the court a quo held that the preamble, being subordinate to the operative provisions of the contract, is not the only operative portion of the contract as the court must regard other clauses. This approach is in line with the following pronouncement in *Total South Africa (Pty) Ltd v Bekker* NO 1992(1) SA 617 at 627 E-G:

“It is permissible to have regard to the words in the preamble in interpreting the agreement but, as pointed out by the Court a quo (at 171H) ‘a preamble’ is generally regarded as subordinate to the operative portion of contract which, if clear, carries more weight than anything in the preamble.”

- [37] Post *Endumeni*, the Supreme Court of Appeal reaffirmed the principle restated in *Total South Africa* in *Iveco South Africa (Pty) Ltd v Centurion Bus Manufacturers (Pty) Ltd* (Case no’ 183/2019) [2020] ZASCA 28 (3 June 2020) at [7] as follows:

“The introduction/preamble to an agreement is instructive, but not decisive as it is regarded as subordinate to the operative part of a contract, which if the meaning thereof is clear, will prevail over anything to the contrary in the preamble. However, where the operative part is not clear recourse may be had to the preamble to elucidating.[9] The contextual setting for interpretation might furthermore include subsequent conduct of the parties which indicates how they understood the agreement. [10] Recourse to such evidence is permissible. [11] where evidence indicates a common understanding of the terms of the agreement and does not alter the meaning of the words used, provided such evidence is used as conservatively as possible. [12] All the above considerations must be considered holistically. [13] Insofar as it may find application, regard may also be had to the contra proferentem rule.”

- [38] The court a quo found that the operative portions of the AOD make it clear that the purpose for the Appellants to provide security for Cream Magenta in their personal capacity and were, as a result personally liable for the aforesaid debt. Flowing from the foregoing, the core question to be answered in this appeal is the interpretation of the AOD. It is well to recall that in this judgment I have already found that the Second Appellant, as never having been the directors of Cream Magenta, he could only have signed the AOD in his personal capacity. The background to how the AOD came into existence is not in dispute. As outlined by the court a quo it came into existence because the Respondent was anxious that Cream Magenta would not honour its obligation towards her. It was prepared by Mr Minnaar at the instance of the First Appellant after negotiations with Mr Moosa were held, and incorporated terms agreed to by the latter and the Appellants. In the preamble, the Appellants acknowledged the indebtedness of Cream Magenta to the Respondent. There is therefore nothing controversial about the introduction. However, what is in dispute, as was the case in the court a quo is the weight to be attached to the preamble in the interpretation of the contract. The context in which Cream Magenta is designated as the “Borrower” and the Respondent as the “Lender” is clearly the loan agreement. The question for determination is whether the operative part of the AOD is clear such that it prevails over anything to the contrary in the preamble. This necessitates an examination of the relevant paragraphs of the document.

- [39] It must be stated from the outset that the preamble is the only portion of the AOD which contains designations of who the Borrower and the Lender are. It is also undisputed that the “We” depicted in the various clauses of the AOD must be understood to refer to the First and Second Appellants. Whether or not this in the Appellants’ personal capacity remains to be determined.
- [40] Clauses 1 to 3 appear to be neutral insofar as personal liabilities of the Appellants is concerned. The operative clauses commence from clause 4, which deals with liability for “accrued opportunity costs” in an amount of R20 000 per month. Clause 4 provides that the amounts referred to in clauses 1 to 3 may be paid “at such address as the Lender may nominate from time to time.” According to Counsel for the Respondent, when the First Appellant asked the Respondent to provide bank details to which he could render payment, he was acting in accordance with the provisions of Clause 4.
- [41] These clauses are linked to Clause 6 which deals with the Appellants’ total indebtedness as quantified and set out in the certificate of indebtedness. It will be recalled that according to the Appellants, the “we” and “us” refers to them as representatives of the Company and not in their personal capacities. The court a quo held that the provisions of the preamble must be assessed in light of other operative provisions of the AOD.
- [42] Insofar as Clause 6 is concerned, there can be no doubt that, as correctly emphasised by the court a quo, that reference is to the Appellants in their personal capacities. I find it necessary to repeat its provisions:
- “We agree that a certificate signed by the Lender reflecting the amount of the aforesaid indebtedness to the Lender and the fact that the same is due and payable shall be binding upon us and shall be valid and enforceable against us for the purposes of the Lender obtaining provisional sentence or judgment against us.” Undelyining added.*
- [43] The use of the words “we” and “us” repeatedly, without once referring to Cream Magenta suggests that the Appellants considered themselves to be personally bound for the debt of the Company. In similar vein, reference to provisional sentence proceedings clearly could not be intended for Cream Magenta as such remedy is incompetent when enforcing payment of a debt by a company.
- [44] In Clause 9 of the AOD the Appellants renounce the benefit of legal exceptions and “all other exceptions which could be pleaded to the validity of the AOD”. They further confirm that the full meaning of the legal exceptions and their effect had been explained to them and they are acquainted therewith. The benefits referred to, as pointed out by Counsel for the Respondent operate in cases where there is more than one debtor. It follows that the more than one debtor refers to the Appellants in their personal capacity and not the Company.

- [45] The use of “we” and “us” in the AOD continues into Clause 10 and 11. In Clause 10, “us” is used in the first and last sentences. The Appellants consent to the jurisdiction of the Magistrate Court “in respect of any action or procedure which may be instituted against me in terms or arising out of this Agreement”. The reference to “me” clearly denotes that the envisaged action may be taken against a person, not a juristic entity. Surely, it refers to the Appellants in their personal capacity. There cannot be any other interpretation of Clause.
- [46] In the last Clause of the AOD, Clause 11, the Appellants acknowledge that “this Agreement will also be binding on our estates, administrators, heirs and successors in title”. The interpretation accorded to this Clause by the court a quo, namely, a company “could not acknowledge indebtedness in similar terms” cannot be faulted as it is sensible. So is the ultimate finding to the effect that the use of first-person plural pronouns is “very clear and expressive”, and thus, personal liability was entirely businesslike.
- [47] Counsel for the Appellants insisted, as set out by the First Appellant that nothing much should be read in the use of first-person pronouns, “we” and “us” as this was clearly a drafting error which resulted from cutting and pasting error from a AOD format. I do not agree. The multiple use of “we” and “us” in the AOD’s operative provisions clearly signifies a deliberate intention to bind the Appellants in their personal capacity. Furthermore, Mr Minnaar, the person who drafted it merely deposed to a confirmatory affidavit and did not bother to explain fully the circumstances under which the cut and paste mistake resonating with the Appellants’ personal liability manifested resulting in such serious legal consequences for them. In addition, in his letter of 7 October 2021, to Mr Moosa, written on behalf of the Appellants, regarding the inability to meet the financial obligations under the loan agreement, a clear reference is made to the precarious personal financial status of the Appellants as ‘principals’ of Cream Magenta. It reads thus:

“I trust you are well. The principals of Magenta 101 Pty Ltd recently met to discuss the repayment of the balance of your wife’s

investment and the associated opportunity costs both of which are due by Cream Magenta 101 Pty Ltd and payable on 31 March 2020.

Covid has unfortunately decimated the company and the principals [sic] cash flow. In addition, the company owes R579,544,14 to the City of Johannesburg for outstanding rates payments and the R4,600,206 to Investec. In this regard, the Company is regrettably unable to meet the planned repayment of the balance of your wife’s investment and opportunity costs on 31st October 2020.

At the current juncture we cannot advise you when the company will be in a position to make the aforementioned payments but we will be in contact as soon as the financial position changes.

Please accept our humblest apology in this regard.”

- [48] According to the First Appellant’s affidavit, Mr Minnaar was his own Company’s legal person. It is not unreasonable to assume that he would have knowledge of the basic tenet that the debts of the Cream Magenta do not attach to its members, but to the Company itself.

Even if he was not, the record reflects that his email was circulated internally, two days before it was sent out because of “sensitivities of this matter [sic]”. Pursuant to the circulation, none of the Appellants effected any amendments. Besides the legal knowledge I have imputed on Mr Minnaar, the email clearly refers to the Appellants’ “respective financial woes”, which in essence should have no bearing at all on the Company, yet the Appellants did not amend it. It is clear why they did not do so. They and Mr Minnaar were aware that in terms of the AOD the Appellants were personally liable for the amounts reflected therein. Thus, the Court a quo’s finding to the effect that the reference to the Appellants’ financial position in Mr Minnaar’s email would have been superfluous if the Appellants were both not personally liable, is unimpeachable.

The suretyship

[49] Much was made of the fact that the Respondent, by seeking that the Appellants execute additional security for the loan by way of a suretyship which would have the effect of personally binding them constituted an unequivocal acknowledgement that the AOD was not designed to bind them in their personal capacity. Insofar as the additional suretyship required by Mr Moosa on behalf of the Respondent is concerned, the Appellants contend that all it shows is the apprehension of the creditor of the prospects of recovery from the company – thus she sought to extend liability to the principals of the company. Accordingly, the only ineluctable conclusion to be drawn from Mr Moosa’s attempt to execute a suretyship is that they (the Appellants) are not personally liable under the AOD. Additionally, so goes the contention, it is apparent Mr Minnaar’s response to the request for suretyship that the understanding of the Appellants and him was the same, namely, that the Company (alone) is indebted to the Respondent when he states that:

“The company remains firmly committed to ensuring that the loan together with the opportunity cost due to you is paid by 31 October 2020.”

[50] The explanation proffered by the Respondent, viz, that she and Mr Moosa sought additional security by way of a suretyship was because the First Appellant owed substantial amounts in an unrelated transaction to her husband is not that difficult to understand given that she is lay person. Besides, when Mr Minnaar, in his considered legal reasoning declined that the Appellants execute a suretyship, claiming that the AOD did not allow for further security to be provisioned, this suggestion fell flat. Mr Minnaar further reassured the Respondent that the Shareholders of Cream Magenta remained committed to the repayment of the capital loan amount as well as opportunity costs. Needless to point out that, notwithstanding the commitment, the amounts remained unpaid. The notion that more could be inferred from draft suretyship agreement was correctly dismissed by the court a quo.

Conduct of the parties

- [51] In interpreting the AOD, is permissible to consider the conduct of the parties. In *Phadziri & Sons (Pty) Ltd v DO Light Transport (Pty) Ltd and Another* 2023 JDR 0490 (SCA) delivered on 20 February 2023, the Court held that conduct of the parties in implementing an agreement may provide clear evidence as to how reasonable persons construed a disputed provision in a contract. The Court a quo relied on *Comwezi Security Services (Pty) Ltd v Cape Empowerment Trust Ltd* [2012] ZASCA 126 (SCA) where the Court held thus:

“In the past, where there was perceived ambiguity in a contract, the courts held that subsequent conduct of the parties in implementing

their agreement was a factor that could be taken into account in preferring one interpretation to another. Now that regard is had to all relevant context irrespective of whether there is a perceived ambiguity, there is no reason not to look at the conduct of the parties in implementing the agreement. Where it is clear that they have both taken the same approach to its implementation, and hence the meaning of the provision in dispute, their conduct provides clear evidence of how reasonable businesspeople situated as they were and knowing what they knew, would construe the disputed provision.”

- [52] The interpretation of the AOD must further be considered in light of the conduct of the parties. This brings into the fold the payment made by the First Appellant and the related WhatsApp message he sent seeking the banking details to which the amount should be paid, in line with the provisions of Clause 4 of the AOD. In the WhatsApp message the First Appellant commits to paying “half of the capital sum” from “his personal funds” and in fact effects payment. This is conduct consistent with the interpretation that the First Appellant understood and/or accepted that by signing the AOD, he was binding himself in his personal capacity regardless of the fact that the loan constituted a cash flow injection for the ailing Cream Magenta. I agree wholeheartedly with the findings of the court a quo in respect of the WhatsApp message, that: “Nothing could be a clearer expression, by the first respondent at that stage, of his indebtedness to the applicant”, most importantly that “Its significance was that it was consistent with the undertaking made by [Adam] to [Moosa] in the [AOD]”. It is difficult to conceive of any other reason for the First Appellant’s payment of half the capital debt from his own funds besides clear knowledge that he was bound thereby.

- [53] The Appellants lamented the fact that the Respondent put up the WhatsApp communication in reply. the Appellants contend that it ought not to have placed any reliance on same as it was adduced for the first time in reply whereas the Respondent was bound to make out her case in the founding papers and the latter advanced no exceptional circumstances on the basis of which the court a quo could have regard to it. In any event, continues the contention, the WhatsApp message is only one instance of the parties’ conduct, which must be evaluated together with the conduct averred to by the First Appellant in the answering affidavit.

[54] Nothing much turns on this issue as the Appellants did not bring an application for the striking out of the evidence allegedly introduced for the first time in reply. Neither did they bring an application for the admission of a further affidavit in reply to the new issue. In any event the WhatsApp communication emanated from the First Appellant, who did not make any attempt to distance himself from it. This leads to an inescapable inference that the First Appellant did not raise much of an ire during the proceedings regarding the alleged new matter because he knew that it was factually correct. The statements he made in WhatsApp clearly point to his acknowledgment of his personal indebtedness for the half share of the debt owed to the

Respondent. In my view, there clearly was nothing to reply to. Furthermore, I consider it to be imprudent of the appellant to resuscitate the issue on appeal.

[55] In the answering affidavit the First Appellant states that he intended to recover the amount he had paid from the Company. This assertion was, once again, rightly rejected by the court a quo and an adverse inference drawn against the First Appellant for the following

reasons:

55.1 At the time of making payment, the First Appellant was “keenly aware of the fact that Cream Magenta itself was unable to fulfil its obligations and the Agreement”; and

55.2 When the First Appellant made payment he was in receipt of the winding up application.

[56] It is difficult to believe the First Appellant’s assertion that he intended to recover the amount he had paid from Cream Magenta when on his own version, the Company was facing challenges. In any event, the First Appellant did not manifest this intention because, as contended by Counsel for the Respondent, almost twelve months elapsed from when he made payment until he deposed to his answering affidavit.

Was the Second Appellant a director of Cream Magenta?

[57] Counsel for the Respondent contended that the assertion that the Appellants signed the AOD, not in their personal capacity, but on behalf of Cream Magenta must be dispelled insofar as the Second Appellant is concerned for the following

reasons:

57.1 The Second Appellant was never a director or shareholder of Cream Magenta;

57.2 Factually, the Second Appellant was never an officer of Cream Magenta.

[58] This contention must be considered in light of the fact that it is trite that a company, being an artificial person, cannot act on its own behalf through the medium of its directors or officers, Secondly, the business of the company must be managed by, or under the direction of its board. In casu, the First Appellant states that he instructed the unnamed auditors of the Company that the name of the Second Appellant be added to the names of the directors

of the Company. The Second Appellant in his affidavit merely confirmed the First Appellant's assertion and did not expatiate on the issue.

[59] Even if the First Appellant's assertion that he directed that the Second Appellant's name be added to the director's list, this assertion, must, without more fall flat, because before lodging the name of the Second Appellant with CPIC or effecting any changes of Cream Magenta's directorate, a resolution to that effect would need to have been passed by the Company. In the absence of the COR39 Form, the First Appellant has not attached a copy of the resolution, and at the very least, he has not indicated in his affidavit when the resolution was taken. Furthermore, the Company ought to have a copy of the appointment letter of the Second Appellant as director or minutes of a meeting consequent upon calling for his addition as a director. The First Appellant, as director of Cream Magenta ought to have known that his directive regarding the addition of the Second Appellant would not suffice as he could not act in his personal capacity. This casts serious aspersions on the appointment of the Second Appellant as a director of Cream Magenta. In my view, the ineluctable conclusion is that the Second Appellant signed the AOD in his personal capacity as there is no basis for either of them assuming that he was at the time or subsequent thereto

a director of the Company.

[60] I am fortified in this view by the fact that according the CIPC Company report dated 06 May 2021, the First Appellant has been the sole director of the Company since 19 August 2004. The Company had been in existence for approximately 15 years prior to the signing of the AOD, and it can be inferred that its business was being conducted in accordance with the applicable statutory framework. Thus, the inclusion of the name of the Second Appellant in the list of directors would have followed the normal process. However, what further casts aspersions on the First Appellant's version in this regard is that it is unclear whether the instruction he allegedly issued to the unnamed the auditors to include the name of the Second Appellant in the director's names was in writing or verbal. I say this because the duties and responsibilities flowing from holding directorship in a company are governed by the statutory framework set out Companies Act of 2008. In light of the fact that the aforesaid responsibilities carry serious legal consequences, the Second Appellant ought to have apprised himself thereof before accepting an appointment. For example, in certain instances a company may recover losses, damages or costs incurred by it from the directors. It is not unreasonable to expect the Second Appellant to have further explained in his affidavit when he considered himself as being the director of Cream Magenta. Instead, he contented himself with deposing to a confirmatory affidavit without explaining this aspect, which called upon him to at least bring to light his understanding of his appointment.

[61] It seems to me that the Second Appellant was acutely aware of the fact that he was not registered as a director of the Company. In the AOD he sets out his residential address as his domicilium address. Had he signed the AOD in his capacity as a director of the Company, surely the latter's registered address would suffice for service of process. As correctly contended by Counsel for the Respondent, and found by the court a quo, providing his

residential address would have been superfluous if he had not undertaken personal liability. Put in another way, the Second Appellant provided his home address as domicilium because he knew that the delivery process at the Company's registered address was not going to be effective because his name was not in the Company records. In this way, the Respondent was relieved of the burden of having to locate him in the event that she had to recover monies due to her from him. Notwithstanding the interpretation that may be accorded to the operative provisions of the AOD in this judgment, the evidence overwhelmingly points towards the fact that the Second Appellant bound himself personally and was not or could not have been acting on behalf of Cream Magenta when he signed the AOD.

[62] Therefore, it is my finding that on this basis alone, the Second Appellant is bound himself individually and personally in terms of the AOD.

Was the AOD a credit guarantee in terms of section 8(5) of the NCA?

[63] The court a quo found that the provisions of section 8(5) of the National Credit Agreements Act were applicable to the AOD and as it was a credit guarantee, as opposed to a credit agreement envisaged in section 8(4)(f) of the NCA. It found that obligations of the Appellants under the AOD "fall squarely within the language of section 8(5)". The section provides that an agreement 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 the NCA applies. Section 4 (2) (c) of the NCA on the other hand provides that the Act applies to a credit guarantee only to the extent that the Act applies to a credit facility or credit transaction in respect of which the credit guarantee is granted. In other words, if the provisions of the Act did not apply to the agreement between Cream Magenta and the Respondent, they also would not apply to the guarantee contained in the AOD.

[64] The court a quo referring to *Total South Africa (Pty) Ltd v Bekker NO*

[1991] ZASCA 183; 1992 (1) SA 617 at 627 G-J characterised the AOD as an *intercessio*. In *Total South Africa*, the Court quoted from Wessels' *Law of Contract in South Africa*, 2nd ed at 968 the following:

'3778. There are several ways in which a person, without being compelled to do so by law, may intervene in a contract between two parties *ob majorem creditoris securitatem*. The Roman jurists called this intervention an *intercessio* on the part of the stranger to the contract ("*per intercessionem aes alienum suspiens*" (D14.3.19.3). "*Se medium inter debitorem et creditorem interponere*" (Voet 16.1.8)).

3779. The term *intercession* is a convenient one to denote the intervention of one person (*intercessor*) in the obligation of another either by way of substituting or adding a new debtor (Nov 4.1; C8.40 (41).19).

3780. The stranger may either intervene by contracting with the creditor in such a way that the original debtor is completely liberated, or else he may promise the creditor to become liable for the debt, the original debtor continuing to remain bound. In the former case, called *expromissio* by the glossators, there is a complete novation – the old debtor and intercessor are liable, they may either both be principally bound to the creditor or else the debtor may be principally liable, whilst the intercessor is only bound in *solidum*, i.e., in case the creditor cannot obtain payment from the principal debtor.”

[65] CS Forsyth and IT Pretorius in *Caney's, The Law of Suretyship* 6th ed, 2013, also explain that a person who undertakes to pay another's debt may intend to take upon himself the obligations of a debtor to the creditor as a principal, either alone, (i.e replacing the existing debtor) or as a co-principal debtor with an existing debtor. If he assumes liability for the debt of another as a co-principal debtor or if he is in the place of the other by novation, his undertaking is an *intercessio*.

[66] To my mind, the classification of the AOD is not inaccurate, however, for the present purpose the real question is whether or not it truly falls within the ambit of section 8(5) of the NCA.

[67] The Appellants contend that the court a quo's finding that the AOD is a “credit guarantee” granted in respect of the facility made available to the Company and because the NCA did not apply to it, it also did not apply to the AOD is erroneous. According to the Appellants the AOD was a credit agreement. In addition, so further contend the Appellants, the court a quo misapplied the decision in *Shaw and Another Mckintosh and Another* 2019(1) SA 398 SCA. This assertion implies that the Respondent was obliged to register as a credit provider with the National Credit Regulator in terms of the NCA at the time of the conclusion of the agreement in respect of which monies were loaned and advanced. This is so because the NCA a credit provider to conduct a prior assessment to determine whether the Appellants'

financial circumstances permitted them to enter into such an agreement because entering into an agreement without conducting the

requisite assessment creditworthiness may render the credit provider liable for reckless lending.

[68] In assessing these contentions, it is necessary to briefly set out the facts in *Shaw*. The First Respondent (Mackintosh) in 2009 lent Mabili Search & Selection (Pty) Limited (Mabili) an amount of R2 million. Approximately three years later, in 2012, the parties signed a written acknowledgment of debt (the agreement). In terms of the agreement, the amount would attract interest at the rate of R50 000 per month until the date of payment. Mabili defaulted on the terms of the payment and Mackintosh sought and was granted judgment by default against it. Mabili was subsequently liquidated. The appellants had bound themselves as surety and co-principal debtors. They also waived the benefits of excussion, division and cession of action. Similar to the matter at hand, the Court had to consider whether the agreement between the appellants and the respondents credit guarantee and then whether the agreement between Mabili Mackintosh falls within the NCA.

[69] In Shaw, the SCA found the transaction in question to be a “credit guarantee” within the meaning of section 8(5) of the NCA and explained thus:

“[8] The NCA applies in respect of three kinds of agreements, namely a credit facility, a credit transaction or credit guarantee. A credit guarantee is defined in s 1 as being an agreement meeting with the criteria set out in 8(5). That section reads in material parts as follows:

‘An agreement, irrespective of its form . . . constitutes a credit agreement 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.’

If the agreement between the appellants and Mackintosh is a credit agreement as defined, it does not fall within the NCA because the s 4(2)(c) provides thus:

- (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.’

If the appellants bound themselves in terms of credit guarantee as defined, the credit transaction in respect of which the credit

guarantee was granted was the transaction between Mabili and Mckintosh. If the NCA does not apply to the credit transaction, it

cannot apply to the credit guarantee.

[9] It is apparent that the question in this case is answered by determining whether the agreement between the appellants and respondent a credit guarantee was and then whether the credit transaction between Mabili and Mackintosh falls within the NCA. These questions fall to be answered by applying the ordinary provisions of statutory interpretation in *Natal Joint Municipal Fund v Endumeni Municipality* 2012 (4) SA 593 SCA para 18 to s 8(5) and then determining whether the agreement between the appellants and Mackintosh falls within that section.”

[70] The SCA further held at paragraph [34] that:

“An essential precondition to the operation of s 8(5) is that it applies to the obligations of another. The language of the section refers both to an undertaking and a promise to satisfy the obligations of another. It makes no reference to a suretyship or a guarantee or any similar word...The loan was granted pursuant to an oral agreement which was concluded between Mabili and Mackintosh. The purpose of the acknowledgement of debt which the applicants signed was to arrange how the amount owing to Mackintosh was to be repaid.”

[71] Applying the aforesaid principles, the court a quo in these proceedings found that the AOD was a credit agreement and as such the NCA did not apply to it. It held at paragraph 36 thus:

“[36] Likewise, the parties were in agreement that the initial loan by the applicant to the company was not subject to the NCA, and therefore the acknowledgement of debt, as constituting a credit agreement under the provisions of Section 8(5) of the NCA, was equally not subject to the provisions of the NCA. The was, in my view, no merit at all in the second respondent’s contention that the contract was null and void.”

- [72] It was further contended on behalf of the Appellants that the Shaw matter, notwithstanding the striking similarity of the facts with those in *casu*, is distinguishable in that in Shaw there was no question that the appellants had undertaken to settle the admitted indebtedness of another, their involvement only arose on their promise to pay a pre-existing loan. In the present matter, the AOD did not provide that any person undertook or promised to satisfy, ‘upon demand any obligation of another consumer’. The AOD, so goes the contention, did not require the Appellants to satisfy the obligations of any other person, only imposed primary

obligations on the Appellants. Furthermore, it (the AOD) was not preceded by a loan agreement, but by an agreement with investment-type features which may have never yielded a return for the Respondent. Put in another way, the underlying agreement which gave rise to the AOD was substantially different from that in Shaw.

- [73] Against this backdrop, I turn to consider the distinguishing facts in Shaw and the present matter. The Appellants seem to suggest that because the AOD was not preceded by a loan agreement but by an agreement with investment-type features, it is dissimilar to Shaw. This contention has no substance. In Shaw, the Court specifically sets out that the obligation of the appellants arose only when they undertook to or promised to pay on demand the admitted indebtedness of Mabili and Mackintosh. To my mind, whether the original agreement was an agreement with investment-type features is immaterial. The AOD, as in Shaw, expressly states that the capital amount of R3,5 million was loaned to Cream Magenta. Furthermore, the AOD explicitly sets out that the capital amount was “in respect of monies lent and advanced by the Lender to the Borrower”. The contention that the debt for which the Appellants became liable did not exist prior to the conclusion of the AOD does not change the fact that, as in Shaw, the Appellants were not parties to the agreement between the Respondent and Cream Magenta.

- [74] Regarding the submission that in Shaw, the SCA held that the essential feature of a statutory credit guarantee is “that applies to the obligations of another”, in light of the conclusion reached in this judgment to the effect that the Appellants are personally liable under the AOD for the debts of Cream Magenta, it must be accepted that this requirement has been satisfied. As to contention that the AOD falls short because it did not provide that any person undertook or promised to satisfy “upon demand any obligation of another consumer”, it is so that this has not been expressly stated therein. In my view, this turns on the interpretation of the provisions of the AOD. I have already emphasised that the AOD was explicitly designed for the obligations of Cream Magenta to the Respondent. The issue is whether the fact that it did not state that the Appellants undertook or promised to satisfy

Cream Magenta's debt "on demand" materially distinguishes the matter from Shaw. I think not. This is so because, it is plain from Clause 6 of the AOD that should the debt not be satisfied by 31st October 2020, the Respondent may take steps to demand payment, hence the certificate reflecting the Borrower's indebtedness is binding on the Appellants for the purpose of obtaining provisional sentence or judgment against them. Likewise, Clause 5, anticipates a demand by the Respondent should payment not be tendered in accordance with the terms of the AOD. It provides as follows:

"5. No extension of time or other indulgence granted by the Lender to us in respect of our obligations will constitute a waiver of the Lender's rights to enforce compliance with the terms hereof nor will it constitute a novation of this agreement."

[75] Based on the foregoing reasoning, I am satisfied that the Appellants undertook, or promised to satisfy upon demand the obligations of Cream Magenta towards the Respondent.

[76] The Appellants also take issue with the fact that the AOD imposed primary obligations on them. In my view, this contention overlaps with the argument that the AOD was a stand-alone credit agreement, but a credit transaction as envisaged in section 8(4)(f) of the NCA, which is discussed in greater detail below. Nonetheless, it must be re-emphasised that as in Shaw, the appellants were not granted, nor were they given any credit. Similarly, in casu, they were not parties to the agreement between Cream Magenta and the Respondent. The Appellants' involvement commenced only when they undertook or acknowledged responsibility for Cream Magenta's indebtedness to the Respondent. I emphasised that the NCA is not applicable to the oral agreement between the Cream Magenta and the Respondent. Thus, their obligations fall within the purview of section 8(5) of the NCA.

[77] I now turn to consider the applicability of section 8(4)(f) of the NCA.

The applicability of section 8(4)(f)

[78] In light of this court's finding that the Appellants are personally liable under the AOD, the alternative argument raised by them is that the AOD is not a credit guarantee, it is stand-alone credit facility within the meaning of section 8(4) (f) of the NCA. Thus, so goes the contention, it is not excluded from the ambit of the NCA. Section 8(4) (f) provides thus:

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

...

(a) ...

(f) Any other agreement, other than a credit facility or credit guarantee, in terms of which payment of an amount owed by one person to another is deferred, and any charge, fee or interest payable to the credit provider in respect of

- (i) the agreement.
- (ii) or an amount that has been deferred
- (ii) that amount

[79] It is common cause that the original agreement between the Respondent and Cream Magenta did not fall into the ambit of the NCA as it was a large agreement with a juristic entity. A literal interpretation of the AOD gives the impression that it is a credit transaction. This I say because Clause 3 of the AOD provides as follows:

“Should any amount not be paid on due date same shall bear an additional opportunity cost at 3% above the prime bank commercial overdraft

lending rate charged by the Lender’s bankers to its best rate customers on an unsecured basis from time to time, which interest

shall be calculated on a monthly basis and capitalised. In the case of a dispute as to the rate so payable, the rate shall be certified

by any Manager or Assistant Manager of any branch of the said bankers, whose decision shall be final and binding on the parties.”

Furthermore, payment of the amount was deferred.

[80] In terms of the NCA, a credit agreement is unlawful, if when it was concluded the credit provider was unregistered. The requirement to register as a credit provider is applicable to all credit agreements once the prescribed threshold is reached irrespective of whether the credit provider is involved in the credit industry and irrespective of whether the credit agreement is a once-off agreement as is the case in the present matter. (See *De Bruyn N.O. v Karsten* 2019 (1) SA 403 (SCA)).

[81] In this matter, it is not in dispute that the Respondent was not a registered credit provider as contemplated in s 40(1) of the NCA at the time of the signing of the AOD. If therefore it is found that the NCA applies to the AOD, the AOD is unlawful and must, in terms of section 89(5)(a)[1] of the NCA, be treated as void.[2] In addition to not being a registered credit provider, it is undisputed that the Respondent did not comply with the mandatory enforcement

provisions contemplated by section 129 and 130 of the NCA before bringing her application. However, the matter does not end there

because in *Ratlou v MAN Financial Services SA (Pty) Ltd* 2019 (5) SA 117 SCA, the Court cautioned that it was never the intention of the legislature that all settlement agreements or acknowledgments of debt which meet the aforesaid requirements fall within the purview of the NCA and at paragraph [21], held thus:

“A purposive and not a literal interpretation 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 agreement and thereby curtail litigation.”

It continued:

“[23] The purposes of the NCA are set out in s 3 of that Act. Section 2 thereof provides that the NCA must be interpreted in a manner that gives effect to such purposes. Under s 3 the purposes of the Act are to promote and advance the social and economic welfare of South Africans, to promote fair, transparent, competitive, sustainable, responsible, efficient effective and accessible credit market and industry to protect consumers.’

[82] In the instant matter, it is common cause that the provisions of the NCA do not apply to the underlying causa. As in *Ribeiro & Another v Slip Knot Investments 777 (Pty) Ltd 2011(1) SA 575 SCA*, there is no credit provider – consumer relationship and the AOD and the loan agreement between the Company and the Respondent are interdependent. Therefore, “there can only be one conclusion, that the NCA was not designed to regulate settlement agreements where the underlying agreements or cause, would not have been considered by the Act.”

[83] It was contended on behalf of the Appellants that even if it is accepted that the AOD rendered the Appellants “individually” liable, they (the Appellants) did not become liable for any pre-existing or distinct obligations of the Company. According to this contention, the Company and the Appellants became liable for the same debt at the same time. In other words, the debt for which they all became liable did not exist prior to the conclusion of the AOD. Accordingly, they became co-principal debtors or in the Appellant’s version, ‘co-consumers’ of credit. However, the AOD made it clear that the loan was advanced to Cream Magenta.

[84] Similar to the facts in *Shaw*, it could be accepted that the Appellants and Cream Magenta became liable as co-principal debtors for the admitted debt. The conclusion reached in *Shaw* applies, as the facts as correctly found by the court a quo establish that the Appellants bound themselves in terms of a credit guarantee. It follows therefore that none of the grounds of defence raised by the Appellants carry any merit.

Conclusion

[85] I have in this judgment held that the only plausible and businesslike interpretation that may be accorded to the AOD is that both Appellants, albeit for different reasons, intended to bind themselves personally for the debt of Cream Magenta to the Respondent.

[86] In the result, the following order is issued:

The appeal is dismissed with costs.

I agree.

HENNEY, J

NZIWENI, J

Heard: 19 July 2023

Delivered: 19 April 2024

Appearances

For the Appellants

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Advocate C J Quinn

Instructed by:

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Cape Town

Counsel for the Second Appellant:

Advocate R. S van Riet SC

Instructed by M E Mahommed attorneys at law Cape Town

For the Respondent:

Counsel for the Respondent:

Advocate A Laher

Instructed by:

FASKEN (Incorporated in South Africa as Bell

Dewar Inc) Sandton

- [1] Section 89(2)(d) provides thus: “Subject to subsections (3) and (4), accredited agreement is unlawful if ... at the time the agreement was made, the credit provider was unregistered, and this court requires that the credit provider to be registered.’
- [2] Section 89(5)(a) provides as follows: “If the credit agreement is unlawful in terms of this section, despite any other legislation or other provision of an agreement to the contrary the court must make a just and equitable order including, but not limited to an order that ... the credit agreement is void as from the date the agreement was entered into.”

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