

SOUTH AFRICA / JUDGMENT

Blacher v Josephson (A15/22)

[2023] ZAWCHC 27; 2023 (3) SA 555 (WCC) (14 February 2023)

[2023] ZAWCHC 27

COURT

Western Cape High Court, Cape Town

BEFORE

Sher, Le Grange, Gamble

CASE / FILE NUMBER

A15/22

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FLYNOTES:

CAUSE OF ACTION AND ARBITRATION AWARD
ARBITRATION– Award – Cause of action – Original agreement
unlawful – Whether award giving rise to
new independentcause of action or whether statutory prohibition permeating
through award – Unlawful credit agreement
in this casecannot be upheld by enforcing arbitral award – National
Credit Act 34 of 2005.

IN

THE HIGH COURT OF SOUTH AFRICA

[WESTERN

CAPE DIVISION, CAPE TOWN]

Case

no: A15/22

In

the matter between:

COLIN

STUART BLACHER

Appellant

and

DAVID

JOSEPHSON

Respondent

JUDGMENT

DELIVERED (VIA EMAIL) ON 14 FEBRUARY 2023

SHER, J (LE GRANGE J et GAMBLE J concurring)

1. This is an appeal against a judgment of this Court whereby an arbitral award, which directed the appellant to make payment to the respondent of the sum of R 1 535 000 together with interest and costs on the attorney-client scale, was made enforceable by an order of court.

The

facts

2. The award was based on an acknowledgment of debt ('AOD') which was signed on 28 August 2019, in terms of which the appellant declared that he was 'truly and lawfully' indebted to the respondent in the amount of R 2.5 million, which he undertook to pay in full or in part a month later i.e. by 30 September 2019. In the event that the amount was only paid in part, the balance was to be paid over an agreed period of time. The circumstances which gave rise to the AOD were as follows.
3. The parties were previously close and long-standing friends. The appellant, who is an admitted but non-practising advocate, served as trustee of the respondent's personal trust between 2013 and June 2019. Early in 2015 he approached the respondent, who had recently sold his house, to borrow money from him.
4. Between 26 February and 1 July of that year the respondent advanced a total of R 2.5 million to him, by way of 5 unequal instalments. The appellant drew up an acknowledgement of debt ('the first AOD') which covered the first 2 advances which amounted to R1.2 million, which he signed on 2 March 2015. A second AOD which incorporated the total amount which had been advanced to him and which essentially repeated the material terms which were set out in the first AOD, was prepared and signed by him on 15 October 2015.
5. The AODs provided that the capital amounts which had been loaned and advanced were repayable on demand (subject to 45 days' notice) and attracted interest at the rate of 2.5% per month. Thus, the effective annual compound rate of interest was 30%.
6. Aside from the loans, in October 2015 the respondent also paid over an amount of R 750 000 to Axiom Finance, an entity which was controlled by the appellant, for it to be invested in a company which was to be formed by one Panico Protopapa (the 'Panico investment'), for the purposes of a property development in Gauteng, in return for which the respondent was to acquire a 20% shareholding therein.

7. It is common cause that without the loans having been formally called up the appellant made certain repayments in respect thereof over the course of the ensuing 4 years, and by 29 October 2018 he had paid over a total of R 2 121 500 to the respondent.
8. In 2018 the appellant requested that he be granted a discount on what was owing. The respondent offered to reduce his indebtedness by R 1.4 million if he settled the amount which was outstanding in a lump sum, by a certain date, but the proposal was not acceptable to the appellant. A similar request early in 2019 went the same way.
9. By May 2019 the appellant was in default despite repeated requests to make payment, and the respondent was 'at his wits end'. He accordingly instructed his attorneys to put the appellant to terms. On 28 June 2019 they called upon the appellant to repay what was outstanding at the time in respect of the loan and the interest thereon, in the amount of R 3 861 500, as well as the R 750 000 which had been paid in respect of the Panico investment.
10. The appellant denied liability in respect of the Panico investment and raised two queries in regard to the loans which had been advanced to him viz whether the respondent had been registered as a credit provider in terms of the National Credit Act (the 'NCA')[1] at the time of the conclusion of the agreements in terms of which the monies were advanced, and whether the respondent had conducted a credit assessment of him, prior thereto.
11. The implication in these queries was that the loans constituted credit agreements in terms of the NCA[2] and as such the respondent was obliged to be registered as a credit provider with the National Credit Regulator[3] and to conduct a prior credit assessment of the appellant i.e. to determine whether he was in a financial position to enter into such loans and to repay them. In this regard, the NCA provides[4] that a credit agreement is unlawful if, at the time when the agreement was 'made' the credit provider was unregistered, in circumstances where the Act requires that he/she be registered, and if a credit provider concludes a credit agreement with a consumer without a credit assessment having been performed this may constitute the provision of reckless credit, which is liable to be set aside by a court.
12. The appellant avers that, having been made aware that he had failed to comply with the NCA at the time when he granted the loans, the respondent sought to press for a further AOD to be furnished, in order that he might thereby 'regularize' them. The respondent also began pressurizing him to make payment of what was outstanding. The appellant claims that he was not amenable to signing a further AOD and was in fact advised by his attorney not to do so.
13. However, on 16 July 2019 the appellant made a written offer via his attorneys to pay the amount of R 2.5 million to the respondent by 31 December 2019, subject to the respondent acknowledging that he was not liable for the amount claimed in respect of the alleged Panico debt.

14. The respondent was amenable to the proposal provided that the appellant signed a fresh AOD for the amount proposed by him. He accordingly instructed his attorneys to prepare a draft which was forwarded to the appellant who, after making certain amendments to it, duly signed it on 28 August 2019. It is this AOD ('the third AOD') which forms the subject of the appeal.
15. As previously indicated the appellant acknowledged therein that he was indebted to the respondent for payment of an amount of R 2.5 million, which he undertook to settle, in full or in part, on or before 30 September 2019. Unlike the previous AOD's the third AOD made no provision for the levying of interest.
16. According to the appellant, by providing the third AOD he intended simply to acknowledge that he was liable to the respondent in the capital sum of R2 .5 million which had previously been advanced to him, and no more than that. Thus, he claimed that he did not intend to bind himself to make payment of an additional sum of R 2.5 million. He signed the AOD notwithstanding the advice he had received from his attorney because he was desperate to maintain his friendship with the respondent. The respondent on the other hand understood that the appellant intended to bind himself to make payment of a further R 2.5 million over and above what he had already paid (R 2 121 500).
17. Contrary to the terms of the third AOD the appellant did not make any payment by 30 September 2019, not even the amount of R 378 500 which, on his version, would be the balance owing in respect of the capital sum of R 2.5 million which had been advanced. But, curiously, on 8 November 2019 he proceeded to pay over to the respondent an amount well in excess of that viz R 965 000. His explanation for doing so was that the respondent was desperate for money, and he was desperate to maintain their friendship. This was the last amount the appellant paid to the respondent.
18. Thus, it is common cause that in total the appellant paid the respondent R 3 086 500. If one deduct the capital value of the loan this means that he effectively paid R 586 500 in lieu of interest, which equates to a return of approximately 23.46% over a period of 4 years, from the beginning of 2015 to the date of the last payment.
19. In January 2020 the respondent declared a dispute which he referred to arbitration, in terms of a clause in the third AOD. In response, on 21 January 2020 the appellant instituted an action out of this Court[5] in which he sought an order declaring that the various oral loan agreements and the three AOD's which gave effect to them, constituted unlawful credit agreements in terms of the NCA and were accordingly void, and consequently the respondent should be directed to repay the full amount which had been paid to him i.e. R 3 086 500.

20. The respondent delivered a statement of claim in the arbitration on 21 February 2020, in which he sought an award in his favour for R 1 535 000 being the balance owing in respect of the R 2.5 million referred to in the third AOD, less the R 965 000 the appellant had paid in lieu thereof.
21. In response, the appellant filed a statement of defence in which he pleaded (by way of 2 special pleas and a plea over) that the arbitration should be stayed pending the adjudication of his action in the High Court and, failing this, that it should be declared that the third AOD was a reckless credit agreement and that his obligations thereunder should consequently be set aside, and the respondent's claim dismissed. He also sought to counterclaim for an order directing the respondent to refund the R 586 500 which had been paid in lieu of interest, on the grounds that the respondent had been unjustly enriched thereby.
22. The matter proceeded to arbitration on 7-8 July and 30 August 2020. On 4 November 2020 the arbitrator delivered her award. She held that she could not grant a stay because in terms of the arbitral agreement she was obliged to proceed to determine the matter and, in any event, in terms of the Arbitration Act[6] the grant of a stay fell within the jurisdiction of the High Court and an arbitrator did not enjoy such a power, unless it was expressly conferred in terms of the arbitration agreement.
23. As far as the merits were concerned the arbitrator held that the third AOD was intended to be a compromise i.e. a settlement of both the claim in respect of the loans which had been advanced and the claim in respect of the Panico transaction and, as such, the provisions of the NCA did not apply to it.
24. The arbitrator did not entertain a defence of mutual mistake which was raised by the appellant for the first time in argument before her, but which had never been pleaded. In this regard the appellant contended that whereas he had signed the AOD on the mistaken understanding that he was merely intending thereby to confirm his original indebtedness in respect of the capital sum which had been advanced to him, the respondent was under the mistaken impression that the appellant intended to bind himself in respect of an additional sum of R 2.5 million.
25. The arbitrator rightly rejected this contention. She pointed out that the appellant's claim that he thought he was merely affirming his original liability was not borne out by the contents of the various settlement proposals he had made to the respondent in which he had first asked for a discount on the R 3 861 500 which the respondent had called upon him to pay, and when this failed had then offered to pay an amount of R 2.5 million to the respondent on or before the end of September 2019. She pointed out that, having already paid R 2 121 500 by that time, had the appellant merely intended to affirm his original capital indebtedness of R 2.5 million he would surely have indicated that he was only accepting liability for the balance owing thereon viz R 378 500. The terms of the third AOD were inconsistent with this version in that, not only did the appellant declare therein that he was indebted to the respondent in the sum of R 2.5 million, but he undertook to make payment of such amount,

in full or in part, by 30 September 2019. To this end the appellant had amended the draft AOD to provide that in the event that only part of the R 2.5 million was paid by the due date, the balance thereof would be paid over an agreed period.

26. Thus, the arbitrator was of the view that on a proper interpretation of the terms of the third AOD it was clear that the appellant intended to bind himself to make payment of an additional R 2.5 million, and the parties were ad idem in this regard and did not labour under any misapprehension as to what was agreed. Consequently, on 2 November 2020 the arbitrator made an award in favour of the respondent in the sum claimed by him.
27. Shortly after the award was delivered the respondent's attorneys enquired when payment would be made. No response was forthcoming. On 16 November 2020 the respondent sought to have the award made an order of court via a chamber- book application. On receipt thereof the appellant gave notice that he intended to launch an application to review the arbitration proceedings. This prompted the respondent to withdraw the chamber-book application and to make application by way of motion proceedings for the award to be made an order of court.
28. On 14 December 2020 the appellant duly filed his application for review. On 19 February 2021 an order was made directing that the two applications i.e. the application for the enforcement of the award and the application for the review of the arbitration proceedings, should be heard together.

The proceedings before the Court a quo

29. In his grounds of review the appellant contended, principally, that the arbitrator had made herself guilty of misconduct in her conduct of the proceedings, as a result of which they were vitiated by gross irregularity. After a detailed and careful consideration of the circumstances the Court a quo held, quite correctly, that there was no substance or merit to these allegations. Consequently, the review was dismissed. The appellant

has not sought to appeal the dismissal of the review and there is no need to spend any further time on this aspect.

30. I may point out, in passing, that the sole 'non-misconduct' ground of review i.e. that the award was one obtained and made improperly^[7] in that it fell foul of the NCA, also formed the central basis of the appellant's opposition to the application to enforce the award and is the focus of the appeal which is before us. As such, as the Court a quo did, we deal with it as part of our consideration of the appeal, as it was also raised as a principal ground to resist the enforcement application.
31. In this regard, as in the arbitration proceedings the appellant submitted before the Court a quo that the two AODs which were entered into in 2015 were unlawful credit agreements in terms of the NCA, as they had been concluded without due and proper compliance with certain of the Act's statutory prerequisites, and as such they were not capable of being enforced. The appellant further contended that inasmuch as the third AOD perpetuated the

underlying illegality inherent in the earlier AODs, it would be contrary to public policy to enforce it.

32. The Court a quo 'could find no difficulties' (sic) with the arbitrator's findings that the third AOD constituted a compromise and that the provisions of the NCA did not apply to it, and it held that in the circumstances there was no basis to find that its enforcement would therefore perpetuate any unlawful prior agreements, or that it would be contrary to public policy.

The

applicable principles

33. It is a basic principle of our law that to be valid an agreement must be lawful.[8] At common law a contract which is unlawful is generally considered to be void ab initio (from the outset) and of no effect, as it is a nullity, and cannot be enforced. Thus, no party can acquire rights under it and if a party fails to perform in terms of such an agreement the other cannot compel him/her to do so by way of a contractual claim for specific performance or damages. This is expressed in the maxim *ex turpi causa non oritur actio*: no action arises from a cause that is turpitudinous. The exception to this principle is where it is apparent from the language of a statutory injunction from which the unlawfulness originates, that an agreement or act performed contrary thereto will not be invalid.[9]
34. A party who has transferred money or goods under an unlawful agreement and who wants to claim restitution accordingly cannot do so under and in terms thereof and must resort to an enrichment action, specifically the *condictio ob turpem vet iniusta causa*. [10] However, in doing so he/she may come up against the so-called *par delictum* rule, which is expressed in the maxim *in pari delicto potior est conditio defendentis*, which on a literal translation means 'where both parties are at fault, the defendant's position is stronger'.
35. Thus, just as the *ex turpi* principle serves to defeat a contractual claim arising from, or in terms of, an unlawful contract, the *par delictum* rule may do so in respect of an enrichment action which is resorted to in place thereof. But the important qualification to the operation of the *par delictum* rule in enrichment actions is that pursuant to the decision in *Jajbhay* [11] it has been attenuated by the recognition of an equitable discretionary power by the court, so that it may do 'simple justice between man and man'.
36. As pointed out by Botha in his dissertation on the consequences of illegal contracts,[12] there are no fixed and determinate criteria which our courts have applied in the exercise of this equitable power. Most commonly these include a consideration of the purpose of the statutory provision that was contravened, the class of persons it was intended to benefit and whether there is a need to protect a particular group of vulnerable persons,[13] the state of mind of the parties (i.e. whether they were aware of the illegality), and the extent to which performance under the agreement has taken place. Where both parties have fully or substantively performed in terms of an illegal agreement the court will be more reluctant to

relax the par delictum rule.[14] Conversely, where there has only been partial performance the need to award restitution may be more acute, to prevent the defendant from receiving an 'unwarranted windfall'.[15]

37. Before proceeding it is necessary to emphasize two aspects which flow from the preceding discussion. In the first place, a court can only exercise an equitable discretion in enrichment (and not contractual) actions, where there is an acknowledged illegality which rendered an agreement between the parties unlawful and void. Thus, where an agreement is not illegal or unlawful it will axiomatically be valid and no enrichment claim can arise from or because of it, as its validity may provide the defendant with a basis for retaining any performance which was made by the plaintiff, at least in the context of any alleged impoverishment of the plaintiff.
38. In the second place, and somewhat anomalously, although an agreement may be valid it may nonetheless be unenforceable. The most well-known example of such agreements are wagers or betting/gambling agreements, which, since the decision in Gibson[16] in 1952 have consistently been held to be unenforceable because of public policy, but not illegal. Because of this they can be executed

and performed voluntarily, and they can be settled or set off against other obligations.[17] For the same reason, collateral or ancillary agreements flowing from them will be capable of being enforced as long as they do not serve as a means of enforcing the underlying gambling debt itself. [18]

39. Determining whether statutory provisions which do not expressly declare a contract or agreement to be unlawful or illegal nonetheless do so impliedly, thereby rendering it null and void, or whether they merely render it unenforceable, is a matter of interpretation which may give rise to difficulties.
40. In Cool Ideas[19] certain provisions[20] of the Housing Consumers Protection Measures Act (the 'HCPMA')[21] which stipulate that no person shall carry on the business of a home builder or receive any consideration in terms of any agreement with a housing consumer in respect of the sale or construction of a home, unless they are registered as such, and a related provision that a failure to comply therewith constitutes an offence, [22] came up for interpretation.
41. Cool Ideas CC had undertaken to perform certain building works for Mrs Hubbard at a time when it was not registered as a homebuilder. However, it had subcontracted the works to a building contractor who was registered. On practical completion of the works Hubbard refused to make the final payment which was due, on the basis that the works were defective and required remediation to the value of R 1.2 million, which she sought to claim via an arbitration process, as provided for in the building contract.

42. The arbitrator found in favour of Cool Ideas CC, holding that Hubbard was liable to it for the balance of the contract price, in an amount of approximately R 550 000. In the absence of payment Cool Ideas CC applied for the award to be made an order of court, which was opposed by Hubbard on the grounds that the award was unlawful and therefore void because at the time that the works had been performed Cool Ideas CC was not registered as a homebuilder. The High Court held that inasmuch as the HCPMA allowed for late registration and Cool Ideas CC was registered by the time the matter came before it, the arbitral award could be enforced.

43. On appeal the SCA disagreed. It held that the provisions of the HCPMA required that both Cool Ideas CC and its subcontractor had to be registered at the time when the works were performed.[23] In its view, the provisions under interpretation did not nullify the building contract which had been entered into by the unregistered

homebuilder contrary thereto, and merely disentitled it from receiving any consideration in terms thereof. The majority further

held that inasmuch as the HCPMA provided that a failure to comply with the provisions in question constituted a criminal offence,

enforcing the arbitral award would effectively sanction the very mischief which the Act sought to avoid, in breach of a statutory prohibition. Thus, it reversed the decision of the court a quo.

44. The Constitutional Court endorsed the principal findings of the majority in the SCA. It agreed that, inasmuch as the HCPMA was aimed at protecting housing consumers, the provisions in question envisaged that a homebuilder should be registered before performing any building works, either directly or via a subcontractor. It also agreed that although the provisions did not render the building contract invalid, for the reasons advanced by the majority in the SCA public policy required that the court should decline to make the arbitral award enforceable by means of an order of court, for doing so would result in the contravention of a statutory criminal prohibition which had been enacted for the laudable and important purpose of protecting housing consumers.

45. Ironically, notwithstanding the outcome in Cool Ideas the respondent relies on a dictum in the judgment of the majority in the CC,[24] which held that it is not inevitable that a court will never enforce an arbitral award which is at odds with a statutory prohibition, and constitutional values required courts to be careful not to undermine the achievement of the aims and goals of private arbitration. Consequently, courts should ordinarily respect litigants' choice to have their disputes

resolved by way of alternative dispute resolution procedures.[25] If they refused 'too freely' to enforce arbitral awards it would erode the utility of arbitration as an expeditious means of resolving

disputes.[26] Thus, courts are required to weigh up the force of a particular statutory prohibition or injunction against the goals of private arbitration, when considering whether to enforce an arbitral award.[27] That said, the Constitutional Court confirmed that, if making an arbitral award enforceable by an order of court would sanction a statutory prohibition or facilitate an illegality,[28] it would be contrary to public policy to do so.[29]

46. The respondent seeks to distinguish Cool Ideas from this matter on several bases. He contends that unlike the provisions of the HPCMA which were applicable in that matter, the provisions of the NCA which are under consideration here do not provide that a failure to comply with them will constitute a criminal offence, nor do they expressly or impliedly provide that as a party to the third AOD the respondent, as creditor, is not entitled to receive any consideration under, or in terms of, it. Furthermore, unlike in Cool Ideas the arbitral award in this matter is based on a settlement agreement which constituted a compromise, and not an underlying agreement which conflicts with a statutory injunction, or which is unlawful. Accordingly, the respondent contends that as a matter of law this serves to distinguish the two matters and

constitutes an important reason why the award should be enforced.

47. In this regard, as did the Court a quo, the respondent relies on the decision in Benefeld,[30] which held that a compromise is a self-standing, substantive agreement of settlement of litigation or envisaged litigation, which stands independent of the underlying causa that gives rise to it. As a result, so the respondent contends, it is not affected by the possible invalidity or illegality of the original agreements as contained in the various AODs, and the underlying obligations which arose from them. Consequently, the respondent

submits that the Court should yield to the principle of party autonomy which was given effect to in the resolution of the instant

dispute by way of arbitration, as firmly endorsed by the CC in Lufuno[31] and Cool Ideas.[32]

48. In determining the cogency of the respondent's submissions, it is necessary to consider the import of the decision in Benefeld. It is also necessary to consider whether- given that the rights and obligations which the respondent seeks to enforce arise directly from an arbitral award as opposed to prior underlying agreements which may have been unlawful in terms of the NCA- the award constitutes a fresh and independent causa which is divorced from such agreements, thereby allowing for it to be enforced. This is an important aspect which was not considered in the arbitration or in the Court a quo.

49. In an article which he wrote on Cool Ideas[33] (in which this aspect was also not pertinently considered by any of the Courts and the matter was ultimately decided with reference to constitutional principles as opposed to those of the common law), Wallis JA pointed out that, depending on the circumstances, an arbitral award may have one of two consequences as far as the underlying claim or causa on which it is based is concerned. In the first instance it may replace it, thereby giving rise to an entirely separate and new i.e independent cause of

action on which it is based.

50. Alternatively, it may leave it intact and merely strengthen the enforceability thereof, resulting in a so-called novatio necessaria (a type of compulsory, judicial novation as compared to a voluntary, party-based one[34]), which serves to strengthen the underlying claim by rendering it enforceable by way of execution, after the award is made an order of court. In such a case the essential nature and character of the original, underlying claim or causa remains the same, notwithstanding the award. Thus, if the original claim or cause of action is hit by a statutory prohibition which renders it (or any agreement arising therefrom) illegal, this will permeate through to the award, rendering it unenforceable.[35]
51. The learned judge of appeal noted that our authorities on the point are not consistent or harmonious, and in each instance which of the two situations we are dealing with must be determined by careful consideration of the relevant facts, the nature of the proceedings at hand, and the contents of the arbitral award.
52. Where it is apparent that the real purpose of an arbitral award is to enforce contractual rights by means of execution, without affecting other/ancillary rights which arise out of the underlying contract, it may be 'more realistic'[36] to regard the award not as novating, but strengthening or reinforcing the original, underlying contractual claim or cause of action. In such an instance all that happens in effect is that the original right of action is replaced by a right to execute but the underlying, original claim rights on which it is based, remain, and are not transformed.
53. As Wallis JA concluded,[37] the arbitrator's award in *Coo/ Ideas* amounted to a novatio necessaria which reinforced the underlying claim and replaced the right to sue on it, with a right to sue on and enforce the award, by way of execution. The essential nature of the underlying claim was however not altered-it remained a claim for payment under a building contract- and as such the statutory provisions which were applicable to it prohibited *Cool Ideas CC* from receiving payment under it. In the circumstances the arbitration did not materially alter or transform the underlying obligations, and served merely to quantify the payment which was due to be made under the original agreement, and that was the purpose and effect of the award which ensued.
54. As far as the decision in *Benefeld* is concerned, the following. The matter concerned a special plea which was taken to a contractual claim which arose out of a compromise which had been concluded in settlement of an action in the magistrates' court. The defendant contended that the compromise was contra bonos mores and thus void and unenforceable.
55. The parties had been involved in an adulterous relationship out of which two children were born. During the relationship the defendant had promised to marry the plaintiff once his existing marriage was terminated, but he failed to do so. As a result, the plaintiff

instituted action against him for breach of promise. In settlement thereof the defendant agreed to pay the plaintiff an amount of R 1.5 million, in respect of both the breach of promise and the 'years of dedication' which the plaintiff had devoted to him and their children.

56. Coppin J held that whereas the original agreement i.e. the promise to marry was contra bonos mores, as it contemplated or promoted the dissolution of the defendant's existing marriage, the same could not be said of the compromise. It did not seek to promote or foster any unlawfulness and could not be said to otherwise be illegal or contra bonos mores, and public policy therefore did not require that it be declared to be such, so that it could not be enforced.
57. The decision was undoubtedly correct, given that the settlement agreement was aimed at compensating the plaintiff for the wrongs which had been done to her by the defendant and was not aimed at promoting or enforcing the original agreement. That said, certain of the comments which were made in the judgment, on which both the respondent and the court a quo rely/relied, require consideration.
58. As a general proposition it is correct, as was pointed out by the Court[38] that, as a matter of law, a compromise is considered to be a self-standing agreement which stands independent of the underlying claim or causa from which it arises, which may be contractual i.e. a claim or causa which arises out of an earlier agreement.
59. It is commonly defined as an agreement in terms of which the parties to a dispute, the outcome of which is uncertain, agree to settle it on terms whereby each of them recedes from their positions by conceding something, thereby achieving or receiving less than they intended.[39] It has the effect of res judicata and consequently a party to it ordinarily cannot go behind it and sue on the original, disputed contract or agreement which gave rise to it. But the fact that a party may be bound to it and thus cannot resort to a prior agreement or obligation that gave rise to it, does not mean that it is necessarily and always the case that a compromise is not affected by a defect which attaches to the prior, underlying claim or causa, as the Court seems to have suggested,[40] and neither of the two decisions on which it sought to rely in this regard serve as authority for such a proposition.
60. In Dennis Peters [41] the plaintiff applied for provisional sentence on an AOD which had been tendered in settlement of a disputed claim for monies allegedly

loaned and advanced. The defendants alleged that the advances were money-lending transactions in respect of which the plaintiff had sought usurious rates of interest. The Court reiterated the general principles applicable to a compromise by pointing out that, inasmuch as it is accepted that it has the effect of res judicata, it provides an absolute defence to an action based on an earlier contractual causa, such as an earlier agreement. As the Court was of the view that the defendants had failed to establish on a balance of probabilities that the proceedings which were before it were for the recovery of a debt in respect of money-lending transactions, or that finance charges at an excessive rate had been levied, the defendants were unable to rely on these earlier transactions and the Court granted judgment on the AOD, as sought. In the circumstances,

the remark which the Court made,[42] with reference to text-book commentary by Wessels[43] and Wille,[44] that even if it were established that the original causa was invalid this would not affect a subsequent compromise, was obiter and not part of the ratio.

61. In Weltmans[45] the parties had entered into a compromise which constituted a full and final settlement of their differences and disputes, arising from or related to the purchase of a business and various actions which were pending in the magistrate's court. Once again, in dealing with the compromise the Court reiterated[46] the general principle that it prevents parties from falling back on their original agreement, out of which some of their disputes have arisen. On a consideration of the nature and contents of the compromise and the earlier agreement, Melunsky AJA concluded[47] that the compromise had not altered or changed the essential nature of the underlying claim, which pertained to the purchase price of the business. The compromise only differed in relation to the amount which was payable and the method of payment. Consequently, the proceedings which the respondent had instituted prior to the transfer of the business were sufficiently closely connected to its claim under the settlement agreement, such that the transfer was held to be void in terms of a provision in the Insolvency Act.[48]
62. I was unable to find any reference in any of the three, separate judgments which were handed down in Weltmans, to the obiter remark by Coppin J in Benefeld that a compromise or transactio, as it is also known, is not affected by the invalidity of the original obligation from which it arises, and from my reading thereof none of them dealt with this aspect. If anything, it seems to me that the approach of Melunsky AJA[49] of considering the true nature of the compromise in order to determine whether it constituted a separate, new agreement with fresh obligations, or whether it was one which merely gave effect to an existing, prior causa, is one which goes against the proposition that a compromise stands on its own and is never affected by any prior agreement which led to it being concluded.
63. In addition, it must be pointed out that Coppin J's remarks in Benefeld, [50] particularly those he made in relation to a compromise which arises out of a prior agreement or obligation which was illegal, as opposed to one which was invalid, were qualified. Thus, he pointed out that the enforcement of a compromise may be met by a defence that it is illegal, or that its terms are contra bonos mores. As he put it, a compromise is not illegal 'merely because the cause' (sic) which gave rise to it was illegal or contra bonos mores. Thus, the learned judge recognized that in certain instances the illegality of a prior agreement or obligation on which a compromise is based, may well render it unenforceable.
64. Whatever the earlier position may have been in terms of our common law, the general proposition that a compromise is not affected by the invalidity of an earlier causa because it is a self-standing agreement, as stated in Benefeld, does not reflect the current state of our law, since the decision of the Constitutional Court in Shabangu.[51]

65. In that matter the Land Bank had made loans to a property developer for the development of immovable property which was situated in an urban area. In doing so it exceeded its statutory powers, which were confined to promoting and facilitating the development of agricultural land.
66. The Bank subsequently instituted action against the developer for repayment of some R 95 million, being the amount allegedly owing in respect of the capital advanced and interest and professional fees. The developer disputed that it was indebted in this amount. Despite this, and notwithstanding that both parties had been advised that the loan agreement was invalid for want of statutory compliance, its financial director signed an AOD in which the Bank accepted liability to repay a lesser amount of R 82 million, in full and final settlement. The developer failed to repay the agreed amount and was subsequently liquidated. The Bank sought to recover its indebtedness in terms of the settlement agreement, from the sureties. It succeeded in the High Court on the basis that the fact that the original loan agreement may have been invalid (it appears it was not contended that the loan agreement was illegal), did not necessarily mean that the ancillary agreements of suretyship were also so. Leave to appeal to the SCA was refused.
67. On appeal before the Constitutional Court the Bank contended that, inasmuch as the AOD was a compromise and not a novation it was not tainted by the invalidity of the prior loan agreement. It sought to rely on the decision of the SCA in *Panamo*[52] which held that the terms of a mortgage bond which had been passed as an ancillary agreement, to secure a loan agreement which was invalid for lack of compliance with the necessary formalities, were wide enough to provide for the accessory liability of the sureties. But, importantly, this was on the grounds that they were possibly liable on the basis of an enrichment action, not an action based on the original loan contract.
68. The CC held that inasmuch as the AOD constituted an offer in full and final settlement of the developer's 'indebtedness' to the Bank in respect of the 'loan balance' which was outstanding at January 2009, it was evident that the parties had sought to compromise the original claim by agreeing on the payment of a reduced amount owing under the loan agreement, which agreement was invalid. The compromise had not intended to settle any dispute about the invalidity of the loan agreement and the bank was claiming an amount in the AOD which it had advanced, in terms of the loan agreement. In essence therefore what the bank sought to achieve in terms of the AOD was a benefit from a prior, invalid contract.
69. The CC did not accept the argument that, because it was a compromise and not a novation, the AOD was immune to the original invalidity and it held, with reference to the decision in *Gibson*, that as it constituted a device for enforcing the original claim, which was invalid, it was tainted with such invalidity. It was of the view that, as in *Weltmans*, the compromise differed from the original agreement only in regard to the amount which was payable and the method of payment, and it had not altered the essence of the underlying claim on which it rested. As such, the AOD was merely a 'resuscitation' of the earlier invalid agreement, and

the acknowledgement of a lesser sum which was owing did not 'transform' the nature of the original invalid agreement into one which was new and valid. Consequently, the terms of the AOD perpetuated the original invalidity.

70. The Constitutional Court held that a subsequent agreement of compromise in respect of a prior invalid agreement, will be valid if the original invalidity is 'overcome in one way or another'.^[53] In the case of organs of State this can be done by removing the legality impediment, by way of a legislative or executive act.
71. It can also be effected in disputes of a contractual nature by premising the compromise on an acknowledgement (this can surely be either express or tacit), that the original debt and the agreement from which it arose was invalid and that there accordingly was an 'absence of a relationship of legal indebtedness'. This would allow for a claim by way of an enrichment action to be put forward.
72. In summary therefore, the CC held that a subsequent compromise in relation to an invalid early agreement may be upheld as valid and enforceable if it relates to an enrichment claim, but not if it seeks to enforce an indebtedness which is based on, and arises from, the earlier invalid agreement.
73. The decision in Shabangu was recently endorsed by the SCA in Valor-IT ^[54] where the Court declined to make a settlement agreement which the parties had entered into in respect of the award of an unlawful tender for the supply of computer equipment, contrary to procurement legislation, enforceable by means of an order. It held that calling the agreement a 'transversal term contract' did not alter the fact that it was unlawful. This followed on a similar outcome in the public law sphere in Buffalo City,^[55] in relation to a compromise which had been entered into in regard to a contract which had also been concluded contrary to procurement legislation.

Towards a conclusion

74. As was pointed out in MV Yu Long Shan ^[56] a cause of action which is based on an arbitral award (or a judgment or order of court) is entirely derivative, in the sense that it owes its existence to the prior existence of an antecedent cause of action, which is 'good in fact and law'.
75. The antecedent cause of action of the award in this matter is the compromise in the form of the third AOD, which was concluded by agreement between the parties, in August 2019. On either of the parties' versions of how it came to be provided, it in turn was related to, or derived from, the earlier AODs, to a lesser or greater extent, depending on which version one considers.
76. On the strength of the principles which are set out in the preceding section, it follows that the fact that the award was based on a compromise, which in law constitutes a self-standing agreement, does not necessarily mean that it was immune to any invalidity or illegality which affected the earlier AODs, and both the arbitrator and the Court a quo erred in this

regard. Depending on the nature and extent of the disability (i.e the invalidity/illegality) applicable, it may have infected the third AOD, and in turn the compromise on which it was based.

77. This in turn impacted upon the determination which the Court had to make in terms of Cool Ideas, as to whether or not to give effect to the award in the interests of party autonomy, or whether it should be held that the enforcement of the award was against public policy. The Court a quo did not come to such a determination because it was of the view that as the third AOD constituted a compromise, in terms of the decision in Benefeld it was an independent agreement which was unaffected by what preceded it, and what public policy required did not come into play.

78. In the circumstances one is required, of necessity, to start with the first two AODs, and to evaluate them. It is common cause that

inasmuch as they were agreements whereby payment of the amounts which were owing in terms thereof were deferred and charges and fees were levied thereon, they constituted credit agreements in terms of the NCA.[57]

79. The NCA provides that a credit agreement is unlawful if at the time when it was made the credit provider was unregistered, when the Act required him/her to be registered. In this regard, when the loans were advanced in 2015 the Act provided that a credit provider was to be registered if the total outstanding principal debt owing in terms of a credit agreement exceeded a prescribed threshold of R 500 000. As the capital value of the loans advanced by the respondent exceeded the statutory threshold, he was thus required to be registered as a credit provider.

80. The threshold requirement was subsequently removed by way of legislative amendment on 11 May 2016,[58] from which time in the case of non-commercial loans between natural persons, save for certain exceptions,[59] registration is required for all credit providers, even those extending credit on a once-off basis.[60]

81. In the circumstances, on this basis alone the first two AODs were unlawful agreements.[61] As such, they were obviously also invalid. However, as they were given effect to voluntarily by the parties, no issue arose at the time as to their enforceability. When the appellant began defaulting on his obligations in terms thereof, the respondent made a claim against him, based on the agreements, which was resisted.

82. Both parties were clearly advised at the time that, given their failure to comply with the statutory formalities required in terms of the Act, the agreements were 'invalid'. In the context of the provisions in question this must mean that they were advised that they were illegal and could not be enforced. Nonetheless, the respondent continued to seek payment of what was owing to him under, and in terms of the two AODs, which he averred, together with interest, came to the amount of R 3 861 500.

83. There is no indication that the respondent acknowledged or accepted at the time that he was unable to claim under the AODs and therefore sought to recover what was allegedly owing, on the basis of enrichment, nor could there be, given that the appellant had by that time made payment of an amount of R 2 121 500 and the balance owing in respect of the capital amount of R 2.5 million which had been advanced was R 378 500, and the amount claimed by the respondent was way in excess of this. Put simply, it is common cause that the claim which was advanced by the respondent at the time, was based squarely on the alleged balance owing in terms of the AODs. It was not a restitutionary claim, based on an alleged enrichment of the appellant at the expense of the respondent, if this was at all possible.
84. It was this contractual claim under, and in terms of, the two AODs which the parties sought to compromise, together with the claim in respect of the alleged Panico debt (in respect of which it was not contended that there was any illegality or invalidity attendant).
85. Even if one were to assume in the appellant's favour that in his offer of R 2.5 million he allowed for the full amount of R 750 000 which was allegedly owing in respect of the Panico claim, this means that the balance of R 1 750 000 which he offered was in respect of the claim for monies outstanding on the loans which had been advanced in terms of the unlawful credit agreements.
86. That offer was accepted and incorporated in the third AOD. Although the AOD was silent as to how the R 2.5 million referred to therein was made up, once again, on neither party's version was it suggested that it was (even partially) an amount for and in respect of an alleged indebtedness on the basis of the enrichment of the appellant, at the expense of the respondent.
87. In the circumstances, as was the case in *Shabangu* the bulk of the amount offered in the compromise was in respect of amounts advanced in terms of earlier, unlawful agreements and, to paraphrase Froneman J in *Shabangu*,^[62] the third AOD did not transform the unlawful nature of such agreements, as embodied in the first two AODs, into 'something new and valid'. It merely constituted an agreement to repay a lesser amount than that which was claimed on the prior, existing indebtedness, and set out fresh terms as to when this was to occur.
88. This means that the arbitral award in turn, did not serve to replace the original, underlying cause of action. In the main, it constituted a *novatio necessaria*, which attempted to strengthen the underlying contractual *causa*, which was derived from the original, unlawful agreements, and it did not transform or replace the contractual obligations arising from them. It simply sought to replace the right to sue on the underlying claims, with a right to execute once the award was made an order of court.

89. In Opperman the Constitutional Court set out what the important aims and purposes of the NCA are viz. to promote and advance the social and economic welfare of South Africans in order to achieve a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers. As was said in *Coo/ Ideas* in relation to the HCMPA, these are important and laudable aims.
90. The requirement that credit providers must be registered allows for their control and regulation, especially in relation to their financial probity and integrity, thereby avoiding the unscrupulous exploitation of credit consumers by so-called fly-by- night operators and loan sharks. In the event that this award is enforced the appellant would end up paying the respondent an amount, in total of R 4 621 500, on a capital advance of R 2.5 million, which by my rough (and possibly inaccurate reckoning), equates to an 84% return on investment.
91. In my view, enforcing such an award would encourage credit providers not to register, and to subvert the regulation and control of their activities which the NCA seeks to achieve. It would encourage them to subvert the Act simply by getting the consumers to whom they provide credit, at excessive rates of interest, to sign agreements whereby any dispute would be referred to arbitration.
92. In the circumstances, giving effect to party autonomy by enforcing an arbitral award which serves to 1) uphold and endorse credit agreements which are unlawful and 2) to subvert the Act and encourage non-compliance therewith by credit providers, would be against public policy.
93. For the foregoing reasons, I would hold that the judgment and order of the Court a quo, should be set aside. Before concluding, some final remarks as to issues of equity and fairness which arise in matters such as these, may be apposite; given that one may feel a measure of sympathy for the respondent, who was clearly treated unfairly by the appellant in relation to the third AOD, the terms of which were proposed by him in lieu of a supposed settlement, only to be dishonoured.
94. Had the matter come before the Court on the credit agreements, in addition to declaring them unlawful and setting them aside it would have had the power, in terms of the NCA, to make an order that was 'just and equitable'.^[63] Such an order is unfortunately not open to a court which deals with a settlement agreement which constitutes a compromise arising from earlier credit agreements, but which is not itself a credit agreement. In *Ratlou* ^[64] the SCA warned that it was never intended that the NCA would be applicable to all settlement agreements, simply because in form they comply with the definition of a credit agreement in terms of the NCA.
95. In the decision of both the SCA^[65] (per Ponnan J) and the Constitutional Court^[66] (per Majiedt J) in *Coo/ Ideas*, the higher Courts eschewed appeals to notions of fairness and equity in relation to the enforcement of arbitral awards.

96. As Wallis JA pointed out in his article, where the enforcement of an arbitral award involves the perpetuation of an unlawful act one cannot disguise or overlook the illegality by saying the parties have chosen arbitration as their dispute resolution medium, and fairness dictates that they should be held to that choice. Such a result would be inconsistent with the notion of public policy as reflected in the spirit, purport and objects of the Constitution and would undermine the principle of legality. [67]
97. Of course, as set out above, in the case of an enrichment claim arising from an illegal agreement the Court has a discretionary power to make an order which allows for 'simple justice between man and man', by relaxing the *par delictum* rule. But, given that the matter before us concerns an application for the enforcement of an arbitral award, neither the Court *a quo* nor this Court had/has the power to make an order based on fairness or equity, whereby the appellant could be directed to make a payment in some amount which is considered to be fair.
98. Although, given that he will succeed in setting aside the order of the Court *a quo* the appellant would ordinarily be entitled to an order in his favour in respect of both the costs of the appeal and the costs *a quo*, the appellant's counsel indicated that in the light of the longstanding relationship between the parties and the fact that the respondent had assisted the appellant financially by means of the loans which he advanced to him, at a time when he needed help, the appellant proposed that in the event he were to be successful we should direct that the parties should each be liable for their own costs, in respect of the proceedings in both Courts. The respondent's counsel indicated that the respondent was amenable to such an order being made and it seems to be one which is fair and appropriate, given the circumstances.

Order

99. In the result I would make the following Order:

1. The appeal is upheld.
2. The order of the Court *a quo* is set aside and replaced with an order as follows:

'The application for the enforcement of the arbitral award is dismissed'.

3. The parties shall each be liable for their own costs, both in the Court *a quo* and in the appeal.

JM SHER

Judge of the High Court

I agree, and it is so ordered.

A LE GRANGE

I agree.

PA GAMBLE

Appearances:

Appellant's counsel: M De Oliveira

Appellant's attorneys: KWA Attorneys (Johannesburg)

Respondent's counsel: D Van Reenen

Respondent's attorneys: Hayes Inc (Cape Town)

[1] Act 34 of 2005.

[2] Section 4(1)(f).

[3] In terms of s 40 (1) read together with s 42 (1).

[4] Section 89(2)(d).

[5] Under case number 1205/22.

[6] Act 42 of 1965.

[7] In terms of s33(1) of the Arbitration Act, 42 of 1965.

[8] Schierhout v Minister of Justice 1926 AD 99 at 109; Pattie v Kotze 1954 (3) SA 719 (A) at 726H-727A; Metro Western Cape (Pty) Ltd v Ross 1986 (3) SA 181 (A) at 188A-B; National Credit Regulator v Opperman & Ors 2013 (2) SA 1 (CC) paras 14 and 36.

[9] Pottie at 727H; Metro at 188F-G.

[10] National Credit Regulator n 9, paras 15 and 39; Jajbhay v Cassim 1939 AD 537 at 545, 547-548; Cool Ideas 1186 CC v Hubbard & Ano 2014 (4) SA 474 (CC), para 142

[11] Jajbhay at 541.

[12] FM Botha 'Determining the Consequences of Illegal Contracts' (LLM, 2022) p

[13] Afrisure v Watson N.O 2019

(2) SA 127 (SCA) para 147.

[14] Id, para 40; Jajbhay n 11 p 544.

[15] Botha n 13 p 19

[16] Gibson v Van der Walt 1952 (1) SA 262 (A).

[17] Nichol v Berger 1990 (1) SA 231 (C).

- [18] Gibson n 16 at 270A; Totalizator Agency Board OFS v Livranos 1987 (3) SA 283 (W) at 289D, 2941-2958 contra Halsey & Ors v Jones 1962 (3) SA 484 (A) where it was held that inasmuch as the principal obligation flowing from a gambling (sweepstakes) competition was unenforceable, so too was an ancillary obligation to safeguard tickets for it, as was a claim for delictual damages for negligence for losing it, as they sought to enforce the principal obligation.
- [19] Note 10.
- [20] Sections 10 (1)(a) and (b).
- [21] Act 95 of 1998.
- [22] In terms of s 2 thereof.
- [23] In terms of s 10(7).
- [24] Per Majiedt J.
- [25] Id, para 56.
- [26] Para 55.
- [27] Para 57.
- [28] Para 59.
- [29] Para 61.
- [30] Benefeld v West 2011
- (2) SA 379 (GSJ) at paras 14, 16-17.
- [31] Lufuno Mphuphuli & Associates (Pty) Ltd v Andrews & Ano 2009
- (4) SA 529 (CC) at paras 235-236 where it was held that courts should be careful not to undermine the goals of private arbitration by enlarging their powers of scrutiny of arbitral awards 'imprudently'.
- [32] Note 10 para 56.
- [33] 'The Common-Law's Cool Ideas for Dealing with Ms Hubbard' 2015 (4) SAU 940
- [34] It is trite that for a novated agreement to be valid and therefore enforceable the original agreement which is substituted by it must have been valid. In accordance with the general principles which were set out above, if the original agreement is tainted by illegality, it will be void, and cannot be given life to by way of a novation.
- [35] Note 33 p 949.
- [36] Id, p 950 with reference to the decisions in Trust Bank of Africa Ltd v Dhooma 1970 (3) SA 304 (N) at 308A-310C, and Swadif (Pty) Ltd v Dyke N.O 1978 (1) SA 928 (A) at 942C-E, 944G.

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- [37] Id, p 951.
- [38] Para 16.
- [39] Dennis Peters Investments (Pty) Ltd v Ollerenshaw & Ors 1997 (1) SA 197 (W) at 202G-H.
- [40] Benefeld para 14.
- [41] Note 39.
- [42] At p 203A.
- [43] Law of Contract in South Africa 2nd Ed Vol 2 para 2 458.
- [44] Principles of South African Law (unknown edition), p 367.
- [45] Weltmans Custom Office Furniture (Pty) Ltd (In Liquidation) v Whistlers CC 1999 (2) SA 116 (SCA).
- [46] Para 16.
- [47] Id.
- [48] Section 34(3) of Act 24 of 1936.
- [49] Which was similar to that which was adopted by Wallis JA as to how the enforcement of arbitral awards is to be dealt with.
- [50] Note 30 para 17.
- [51] Shabangu v Land & Agricultural Development Bank of SA 2020 (1) SA 305 (CC).
- [52] Panama Properties (Pty) Ltd v Land & Agricultural Development Bank of SA 2016 (1) SA 202 (SCA).
- [53] Para 24.
- [54] Valor- IT v Premier, North-West Province & Ors 2021 (1) SA 42 (SCA).
- [55] Buffalo City Metropolitan Municipality v Asia Construction (Pty) Ltd 2019 (4) SA 331 (CC).
- [56] MV Yu Long Shan: Drybulk SA v MV Yu Long Shan 1998 (1) SA 646 (SCA) at 653G-H.
- [57] Section 8(4)(f).
- [58] GG 39981.
- [59] Such as agreements between persons in a familial relationship who are co-dependent on one another (s 4(2)(b)(ii)), as well as any other arrangement in which the parties are not independent of the one another and consequently do not 'necessarily strive to obtain the utmost possible advantage out of the transaction' (s 4(2)(b)(iv), or an arrangement/ agreement in terms of which the parties are otherwise not dealing at arms- length (s 4(2)(b)(v)).

[60] De Bruyn N.O & Ors v Karsten 2019 (1) SA 403 (SCA), paras 27-28.

[61] Id.

[62] At para 24.

[63] Section 89(5).

[64] Ratlou v Man Financial Services SA (Pty) Ltd 2019 (5) SA 117 (SCA) paras 21-23.

[65] Hubbard v Cool Ideas 1186 CC 2013 (5) SA 112 (SCA) para 14.

[66] Note 10 para 52.

[67] Note 33 p 958.

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