IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

(1) REPORTABLE: YES/~~NO~~

(2) INTERESTED TO THE JUDGES: YES/~~NO~~

(3) REVISED

CASE NO: 7991/2017

In the matter between:

NEDBANK LIMITED **PLAINTIFF**

AND

CHARLES JOSEPH STOPFORTH **FIRST DEFENDANT**

AMANDA STOPFORTH **SECOND DEFENDANT**

BUBESI INVESTMENTS 183 (PTY) LTD **THIRD DEFENDANT**

Headnotes: Civil procedure – payment of debt due and payable – whether debtor's compromise made "in full and final settlement" – had effect to extinguish debt due, absolutely whether Parole evidence rule finds application in casu to exclude extrinsic evidence outside the jural act – Deed of settlement not specified if tender made in" full and final settlement" of the debt – issue not content of the document per se, but true meaning thereof as it stands – parole or integration rule applies to nature and scope of a given jural act, not merely admissibility or otherwise of evidence – parole evidence not applicable where evidence required to throw light on true nature and scope of a given jural transaction and what parties intended, nor where a document contains a mere narration of unsubstantiated allegations. Onus thrust on a debtor to prove that compromise made and accepted was to extinguish indebtedness absolutely.

Held – in casu, that the ordinary legal exceptions e.g. where written instrument not intended to cover all the terms of the transaction, oral evidence showing its terms not precluded- plaintiff's claim upheld with costs.

JUDGMENT

MG PHATUDI ADJP

[1] The Plaintiff in this matter instituted a civil action against the First, Second and Third Defendants ("the defendants"), jointly and severally, the one paying the other to be absolved, for payment in terms of **claim A** of an amount of **R272 740.30**, and in respect of **claim B**, an amount of **R454 398.41** respectively plus interest on

the Plaintiff's prime lending rate (currently 10.25%) and 10.5%, translating into 20.75% and capitalised monthly from **19 October 2017**, to date of payment, both days inclusive, costs of suit on attorney and client scale. The action is defended.

BACKROUND TO THE DISPUTE

[2] In claim A, the Plaintiff's claim against the Defendants is one for a debt due. The Plaintiff alleged in its particulars of claim that on or about **26 March 2013** and at its business branch, (Nedbank branch, Polokwane), entered into a partially written and partially oral agreement for the principal debtor (Cape Town Fish Market Polokwane (Pty) Ltd (In Liquidation) to open cheque account with the Plaintiff.

2.1 In terms of the said agreement, the Plaintiff lent and advanced monies to the principal debtor, Cape Town Fish Market ("CTFM") Running **account No: [….]** pursuant to application for services form attached as **Annexure "A"** to the Combined Summons.[1]

2.2 The terms and conditions of the cheque account facility entitled the principal debtor to operate a current account, to

[1] "Cheque Account application form," Index Pleadings, pp 13-23

which the Plaintiff would grant overdraft facilities on the said cheque account on agreed amounts, the Plaintiff being obliged to honour all negotiable instruments presented to it for payment on behalf of the principal debtor, and that in the event of breach of the overdraft , the said debtor would on demand, pay the overdrawn facility, in which event the certificate of balance issued by a competent Manager of the Plaintiff, would constitute *prima facie* proof of the debtor's indebtedness to the Plaintiff.

2.3 It is apparent, as the Plaintiff alleged, that on or about the **18 October 2017**, the principal debtor which was by then in Liquidation process, was not only in breach of the overdraft facility, but also indebted to the Plaintiff in the amount **of R272 740.30,** plus interest at the rate applicable to it (Nedbank.)

[3] As to **claim B**, it is alleged that on **24 August 2015** the parties entered into a written Term Loan Agreement[2] ("the Term loan") in the total amount of **R 996 974.28** being the Capital amount of the debt, together with interest thereon. The Plaintiff's claim, however,

[2] Index Pleadings, Annexure "B", PP 30-37

is limited to the total balance owing, due and payable as on **18 October 2017** in the amount of **R 454 398.41 (Claim B).**

[4] The Plaintiff also claimed as against the First Defendant himself as a "Surety and Co-Principal Debtor" *singuli in solidum* for repayment on demand of all or any sum or sums of money which the Principal Debtor may then or from time to time thereafter be liable to the Plaintiff. A copy of the relevant Deed of Suretyship (incorporating cession of claims[3]) is annexed to Plaintiff's particulars of claim. The relevant Suretyship agreement was concluded on **25 March 2013**.

[5] Furthermore, on **15 April 2013**, the Second and Third Defendants also bound themselves jointly and severally as Sureties and Co-principal debtors in *solidum* for repayment of any monies which the principal debtor may from time to time be indebted to the Plaintiff, together with interest charged. The relevant copies of the deeds of suretyship are marked as **annexures "D" and "E",** respectively,[4] to the particulars of claim.

[6] The certificates of indebtedness as envisaged in the respective Deeds of Suretyships in respect of the Defendants' are attached to the paginated index of Pleadings as **Annexures "F1"; to "F6"** to

[3] Annexure "C" [Ibid pp 40 42]
[4] Ibid pp 44 -50

the Combined Summons.[5] These are certificates of balance evincing the Defendant's indebtedness to the Plaintiff.

[7] The Defendants, in their particulars of defence (Plea) admitted to a number of allegations as contained in claim A, except that they are in breach of the overdraft facility which was allegedly overdrawn, and therefore not indebted to the Plaintiff in the amount of **R 272 740.30** plus interest thereon as alleged.

[8] The First Defendant in its Plea, specifically pleaded in defence that an amount of **R800 000.00** was paid to the Plaintiff in "full and final settlement" of all amounts due and payable by the Defendants, jointly and severally, to the Plaintiff. The alleged discharge emanated from an agreement the parties entered into on **23 June 2017.**[6] The said agreement appears to be a **"Deed of Settlement"** signed by Plaintiff, the Defendants and the Principal Debtor (Cape Town Fish Market). I shall revert to consider and analyse this agreement which invariably, forms the subject matter of the dispute in these proceedings as to its true meaning, and what the parties intended when they concluded its terms.

[9] At the commencement of the trial, Counsel for the Defendants, Mr Diamond, raised a preliminary point of law predicated upon the

[5] Pp 53 -58, Index Pleadings
[6] Annexure "S", Index pleading, pp 71 - 75

principle of the **"parole evidence rule"** or the **integration rule** in terms of which he contended that the Plaintiff was precluded to adduce extrinsic evidence outside the "Deed of settlement" it relied upon to found its claim against the Defendants. I shall return to this aspect later in the course of this judgment to examine in detail the application or otherwise of this rule in the present instance, even though I have already made a preliminary adverse finding against its application to the facts at issue without providing the full reasons. This approach was purely to have permitted the hearing of evidence and also to dispose of the matter on the merits and not piece-meal or on technicalities.

THE LEGAL ISSUE:

[10 The question for determination is whether the terms and conditions set out in the deed of settlement if fulfilled, constituted a valid discharge of the defendant's indebtedness to the Plaintiff in **"full and final settlement"** thereof.

[11] For the sake of convenience and brevity, it suffices to mention that in the said Deed of settlement[7] the Defendants jointly and severally

[7] Annexure "S1", PP 71 Paginated Pleadings Index

"acknowledge their indebtedness to Nedbank" in respect of the following debts, namely; -

11.1 In the amount of **R546 263.17** plus interest at **11.50%** reckoned from **15 March 2017**, being for **Medium Term Loan agreement (No: 100149002)** and;

11.2 In the amount of **R963 093.81**, plus interest at prime rate amounting to **21%** reckoned from **15 march 2017** daily compounded monthly, being for the Current Account **(No: [….]).**

Added together, the total amount of alleged indebtedness as indicated above, translate to **R1 509 356.98** which the Plaintiff claim is owing, due and payable by the Defendants jointly and severally in *solidum*.

[12] Of significance, the parties furthermore agree "that **R800 000.00**, will be paid towards the account mentioned in **paragraph 1.1** and **1.2** *supra*, on or before **30 September 2017**". (Clause 2.1 of the Deed of settlement).

[13] Furthermore, it was also agreed that should any amount/s and/or undertaking referred to in paragraph 2 of the said deed not be paid or complied with on due date (30 September 2017) then and in such event, the full amounts without any right of set-off for any reason, of the amounts due in terms of both the Medium Term Loan ("the Loan") and the current account (overdraft facility) and interest thereon, **"would immediately become due, owing and payable."**

[14] It is common cause that the Deed of Settlement was concluded and signed by the parties on **23 June 2017**, being the date on which the party last to sign appended his/her signature on the deed instrument, the defendants having initially signed it on **03 April 2017.** (Some two (2) months and three weeks before **23 June 2017**).

[15] It is also common cause that the First Defendant on **11 September 2017** tendered payment of **R800 000.00** into the trust account of Nelis Britz attorneys apparently being for the benefit of Cape Town Fish Market.[8] (CTFM). It appears from a copy of the letter dated **11 September 2017** issued by Nelis Britz attorneys on behalf of the Defendants and directed to the Plaintiff's Recovery

[8] Paginated Index Bundle "B" P54, Defendants Discovered Documents

Manager that the tendered payment was made in "full and final settlement"[9] of all amounts owed by the Defendants. This was allegedly done pursuant to the deed of settlement concluded by the parties as indicated elsewhere in this judgment.

[16] It is this payment allegedly made in "full and final settlement" that is vehemently disputed by the Plaintiff. It was on a consideration of this dispute of fact which prompted this court to have called for oral evidence to determine the status of the Deed of settlement referred to and also to establish what the parties intended when they concluded the settlement agreement and what its consequence is.

[17] The Plaintiff in its letter dated **03 November 2017** issued by Mr Marlize Smit, Recoveries Manager, indicates the Third Defendant's indebtedness which is covered by a mortgage bond of **R 550 000.00** over a certain immovable property situated on **Portion 8 (Ptn of Ptn2) of Erf 563 Flimedia Township, North West,** for which the Third Defendant, represented by the First Defendant signed a deed of suretyship. It was indicated in the letter that Cape Town Fish Market still then owed **R272 740.30** (which is overdrawn overdraft on the Current account) and the amount of

[9] Ibid p55

R454 398.41. (the loan debt). A reading of this response suggest that the Plaintiff did not regard the partial payment made of **R800 000.00** as a discharge of all defendants' indebtedness allegedly made in "full and final settlement". I propose to revert to this aspect once I have embarked on analysing the evidence.

[18] **SURVEY OF THE EVIDENCE: (PLAINTIFF)**

18.1 The Plaintiff in an endeavour to establish its claims against the Defendants, called two witnesses to testify, namely, **Messrs Dirk Jooste** and **Victor Lamue.**

18.2 Mr Jooste, in summation, testified that, he is a Credit Manager within the Plaintiff's employment, in particular, operating Limpopo and Mpumalanga Provinces. He is responsible for credit management of the Defendant's banking accounts and sureties. His role is one of managing clients' accounts which are in financial distress.

18.3 He testified that it came to his attention during or on **28 December 2016**, that a business entity known as Cape Town Fish Market (Polokwane), ("CTFM") had closed shop

or ceased trading, and that the Plaintiff also closed its overdraft facility granted to it.

18.4 Pursuant to the closure of CTFM a round of negotiations ensued with the Defendant whose purpose was to discuss the restoration of the closed overdraft facility linked to the current account and also the repayment of the existing debt in respect of the Medium Term Loan Agreement ("the loan"). The teleconference was held in this regard on **17 January 2017**.

18.5 The proposal further was that First Defendant should bring his restructuring repayment plan to liquidate his business indebtedness on or before **28 February 2017**, and also to sign a surety to secure the debt as one of the pre-conditions to reinstate the cancelled overdraft facility.

[19] Pursuant to the telephonic conversation of **17 January 2017**, both the Plaintiff's Business Manager and credit Risk Manager, issued a letter dated **18 January 2017** to the directors of yet another company apparently owned by the First Defendant (Invirocon (Pty) Ltd) in connection with the distressed overdraft facility. In this letter, Invirocon was notified that Nedbank has reinstated its

overdraft limit of **R390 000.00** as per outstanding exposure on Current Account **No: [….]** dated **17 January 2017**, which was approved on **28 February 2017**, by which time a repayment plan of the full outstanding exposure of CTFM should have reached the Plaintiff.

[20] This letter, I must point out immediately, was handed up in evidence with the defence Counsel's consent marked as **Exhibit A.**

[21] The next round of the meeting was a follow up held on **09 March 2017** whose purpose according to this witness, was to enquire further about the defendant's due debt.

[22] It was at this meeting where discussions were held around how the First Defendant were to settle its debts. A prior meeting was actually scheduled on 28 February 2017, both of which were to negotiate repayment structure plan to be proposed to the Plaintiff's credit risk managers. On the **09 March 2017**, the First Defendant was introduced to **Mr Victor Lamue** attached to Nedbank. In all these meetings, according to Jooste no firm payment arrangements were reached, with the result that the Defendant's accounts were handed over to the risk department for recovery measures.

[23] Mr Jooste testified further that in the latter meeting where Mr Lamue was also present **(09 March 2017)**, the First Defendant proposed an offer to pay **R800 000,00** towards a reduction of the capital debt.

[24] This payment, if acceptable, would have been an interim payment of the debt which in all, amounted to **R1.5 million,** speaking roundly, which in essence represented the Defendants' indebtedness to the Plaintiff.

[25] The witness, in addition, testified that pursuant to the meeting of **09 March 2019,** whose purpose was *inter alia* to restructure the Defendant's repayment plan and to consider the First Defendant's proposals, the following terms and conditions were formulated in response to the First Defendant's proposals;[10] -

> **"following the meeting between the client, credit risk and RC on 09 March 2017, only the accounts in the name of Cape Town Fish Market Polokwane (Pty) Ltd to be legal coded and DCAR' end to the legal DCAR with all remaining accounts to be managed by Credit Risk under the Credit Risk DCAR. Basis for this approach is to accommodate the client in his intended full repayment of the exposure in the name of Cape Town Fish Market Polokwane (Pty) Ltd of which agreement has already been reached(sic) to reduce**

[10] Exhibit "B" Supplementary Discovered Affidavit by V. Lamue; Bundle 3 pp210 -213

with R800 000.00 (sic) exposure by end September 2017 on voluntary consents to adjustment basis. Repayment arrangements for the remaining +-R700 000.00 (sic) will be negotiated and contracted with the client and/or sureties."

[26] Following this email **(Exhibit "B")** as alluded to, Martin Adams issued an email dated 16 March 2017 directed to Dirk Jooste, Doreen Van Staden which, in brief, confirmed the agreement reached with the First Defendant as a sequel to the meeting held on 09 March 2017. In it, it was agreed that "Group" will be dual managed by Recovery and Risk by moving CTFM to recoveries department, and the rest of the entities remaining at risk, and that no accounts will be closed until September where it was agreed with client **"to <u>reduce</u> the exposure with R800 000.00 by end of September 2017."**

[27] Furthermore, Adams also intimated that **"no excess will be allowed on all credit base account managed in the Risk entities, and client to make provision for all debit orders presented for payment".** In addition, Adams according to **Exhibit "B**" **(dated 16 March 2017)** recommended dual management of the entity of CTFM Polokwane to Recoveries, until end of

September 2017, when we will have a clear view forward on the group."

[28] Mr Jooste testified further, that the First Defendant had the initial two (2) account debts, secured as it were by sureties, and that to his knowledge the **R800 000.00** was tendered as a reduction of the Capital debts.

[29] On being asked by the court by way of clarity seeking question as to the effect of the payment the First Defendant made towards the debts owed, and whether it was accepted by Nedbank as "full and final settlement" thereof, his answer was in the negative describing it as a "down payment" only and that the Defendants were still being liable to pay roughly **+-R 709 000.00** due by them.

[30] Jooste also testified that since **09 March 2017** meeting, no further formal meetings were held with the Defendant around the settlement of all outstanding debts. This witness was cross-examined quite extensively, as to the subject matter of how the debt was to be paid, and if the **R800 000.00** tendered was a down payment or not. What remains, however, was that no agreement was reached by the parties at that meeting, so the evidence unfolded.

[31] Next to testified **Mr Victor Lamue (Lamue).** His evidence can be briefly summarised as follows: -

31.1 He is a Senior Manager, at Nedbank, responsible for recoveries of financially distressed accounts.

31.2 Jooste would transfer to him CTFM's account as and when the Defendant did not make firm repayment arrangements of the debt due to Plaintiff as per meeting held on **09 March 2017** amounting to approximately **R1.5 million.**

31.3 Lamue further testified that the amount of **R800 000.00** offered by the Defendants in Settlement of the debt was merely for part payment of the **R1.5 million's** total debt exposure for which the Defendant (Charles Stopforth) could not make a definite repayment commitment. would be invoked into novation or set-off of the debt mentioned in **paragraphs 1.1 and 1.2** thereof as a result of which could not have superseded the entire capital debt.

31.5. Lamue testified further that the aforesaid tendered payment was not in "full and final settlement" as contented by the Defendants, but was only towards a full discharge of the entire debt due. He mentioned further that there remained

the balance of the exposure in the amount roughly of **R700 000.00** or so.

31.6 The witness denied the contents of the letter issued by the Defendant's attorneys dated **11 September 2017** in terms of which the Plaintiff was "advised" that the payment of **R800 000.00** was made in "full and final settlement" of all amounts owed by the Defendants. He instead referred us to a copy of an email dated **06 October 2017** in which he confirmed that payment was "not in full and final settlement", but simple down payment. If it was full and final settlement it would have stated it.[11]

31.6 His evidence as aforementioned **[Para 31.6]** was previously corroborated by Plaintiff's attorneys Baloyi Swart & Associates Incorporated in a letter addressed to Defendant's attorneys Nelis Britz dated **10 November 2017**,[12] in which it was recorded that the payment of **R800 000.00** was "not in full and final settlement of the debt". I shall revert to deal in full detail the contents of this letter and its effect in the course of this judgment.

[11] Paginated Bundle 2, p132
[12] Ibid p 148

31.7 The witness in support of his evidence in this regard, again referred to the contents of an email addressed by one Marlize Smit dated **16 August 2017** addressed to Stopforth.[13] The purpose of this email was to confirm that the assets of CTFM were sold to Krygkor (Pty) Ltd the proceeds out of which were provisionally distributed by Sechaba Trust subject to further finalization by the Master of the High Court of the administration of its insolvent estate. Furthermore, the witness in the same email referred us to various amounts of debt associated with the Defendant's existing indebtedness.

That, in a nutshell, was Lamue's evidence-in-chief and further evidence around whether or not the said payment was in full discharge of the debt was raised during cross-examination, and for which he remained firm denying that indeed it was not. It was at this stage that the Plaintiff closed its case.

THE DEFENDANT'S EVIDENCE:

[32] On 20 February 2019 the First Defendant (Stopforth) took a stand to testify briefly as follows: -

[13] Ibid p 152

32.1 He informed certain officials of Nedbank(Plaintiff) that CTFM was experiencing financial distress and contemplated closing shop in the middle of December 2016, so as to commence liquidation procedures. For that purpose, he set an appointment with Mr Neels Lombard, an official of Nedbank, who proposed to see Stopforth early January 2017. A teleconference was subsequently held between him and certain officials of the Plaintiff bank, at which occasion he advised them of closure of business of his CTFM in Polokwane.

32.2 Stopforth testified that the said officials were anxious to know how he intended to liquidate the arrear amounts in respect of which his business outlet (CTFM) was still indebted to the Plaintiff (overdraft facility and the loan debts)

32.3 Stopforth testified that neither he, his companies, nor co-defendants were able to pay in full settlement the Plaintiff's claims. He stated that the purpose of the meeting/s he has held with the relevant Nedbank officials was purely to negotiate and reach a settlement in terms of which part payment could be reached. According to him no further agreements were reached excepting the Deed of Settlement

which he thought was aimed to resolve and bring the matter to a finality.

32.3 The witness proceeded to testify that his communication with Jooste and Lamue can be corroborated by his bookkeeper, one Mr Kirsten. I must remark though in passing that Mr Kirsten was not called by Stopforth to testify in corroboration of these allegations.

32.4 Be that as it may, Stopforth went on to testify in an effort to show that he was a man of straw, how the funds in his home mortgage bond were depleted as he still endured a burden of about R5 Million home loan debt.

32.5 According to the witness a further meeting was held on 28 February 2017. Present at the meeting were himself (Stopforth), Ferdinand Kirsten, Dirk Jooste, Doreen Van Staden and Martin Adams. The minutes of that meeting were recorded in an email dated and transmitted to Stopforth on **01 March 2019**.[14] I shall revert to deal with the relevance of this email shortly in this judgment. What is of importance, however, is that mentioning by him that all CTFM's accounts had to be referred to the recoveries section of the bank.

[14] Paginated Bundle 4, p350 -351.

32.6 The bottom line being the watermark of his evidence was that no definite restructuring and repayment plan had been reached particularly during the meeting held on **28 February 2017**, even though he made alternative proposals, for instance, to recall his investments, dispose of Third Defendant's assets, including an offer to pay the **R800 000.00** referred to in full settlement and thus the discharge of the two outstanding debts, (Overdraft and Medium Term Loan account), which Nedbank allegedly accepted. According to him there were no further subsidiary talks or agreements outside these discussions.

32.6 Stopforth, mentioned further that he then instructed his attorneys to advance the **R800 000.00** on or before **30 September 2017** which he did. But, his attorneys in their letter to Plaintiff's attorneys dated **04 September 2017** were "perplexed" by the demand that he must provide Nedbank with his "settlement proposal with(sic) regards to the shortfall amounts."[15]

32.6 According to the witness the Deed of settlement for what it was, was never made an order of court.

[15] Paginated Bundle 2, p118 – 119.

32.7 On being asked by the court as to whether was there anywhere within the four corners of the Deed of Settlement where it was expressly recorded that the payment of **R800 000.00** before **30 September 2017** if effected, would constitute a valid discharge of the whole of the Defendant's indebtedness to the Plaintiff, the witness merely relied on his interpretation of **paragraph 4.6** of the deed as his answer.

32.8 On that score, that was the conclusion of his testimony-in-chief, where after cross-examination ensued.

32.9 The bulk of cross-examination conducted by Mr Steyn, the Plaintiff's counsel, was meant to show that although several meetings referred to earlier were held, at the end, the payment made, was not in "full and final settlement" of the whole debt exposure.

[33] Next to testify on **13 March 2019** for the Defendants was Mr **Willem Ferdinand Kirsten("Kirsten").** He testified as follows; -

33.1 He is an Accountant and knew the Stopforth as his former client and was present with him in the meetings

held in Polokwane Nedbank premises on **28 February** and **17 March 2017**, respectively.

33.2 In the first meeting (28 February 2017) discussions with Plaintiffs' officials was to negotiate a settlement of Stopforth's liabilities to the bank, and it was where he offered to pay R800 000.00, which offer Jooste said would refer to Nedbank's Lamue for consideration.

33.3 The latter meeting (09 March 2017) he had a meeting again with Lamue, and Adams, but was uncertain if Jooste was also present where, once again, the offer made was discussed, and a draft agreement was to be drawn and referred to Nedbank for consideration. This was the last meeting he attended absent the entire episode.

33.4 He also painted a bleak financial status of the CTFM and other financial liabilities Stopforth was exposed to, which invariably set him up squarely in a sequestration path. It was for that reason that he thought that the R800 000.00 tendered was meant to fully discharge his liabilities.

33.5 Under cross-examination, he confirmed that no firm agreement was reached in the meeting of 28 February 2017. Again, he conceded that it was never specifically stated that the tender made was meant to be a full discharge of his indebtedness.

33.6 He also conceded that in the two previous meetings where he was involved, Nedbank did not agree to write off the balance on the other debt portfolios.

33.7 He also confirmed in evidence that the balance due on the entire debt was about R1.5 million at the time, and that there was no indication that such debt would be written off as a "bad debt". That concluded cross-examination, and with no re-examination, the Defendants closed their respective cases.

COMMON CAUSE FACTS:

[34] From the totality of the evidence so far adduced the following facts are common cause; -

34.1 That, the Plaintiff entered into certain agreements with CTFM Polokwane (in liquidation), the principal debtor, in terms of which it opened a cheque account with overdraft facility, and

also a written Medium-term Loan Agreement ("the agreements") full details whereof are better circumscribed in Paragraphs 3 and 10 of the Plaintiffs' particulars of claim. Both these exposures are not in dispute regard being had to the Defendant's plea in general.

34.2 The Defendants signed and entered into a Deed of Suretyship as co-principal debtors jointly and severally for the due fulfilment of all obligations of the principal debtor. The defendants, however, deny their liability thereunder.

34.2 The principal debtor has been liquidated a fact which is admitted by the Defendants in their plea. The liquidation was occasioned by failure on the part of the principal debtor to have made prompt regular payments on dates as and when payments became due and payable.

34.4 As a result, the Plaintiff and First to Third Defendants entered into a Deed of settlement **(Annexures "S1")** which was finally concluded on **23 June 2017** being the date on which the last party signed the relevant instrument.

34.5 In it, the First and Second Defendants indubitably admitted their indebtedness in their personal capacities jointly and severally to the Plaintiff for the written Loan and overdrawn

Current Account. For the sake of completeness, the indebtedness admitted is one referred to in paragraphs 1.1 (Loan debt) and paragraph 1.2 (overdrawn Current Account). of the relevant deed document.

34.6 Further that, on 11 September 2017 the Defendants paid an amount of **R800 000.00** towards settlement of the principal debtor's outstanding accounts, which amount was accounted for by the Plaintiff on **02 September 2017.**

[35] It was this payment which is and remaining the subject matter of the dispute whether in terms of subject-matter settlement the said payment constituted a valid discharge of the Defendants' indebtedness is in fact the nuts of the dispute as formulated in **paragraph 10**, above.

[36] The Plaintiff's contention in the main is that the "Deed of settlement" concluded by the parties was no more than an interim payment towards settlement of the principal debtors' whole indebtedness already alluded to herein, and that further arrangements will be made after the amount of **R800 000.00** was paid in respect of the balance then due and owing.

The Defendants, conversely, submitted that the foregoing proposition is untenable it being contended that the payment advanced on **1 September 2017** which was due and payable in terms of the deed instrument signed was in fact intended to be a settlement of all debt in "full and final settlement" thereof. This is where the battle lines are drawn.

[37] Before I weigh up to assess the veracity of these mutually opposing contentions, I consider it expedient to deal with and dispose of the issue of whether or not the Parole evidence rule finds application in these proceedings and if so, extrinsic evidence should have found to preclude the Plaintiff from leading such extraneous evidence outside the "Deed of settlement" under consideration.

PAROL EVIDENCE RULE;

[38] Parole evidence or the integration rule as it is otherwise generally known in our law, provides that *"where a jural act is incorporated in*

a document, it is not generally permissible to adduce extrinsic evidence on its terms."[16]

Properly interpreted the extrinsic evidence rule is to the effect that no evidence may be given to alter the clear and unambiguous meaning of contract, regardless of whether written or verbal. The process of interpretation involved is embodying the terms and conditions of a jural act in a single memorial, hence the integration of the transaction constituted by scattered parts into an integral documentary unity.

[39] That said, the consequence of those disregarded parts in their original and in choate shape produce no jural effect as they are substituted by a single embodiment of the transaction, which then renders all other utterances of the parties on the subject legally immaterial for the purposes of establishing what are the terms of their act.

[40] To that extent, it is clear that the rule may serve two possible purposes, namely;

[16] "Principles of Evidence," Schwikkard & Van der Merwe (4th Edition) 2016; p40. See also KPMG C.A. (SA) v Secure fin and Another 2009(4) SA 399 (SCA).

40.1 To show terms different to those contained in the document with a view to determining what the terms of a particular transaction are; or

40.2 to show the true meaning of the terms contained in the document.

In issue therefore is not the content of the document per se, but the true meaning thereof, as it stands,

[41] The extrinsic evidence rule comprises two distinct rules, namely the integration rule which applies to the former position, and the interpretation rule, which applies to the latter position in this present instance.[17]

[42] On proper analysis the parole evidence rule is clearly one of substantive law applying to the nature and scope of a given jural transaction and not just merely the admissibility or otherwise of evidence, it is for that reason that a few exceptions to the general rule excluding parole evidence exist.[18]

[43] One of the exceptions are, for instance, where a written contract is not intended to cover the terms of the transaction lock, stock, and

[17] Ibid p41.
[18] Vide, "The law of Contract in South Africa: p200 et seq. Christie & Bradfiel.

barrel in which event evidence of further oral terms is not precluded.[19]

[44] The rule therefore does not apply, in my view, where evidence is required to throw a better light on the true nature of a transaction such as the "Deed of settlement" *in casu* and what was intended by the parties regarding the part payment made by Stopforth pursuant to the said jural instrument.

Furthermore, the rule cannot apply to a document which contains a mere narration of an unsubstantiated allegation, for instance, that the payment made *in casu* was in "full and final settlement" of the whole of the Defendant's indebtedness to the Plaintiff, when nowhere on the document relied upon was such a recordal inscribed by the parties.

[45] For all the considerations a foregoing, and for the reasons advanced herein, I did not hesitate to make a finding [Paragraph 9 above] that parole evidence rule and/or the integration rule did not have room in the present proceedings as the exceptions alluded to, weighed heavily against its application as evidence *viva voce* was essential to determine the true intention of the parties and the actual meaning of the contentious parts of the settlement deed.

[19] Johnston v Leal 1980 (3) SA 927 (A) at 944 B – C.

LEGAL PRINCIPLE:

[46] The starting point perhaps is to examine the legal meaning of tender made in "full and final settlement" which, needless to say, is the hard core of the dispute in the present proceedings. It is generally accepted that "the acceptance by a creditor of a tender made in full and final settlement may, depending on the circumstances, amount to a settlement of the debt." The reason is that the meaning of expression "in full and final settlement" depends on the context in which it is used."[20]

The debtor may therefore raise the compromise as a complete answer to a claim for the balance of the alleged debt.[21] However, it is incumbent for the defendant or debtor to allege and prove the compromise lest in the event of a doubt, the construction unfavourable to the defendant/debtor of the tender or offer will prevail. Should the Plaintiff/Creditor however accept the tendered compromise it shall have accepted the full and final discharge of all

[20] "Ambler's Precedents of Pleadings" _ Harms: 7th Edition p375
[21] Karson v Minister of Public Works 1996 (1) SA 887 E.

otherwise due indebtedness.[22] The remedy therefore is to sue for the debt owing, due and payable.

ANALYSIS OF THE EVIDENCE:

[47] Having dealt with trite principle applicable in compromises of this nature, I now proceed to evaluate the evidence in relation to the facts in this matter taking into account Counsel's submissions. Counsel for the Defendants, Mr Diamond submitted that there is no evidence of the existence of further outstanding debts or ancillary agreement with the Deed of settlement given also the integration rule to prove further parallel agreement.

I am unable to agree with these submissions for the following reasons;

47.1 According to Stopforth he and the officials of Nedbank referred to held a teleconference during early January 2017 to discuss how he could settle his debt. Accepting for a moment that perhaps that was so, and given the fact that he in fact advanced payment of an amount of R800 000.00 as he did before 30 September 2017, it remains quite obscure as to why the "Deed of settlement" did not in fact specifically

[22] Absa Bank v Van der Vyver N.O [2002] 3 All SA 425 (SCA).

record that the tender or compromise made was in “full and final settlement” of the entire exposure. This deed was signed subsequently on **03 April 2017**, last party signed on **23 June 2017**, being the effective date. What paragraph 2 (2.1) recorded was to the following effect; -

“2. The parties agree to the following terms and conditions:

2.1 That R800 000.00, will be paid towards the account mentioned in paragraph 1.1 and 1.2 supra on or before 30 September 2017.”

47.2 It is not in dispute that the accounts mentioned covered by the said amount are the Medium Term Loan (1001 149 0002) and the Current Account ([….]

Furthermore, it was also specifically recorded that the amount of the Defendant’s indebtedness to the Plaintiff **“will at any time be determined by a written certificate/s signed by any manager of Nedbank”** which certificate will upon the mere production thereof be binding, and be *prima facie* proof of the contents thereof (Paragraph 4.1, Annexures “S1”). Most significantly, it was recorded and agreed in paragraph 4.4 that “this agreement does not constitute a novation of any of Nedbank’s rights.”

This clause, therefore, meant that this “Deed of settlement “or any of its terms and conditions was not intended by the parties as a substitution of new contract in place of old one.

47.3 From the evidence presented it seems plain that between 17 January 2017 and 09 march 2017, the parties were still locked in the settlement negotiations to mitigate the Defendants’ over indebtedness. I agree with Stopforth’s evidence that no cogent agreement had been reached as to how to restore their liquidity hence a firm undertaking was required of him as to how to settle his accounts with the bank moving forward.

47.4 The reason for this observation was that if indeed no agreement was reached on his alleged settlement proposals, then the “Deed of settlement”, if accepted by the creditor as a compromise debt, would have specifically recorded that the tender was made in “full and final settlement” in respect of the accounts mentioned in it. This was not done. As already indicated above, (paragraph 46) the debtor who wish to rely on a compromise has the burden thrust on him/her to allege

and prove the existence of a validly discharged tender extinguishing further liability.

47.5 From the contents of Exhibit “B” being an email addressed to the internal recovery officials dated 17 March 2017 from Jooste to Adams, Ms Doreen Van Staden, Smit and Lamue, pursuant to CTFM’s liquidation process in February 2017, it is clear, once again, that the Defendants remained indebted to the Plaintiff in relation to all exposures aforementioned. For that purpose, Stopforth’s exposures were referred to recoveries and were legal coded. The objective being to accommodate him to **“reduce exposure with R800 000.00 by end of September 2017 on voluntary consent to judgment basis. Repayment arrangements for the remaining +- 700 000.00 will be negotiated by RC with the client and/or sureties.”**

47.6 A closer examination presupposes that Stopforth on behalf of CTFM still and remained indebted to the Plaintiff in respect of other accounts. The foregoing observation is fortified by the contents of the email (Exhibit “B”) dated 16 March 2017 from Adams to Jooste and copied to Van Staden regarding CTFM. Its purpose was to confirm inter alia that its account would be

moved to the recoveries department while other exposures remained at risk unit, and that no accounts would be closed until September where **"it was agreed with client to reduce the exposure with R800 000.00 by end of September 2017"**. With this in mind, it follows that the R800 000.00 tendered was as agreed, "to reduce the exposure." It comes, therefore, as no surprise that the deed recorded as already shown in paragraph 2 (2.1) that "the R800 000.00, will be paid towards the accounts "referred to in paragraphs 1.1 and 1.2 thereof.

47.7 Another reason to hold that the tendered amount of R800 000.00 could not have been made or acceptance as "full and final" discharge of Defendants' debts is evinced by the contents of Plaintiff's letter addressed to Nelis Britz Attorneys dated **03 November 2017**.[23] In it, the bank again disclosed the Third Respondent's covering bond held by it, and the "outstanding balances on the accounts of CTFM as at 18 October 2017," in respect of the current account and Medium Term Loan, and thus called for the full proceeds of the sale. (Third Defendants' assets).

[23] Paginated Bundle "B: P71 – "Defendants' Discovered documents."

47.8 In the light of these considerations, I find the evidence of both Jooste and Lamue as supported by a trail of undisputed documentary evidence, to be true, credible and reliable in all material respects. On the contrary, I view the evidence of both Stopforth and Kirsten in a dim light, although Kirsten had conceded that no agreement was reached with Stopforth to write off his debts as "bad debts". This concession alone gives credence to both Jooste and Lamue's evidence as not only being inherently probable, but truthful.

47.9 Defendant's attorneys wrote a letter dated **05 October 2017**[24] addressed to Nedbank's Regional Manager Recoveries seeking to deny that the amount paid as a settlement was never intended to be regarded as a "down payment", but rather as a full discharge of the debt.

In its response through Lamue by email dated **06 October 2017,** it was categorically denied that the said payment would be accepted "not in full and final settlement", but a "simple down payment".

47.10 To crown it all, the Plaintiff's attorneys again in a letter addressed to the Defendant's attorneys dated **10 November**

[24] Ibid p132.

2017, denied that the tender the Defendants made was not in full discharge of their liability.[25] By the same token, the outstanding debts were again clearly delineated according to different exposures, the total then amounted to **R 727 138.71** as at **10 November 2017**. This figure did not take into account the part payment made.

47.11 In his response after being informed of the sale of CTFM's assets and that he received dividends, Stopforth in his email dated 11 July 2017 to Marlize Smit, appears to confirm that the "sale of equipment (if any profit) and the rest, I must make due from own funds". The "rest" he refers to means, in my opinion, the rest of the monies still outstanding in respect of the two other exposures. He, therefore, conceded his further indebtedness to Plaintiff.

47.12 Lastly but not least, there is one other aspect that I wrestled with as I evaluated the existence of the debt and how the Stopforth and his attorneys has handled his affairs. This calls for a brief comment. In its letter dated 04 September 2017, another set of the defendant's attorneys, VZLR attorneys addressed a letter to the Plaintiff's attorneys in which they

[25] Ibid p148 -149.

are “perplexed” by the request made that Stopforth must attend to the “Shortfall amounts.”

It is still not clear from the evidence as to why Neliz Britz Attorneys could have decided to commit the funds kept in its trust account to effect payment on behalf of Stopforth when there was no settled intention by the parties to resolve the matter in the manner their client alleged was the case. If the parties had a union of the minds to the payment made in “full and final settlement”, then needless to mention, it should have been so recorded in *forma specifica.*

[48] Counsel for the Plaintiff Mr Steyn, contended and correctly so in my view, that the “deed of settlement” was concluded as an interim payment or even so-called “down payment” not to have finally discharged the debt in its entirety. I agree that the advance payments made was merely “towards the accounts referred to in paragraphs 1.1 and 1.2 thereof. The deed of settlement makes reference to “this agreement” in paragraphs 4.2; 4,4; 4,5 and 4,6, thereof, and thus could not have been made a novation of Nedbank’s rights either.

[49] For all the reasons proffered herein, I am satisfied that the Plaintiff has established its claim against the Defendants on a balance of probabilities and its claim should therefore succeed.

In consequence I make an order as follows.

CLAIM A

1. The Defendants jointly and severally the one paying the others absolved are ordered to pay the sum of **R272 740.30 to the Plaintiff;**
2. Interest on the said amount at the Plaintiff's prime lending rate (currently 10.25%), from time to time, plus 10.5%, thus 20.75% per annum, calculated on a daily balance and capitalised monthly, calculated from 19 October 2017, to date of payment, both days inclusive;
3. Costs of suit on attorney and client scale, to be taxed;

CLAIM B

1. The Defendants jointly and severally the one paying the others absolved are ordered to pay to the Plaintiff Payment of the sum of **R454 398.41**;

2. Interest on the said sum at the Plaintiff's prime lending (currently 10.25%), from time to time, plus 1%, thus 11.25% per annum, calculated from **19 October 2017**, to date of final payment, both days inclusive;
3. Costs of suit on attorney and client scale, to be taxed;

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MG Phatudi

Acting Deputy Judge President

Limpopo Division, Polokwane

REPRESENTATIVES:

1. Counsel for the Plaintiff	:	Adv. W. Steyn
Instructed by	:	Baloyi Swart & Associates Inc Centurion
2. Counsel for the Defendants	:	Adv. G.J Diamond

Instructed by : Du Toit Swanepoel; Steyn & Spruyt Attorneys, Polokwane

3. Dates heard : 19 & 20 February 2019 and 13 March 2019

4. Date handed down : 01 August 2019