IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Appeal Case No.:	**A142/2025**
Court a quo Case No.:	**16399/2023**

In the matter between:

VALOWORX 33 CC	First Appellant
ARCHAR COLYER HEAD N.O.	Second Appellant
ARCHAR ALEXANDER BROWNLEE N.O.	Third Appellant
ANDREW GRANT KIRKMAN N.O.	Fourth Appellant

[Second to Fourth Respondents in their capacities as the joint trustees of the Cape Leopard Trust (I[...])

ARCHAR COLYER HEAD	Fifth Appellant

and

MERCHANT COMMERCIAL FINANCE 1 (PTY) LTD T/A	Respondent

MERCHANT FACTORS

Coram: Le Grange, J; Ralarala, J; Montzinger, AJ

Hearing: 27 February 2026

Delivered: 21 April 2026

Summary: Claim for monetary judgment in motion proceedings – reliance for judgment premised on various agreements concluded between the appellants and the respondent – conclusion of settlement agreement – the effect of a *transactio* or compromise – discretion of court when faced with disputes in motion proceedings – application of the *in duplum* rule – settlement agreement confirms independent liability – a difference in the legal position does not constitute a *iustus error* to set aside a compromise.

ORDER

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1. The appeal is dismissed.

2. The appellants are ordered to pay the respondent's costs of the appeal, jointly and severally, the one paying the others to be absolved, on the party and party scale, with counsel’s fees on scale B.

JUDGMENT

Montzinger AJ (Le Grange J, *et* Ralarala, J concurring)

Introduction

[1] This is an appeal against the judgment and order of Van den Berg AJ, sitting as the court *a quo*, handed down on 19 November 2024. In the court *a quo*, the respondent ("Merchant") launched proceedings on motion seeking a monetary judgment against the appellants, in the sum of R2,910,901.91 together with interest thereon.

[2] The first appellant is Valoworx 33 CC ("Valoworx"), while the trustees of the Cape Leopard Trust ("the Trust") are the second to fourth appellants. Mr Archar Colyer Head ("Mr Head") is the fifth appellant. Judgment was pursued against Valoworx in the court *a quo* as the principal debtor, and against the Trust and Mr Head as sureties for Valoworx's debt.

[3] The parties exchanged the custom three sets of affidavits and presented oral argument before the court *a quo*. The court *a quo* handed down judgment and granted the following order:

[3.1] Merchant's application for the amendment of the Notice of Motion succeeded in part[1].

[3.2] Judgment was granted against the appellants jointly and severally to pay Merchant the capital amount of R944,919.85 in terms of the settlement agreement.

[3.3] The appellants were liable to also pay interest to Merchant jointly and severally on the unpaid capital amount of R944,919.85 at 3 percent per 30 days or part thereof calculated from 30 November 2021 (being the

[1] This amendment had to do with changing the claim amount in the notice of motion of R2,910,901.91 to the judgment amount of R944,919,85.

date after the last payment was received) up to and not exceeding the unpaid capital amount.

[3.4] Costs was granted on a party and party scale with counsel's fees on scale B.

[4] The appellants on 21 February 2025 unsuccessfully applied for leave to appeal the court *a quo's* judgment. Undeterred, the appellants petitioned the Supreme Court of Appeal for leave and was successful as that court granted leave to appeal to a full bench of this Division.

[5] Before the grounds of appeal and their merits are considered it is necessary to set out the facts that underly the appeal.

Contextualising the facts underlying the appeal

[6] The commercial relationship between the parties have a long history. Merchant is a privately-owned financial services provider offering businesses a faster, more flexible alternative to traditional bank finance. Valoworx, on the other hand, is in the business of model agency that acts as an agent to third party models. It essentially sources models for its clients and is paid commission for such procurement.

[7] It seems as if the parties' paths already crossed during 2012 as Mr Head signed a surety agreement during that year binding himself as surety and co-principal debtor for Valoworx's debt. Three years later, during December 2015 Merchant loaned and advanced, in the form of a credit facility, an amount of R225,000.00 to Valoworx.

[8] It is not clear on the papers how the 2015 credit facility was regulated, However, it is common cause that in June 2016 the parties concluded a written agreement to regulate a further credit extension of R500,000.00 by Merchant to Valoworx. To regulate the extension of that credit facility Merchant and Valoworx concluded a written Memorandum of Agreement ("the Term Loan Facility") in terms of which Merchant agreed to loan to Valoworx a further amount of R500,000.00. The facility was repayable over an 8 month period with interest at the rate of 3% per 30 days or part thereof.

[9] Between 15 July 2016 and 20 February 2018, the parties concluded at least four written addenda to the Term Loan Facility. The addendums initially increased the capital sum of the credit facility to R550,000.00 and later to R705,000.00. The addendums also extended the loan period first to 10, then 22 and eventually 33 months and also varied the repayment schedule from time to time.

[10] The Term Loan Facility incorporated, by reference, suretyships previously signed by Mr Head and the Trust as security for the obligations of Valoworx. Mr Head’s surety was concluded on 24 December 2012 while the Trust's suretyship agreement was concluded on 23 June 2016 by virtue of its trustees. Both surety agreements bound Mr Head and the Trust jointly and severally, irrevocably as surety and co-principal debtor *in solidum* with Valoworx for the due and punctual payment of all monies owing by Valoworx to Merchant. However, the surety concluded by Mr Head is one of the contentious issues in the appeal and will be returned to, as he alleged that the surety agreement he signed was in favour of an entity that is different to the entity that sought the judgment against him.

[11] In any event, to secure the Trust's obligations, on 7 July 2016 two notarial bonds were registered in Merchant’s favour over its movable properties. A special notarial covering bond and a general notarial collateral bond, each providing security of R2, 000,000.00 as continuing covering security and an additional R1,000,000.00 as cover for contingencies.

[12] Valoworx defaulted on its obligations under the Term Loan Facility and the addendum agreements. On 14 December 2020, Merchant and the appellants concluded a written settlement agreement at Cape Town. In terms of the settlement agreement all the appellants admitted their indebtedness to Merchant in the amount of R1,094,919.85, together with interest and the payment of legal fees.

[13] The settlement agreement was signed by Mr Head in three capacities: as Member for Valoworx, as trustee of the Trust, and in his personal capacity. After the conclusion of the settlement agreement Valoworx thereafter only made three payments pursuant thereto: R100,000.00 on 4 January 2021; R25,000.00 on 11 March 2021; and R25,000.00 on 29 November 2021. As the total of these payments totalled R150,000.00, an outstanding balance of R944,919.85[2] remained outstanding.

[14] Since Valoworx defaulted in its obligations, prior to the present proceedings being heard in the court *a quo*, Merchant launched an urgent *ex parte* application on 12 July 2022 before Dolamo J seeking authorisation to take and retain possession of the Trust's movable assets in terms of the notarial bonds. Dolamo J granted the order in the form of a *rule nisi*.

[2] The difference between the capital amount in the settlement agreement of R1 094 919,85 and the payments of R150 000,00.

[15] The return date of that *ex parte* application was argued on an opposed basis before Francis J. Valoworx raised the defence that the Term Loan Facility, addendum agreements, settlement agreement and Deeds of Suretyship were null and void because the Term Loan Facility fell within the ambit of the National Credit Act 34 of 2005 ("the NCA") and Merchant was not registered as a credit provider ("the NCA defence"). Valoworx contended that it was a "consumer" for purposes of the NCA because its annual turnover was below R1,000,000.00.

[16] Francis J rejected the NCA defence in his judgment of 25 May 2023. He held that Valoworx's annual turnover, properly understood, comprised the totality of all monies received into its bank account and not merely the commission it retained. That being the case Francis J found that on the evidence Valoworx's turnover exceeded the R1,000,000.00 threshold and held that the NCA did not apply. The *rule nisi* was confirmed.

[17] Valoworx sought leave to appeal, which was refused. The Supreme Court of Appeal and the Constitutional Court were both petitioned for leave. Both petitions were refused. The NCA defence was accordingly conclusively determined against Valoworx.

[18] Against this backdrop, Merchant launched the present application on 19 September 2023 seeking a monetary judgment of R2,910,901.91 against the appellants. In the answering affidavit Valoworx raised the same NCA defence and additional ones. The additional defences were that the *in duplum* rule was infringed in that the interest charged was usurious, that Mr Head's suretyship was in favour of a different entity, also that motion proceedings were inappropriate

given the foreseeable disputes of fact, and that Merchant had not proved the *quantum* of its claim.

[19] By the time the matter was heard by the court *a quo* on 7 November 2024, the NCA defence had been finally resolved by the Constitutional Court's dismissal of Valoworx's application for leave. The respondents sensibly no longer persisted with it before the court *a quo* and on appeal.

[20] In the court *a quo* Merchant conceded the applicability of the *in duplum* rule. Having regard to the papers as a whole Merchant's concession was limited to the new capital amount of R1,094,919.85 contained in the settlement agreement, as its claim was premised on that agreement. Merchant indicated, in its replying affidavit, that it would provide an updated certificate of balance. At the hearing, instead of handing up an updated certificate, counsel for Merchant applied from the Bar for an amendment of the Notice of Motion and contended that judgment should be granted for the undisputed capital sum of R944,919.85 time two, meaning R1,899, 839.70. The court *a quo* disagreed but granted the amendment and only entered judgment for the capital amount of R944,919.85.

[21] Before considering the grounds of appeal I briefly restate the test for appellate interference.

The test for appellate interference

[22] The question of whether and to what extent a court of appeal may interfere with the findings of a court of first instance, sitting as a trial court, is a well-ventilated and established position in our law. The starting point is the principle that a court

of appeal has limited powers to interfere with the decision of a trial court. As the Supreme Court of Appeal held in *Malan*[3]:

> *"A court of appeal has limited powers to interfere with a decision of the court of first instance. In relation to the first leg of the inquiry, which is factual, appeals are subject to the general limitation that courts of appeal defer to the factual findings of courts of first instance (R v Dhlumayo 1948 (2) SA 677 (A))."*

[23] However, the deference ordinarily afforded to a lower court's factual findings in trial proceedings has a fundamentally different footing when the matter on appeal was decided in motion proceedings, as is the case in this matter. The distinction is important and was articulated with clarity, also in *Malan*. The rule contemplates that a court of appeal may interfere with a decision of the court of first instance where that court decided the case on the papers, *i.e.* in motion proceedings, because in such a case the court of appeal is in as good a position to judge the facts as was the court below.

[24] The circumstances when a court of appeal can interfere with the exercise of a discretion[4] by a lower court also generally forms part of an appeal court's considerations. Depending on the type of discretion that was exercised, whether 'strict' or 'loose' will determine the appellate court's degree of interference. An appellate court is generally slow to interfere with a loose discretion, while a strict discretion is open to interference if it was not exercised judicially, meaning that it had been influenced by wrong principles or a misdirection on the facts, or

[3] *Malan and Another v Law Society of the Northern Provinces 2009 (1) SA 216 (SCA) at par 12*
[4] See *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* 2015 (5) SA 245 (CC) at paras 85 – 89 and *Knox D'Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (A) at 361I.

that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principle[5].

[25] Ultimately, this appeal involves proceedings that were determined in the court *a quo* on motion. Accordingly, save to the extent that any finding turns on matters uniquely within the advantage of the court *a quo*, this Court is in as good a position as the court *a quo* to evaluate the evidence on the papers, to decide the factual issues on the record, and to apply the *Plascon-Evans*[6] approach to resolve genuine and *bona fide* disputes of fact.

[26] It is also trite that an appeal lies against the order of a court, not its reasons. Even if the reasoning of the court *a quo* is found to be wanting, the appeal must be dismissed if the order is nonetheless correct[7]. Conversely, a respondent in an appeal may seek to justify the order appealed against on any ground that the record allows[8].

[27] I now turn to evaluating the grounds of appeal.

The grounds of appeal

[28] As stated the appellants rely on four grounds of appeal.

[29] First, that the court *a quo* should never have determined the matter given the dispute about the correct *quantum* and the application and calculation of the *duplum* in respect of interest. Second, the personal liability of Mr Head and whether he concluded a valid suretyship. Third, that relief against the appellants

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[5] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 11.
[6] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)
[7] See *President of the Republic of South Africa and Another v Tembani and Others* 2025 (2) SA 371 (CC) at ; *Zurich Ins Co SA Ltd v Gauteng Provincial Govt* 2023 (1) SA 447 (SCA)
[8] *Jiba v General Council of the Bar of SA* 2019 (1) SA 130 (SCA)

should not have been granted on a joint and several basis because the Notice of Motion did not specify joint and several liability, and lastly that Merchant lacked *locus standi* because it did not allege or prove that its directors authorised the institution of proceedings.

Ground 1: The disputes of fact

[30] This ground consists of two interrelated considerations. First, the fact that the court *a quo* decided to determine the matter on the papers even though the validity of the 2016 Term Loan Agreement and all subsequent agreements and the claim amount were disputed. Second, it is contended that in any event the court *a quo* incorrectly arrived at the judgment amount of R944,919.85.

[31] First I address the court *a quo's* decision to determine the matter on the papers. In opposing the application, Valoworx raised three principal disputes of fact on the papers in an attempt to impugn the relief sought.

[31.1] First, it challenged the validity of the 2016 Term Loan Agreement, raising the NCA defence, as foreshadowed earlier. Valoworx advanced the proposition that since the 2016 agreement was non-compliant with the provisions of the NCA it tainted the validity of all subsequent agreements, including the December 2020 settlement agreement, and are they all void *ab initio*.

[31.2] Second and inextricably linked to the abovementioned challenge, Valoworx averred that the settlement agreement was in any event vitiated by a common or mutual mistake, alternatively *iustus error*. The gravamen of this contention was that the parties had concluded the settlement agreement whilst labouring under the fundamentally flawed apprehension that the 2016 Term Loan Agreement constituted a valid and legally binding obligation. Consequently, so the argument ran, this mutual misapprehension as to the underlying legal reality negated the requisite *animus contrahendi* when the settlement agreement was concluded thereby stripping it of its enforceability.

[31.3] Thirdly, Valoworx denied that it was indebted to Merchant in the amount of R2,910,901.91 and pleaded that in any event the original capital amount advanced by Merchant was R705,000.00 and that Valoworx has already repaid an amount in excess of that totalling R1,080,000.00.

[32] On consideration of the record, I find that the foreshadowed disputes were not of such a nature that the court *a quo* could not determine them on the papers. In motion proceedings a court is generally confined to the common-cause facts[9]. However, where real disputes of fact arise on the affidavits, the court is not obliged mechanically to grant or refuse relief but rather enjoys a range of options provided by rule 6(5)(g)[10]. A court may dismiss the application outright if the disputes were reasonably foreseeable and the applicant nonetheless chose motion proceedings[11] or if the application is not dismissed the court can adopt the procedure that is best to ensure that justice is done with the least delay[12] and in that regard exercises a discretion[13]. The court can also decide the matter on

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[9] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] 2 All SA 366 (A), 1984 (3) SA 623 (A) at 634

[10] Rule 6(5)(g) provides: Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the afore-going, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise

[11] *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T);

[12] *Johannesburg City Council v The Administrator Transvaal (1)* 1970 (2) SA 89 (T)

[13] *Cresto Machines(Edms) Bpk v Die Afdeling Speuroffisier SA Polisie Noord-Transvaal* 1970 (4) SA 350

the respondent's version[14] or resolve the dispute where it is possible of resolution on the papers.

[33] I can find no basis to interfere with the court *a quo's* discretion to rather determine the matter on the papers. Nothing on the papers suggest that the discretion was not exercised judicially. In any event, the discretion in this instance is a loose one where an appellate court's interference is limited.

[34] Furthermore, it appears that the court *a quo* considered various factors to rather decide the matter on the papers. Firstly, Merchant relied exclusively on the settlement agreement as its cause of action to claim payment. Second, once the NCA defence was finally determined the 'disputes' as foreshadowed were no longer disputes as the validity and enforceability of the settlement agreement was no longer an issue. Lastly, in respect of the issue of *quantum* the court *a quo* had all the material information before it to arrive at the decision that it did.

[35] Therefore, a just and expeditious determination on the papers was possible and, given the protracted litigation history between the parties, was plainly desirable. The court *a quo* was therefore perfectly justified to determine the matter on the papers, without having to resort to the more extreme outcome of dismissing the application. This ground is therefore not a basis to uphold the appeal.

The correct *quantum* amount

[36] Next I consider whether the court *a quo's* decision in respect of the *quantum* amount justifies interference on appeal. The appellants' basis for persisting with disputing the *quantum* is based on the claim that if the *in duplum* rule is applied

(T) 365; *Pautz v Horn* 1976 (4) SA 572 (O)

[14] As per the *Plascon-Evans supra* approach

to the original capital loan of R705,000.00 it meant that Merchant could only ever have been entitled to judgment in an amount equal to double the original loan amount being R1,410,000.00. Therefore, so the argument went, since the appellants had paid an amount of R1,080,000.00 prior to conclusion of the settlement agreement, it meant that Merchant could never be granted judgment in excess of R330,000.00 or R180,000.00, if the post settlement payments of R150,000.00 are also deducted from the R1,410,000.00.

[37] To give due consideration to this ground it is necessary to first set out how the matter was pleaded in the papers and then how the court *a quo* arrived at the judgment amount of R944,919.85.

[38] In the founding affidavit Merchant initially pleaded a monetary claim of R2,910, 901.91, said to be due *"in terms of the Term Loan Facility and the addenda thereto ... the Suretyships ... and the Settlement Agreement",* supported by a certificate of indebtedness dated 15 September 2023. Merchant relied on the settlement agreement that was concluded on 14 December 2020. The appellants in the answering affidavit disputed the *quantum* amount relying on *in duplum* and the amount already repaid. In reply Merchant expressly conceded that the *in duplum* rule applied and undertook to recalculate and furnish an updated certificate of balance at the hearing, thereby abandoning reliance on the R2.91 million as originally claimed.

[39] When no updated balance certificate was filed, counsel for Merchant shifted in oral argument before the court *a quo,* accepted that the original certificate was erroneous and instead invited the court *a quo* to take the capital amount of R1,094,919.85, recorded in the settlement agreement, less the three common

cause payments that equalled R150,000.00 that was made post the conclusion of the settlement agreement and to grant judgment in the amount of R1,889,839.70, being the R944,919.85 times two. The court *a quo* did not oblige but rather granted judgment in the amount of R944,919.85 being the difference between the amount recorded in the settlement agreement of R1,094,919.85 minus the post settlement payments of R150,000.00.

[40] Mr Wilken, for the appellants, argued that having regard to the manner in which Merchant's case was pleaded and even accepting that the approach by the court *a quo* was correct, judgment was possible at most in the amount of R330,000.00 or as a minimum R180,000.00. These amounts are arrived at by taking double the original capital amount of R705,000.00 that equals R1,410,000.00 minus the admitted payments made by Valoworx of R1,080,000.00 or R1,230,000.00. Mr Wilken also argued that the application of the *in duplum* rule cannot be excluded by the conclusion of a settlement agreement.

[41] On behalf of Merchant, Mr Newton argued that the amount of R1,094,919.85 that the parties agreed to in the settlement agreement constituted a *transactio* or compromise, which extinguishes the parties pre-existing rights and obligations. On that approach it meant that the amounts paid prior to conclusion of the settlement agreement are irrelevant and the application of the *in duplum* rule is also not offended as it begins to run again on the new amount in the settlement agreement.

[42] The conclusion on this issue depends on the legal position that governs *transactio* or compromise and the operation of the *in duplum* rule and what the consequences are when these legal concepts intersect.

Transactio and compromise and the settlement agreement

[43] The common law *in duplum* rule provides that arrear interest ceases to accumulate once it equals the amount of the outstanding capital debt. Its purpose is to protect borrowers from exploitation by lenders who allow interest to accumulate[15]. The Constitutional Court in *Paulsen*[16] also confirmed that contracting parties cannot waive the application of the rule, nor can the practice of a bank alter it.

[44] *Oneanate* also makes clear that interest debited to an account and added to the outstanding balance does not thereby lose its character as interest. The mere act of a creditor capitalising interest, treating it as an accounting entry that increases the capital balance, does not convert interest into capital for purposes of the *in duplum* rule[17].

[45] The question raised in this appeal is whether the *in duplum* rule's application is circumvented when the parties, after interest has accumulated, conclude a written settlement agreement that amalgamates the outstanding capital and interest into a new single consolidated amount, expressed and admitted as a new capital amount.

[46] The legal character of a settlement agreement (*transactio*) is well-established. It constitutes a compromise that finally settles disputed or uncertain rights or

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[15] *Standard Bank of South Africa Limited v Oneanate Investments (Pty) Ltd (in liquidation)* [1998] 1 All SA 413 (A) at 426; *Paulsen and Another v Slip Knot Investments 777 (Pty) Limited* (CCT 61/14) [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) (24 March 2015) paras 121

[16] para 122 with reference to *Oneanate supra* at 828D-E.

[17] *Oneanate* at 427

obligations between parties. Save to the extent that the compromise provides otherwise, it extinguishes the disputed rights and obligations and substitutes a new obligation in their place. Our courts have long held that a compromise, even without being made an order of court, has the effect of *res iudicata*[18]. The settlement agreement therefore operates as a juristic act in its own right that stands independently of the underlying transaction it compromises.

[47] The question then becomes: when a settlement agreement expresses the compromised indebtedness as a single consolidated amount, as occurred here with the amount of R1,094,919.85, does that amount constitute a "new" capital debt to which the *in duplum* rule applies afresh, with interest again permitted to accumulate to equal the consolidated amount, or must one look through the settlement figure and identify what portion of it was "true" capital, in this case the R705,000.00, and what portion was capitalised interest, with the result that the *in duplum* cap is measured only against the original R705,000.00.

[48] The key to resolving this question lies in the legal nature of the *transactio* itself. When parties conclude a settlement agreement that extinguishes the original debt and substitutes a new obligation in its place, the conventional understanding in our law is that the parties have created a new obligation. Furthermore, a *transactio* involves mutual consensus: the debtor has agreed, expressly and in writing, that the compromised amount is the debt owed. To allow the debtor subsequently to decompose that amount into its constituent capital and interest elements and then invoke the *in duplum* rule against the original capital alone, would in effect allow the debtor unilaterally to resile from a concluded

[18] See *Road Accident Fund v Taylor* ZASCA 64; 2023 (5) SA 147 (SCA) at paras 38 – 39 where the legal position with regards to a *transactio* or compromise is discussed.

compromise. That would be impermissible, because it would undermine the finality that a *transactio* is designed to produce.

[49] A good example of the application of the principle that a settlement agreement is final is found in *Leech*[19]. The facts of that matter were that the Trust agreed to pay a settlement amount of R4.125 million to Absa Bank to discharge its debts and secure a restructuring of its property holdings. It was common cause that this settlement figure included *ultra in duplum* interest, meaning interest that exceeded the capital limit of the original debt. The Trust subsequently sued the bank for the "overpayment" relying on the *condictio indebiti*, arguing that it had paid the excess amount in the mistaken belief that it was legally owing. The Supreme Court of Appeal dismissed the claim, finding that the payment was not made under a mistaken belief but rather as a conscious, calculated settlement to achieve commercial advantages and avoid litigation.

[50] Valoworx's defence overlaps strikingly with the defence raised by the Trust in *Leech*. Valoworx seeks to allege an overpayment based on an alleged contravention of the *in duplum* rule on the original loans. However, just as in *Leech*, Valoworx freely concluded a settlement agreement that consolidated its liability into an agreed figure of R1,094,919.85. The settlement agreement expressly distinguished this new capital amount and provided for a new, prospective interest liability. Valoworx could therefore have been under no illusion that R1,094,919.85 was the new capital amount to which it was binding itself. Having agreed to this consolidated figure to settle the dispute, and having reaped the benefits of that settlement, Valoworx cannot now attempt to dissect

[19] *ABSA Bank Ltd v Leech and Others*; [2001] 4 All SA 55 (A); 2001 (4) SA 132 (SCA)

the agreed amount and claim "overpayment" on the historical debt and demand an *in duplum* unravelling.

[51] The judgment in *F & I Advisors*[20] is also relevant. In that case, the Supreme Court of Appeal rejected an attempt by a defendant to vaguely invoke the *in duplum* rule without having properly pleaded it. Harms JA noted that while a court will not order the payment of interest in conflict with the *in duplum* rule if the facts clearly show a contravention, the court is not obliged to embark on a *mero motu* scavenger hunt. The general principle remains that a defendant must formulate the dispute clearly in their pleadings. A claim for interest is not inherently "illegal" in the same way a criminal prohibition is. Thus, if a defendant wishes to rely on the *in duplum* rule, they must plead the specific facts demonstrating the breach.

[52] In the present matter Valoworx's answering affidavit contains a generalised assertion that the amount claimed offends the *in duplum* rule and that the applicant has "overreached", but nowhere do they plead how the admitted settlement amount of R1,094,919.85 is composed as between capital and interest, nor do they explain on what factual basis that figure is said to contravene the rule. They do not allege that the post-settlement interest claimed exceeds that compromised amount, nor do they advance any computation directed at the operative indebtedness, being the "compromised amount" recorded in the settlement agreement.

[53] Furthermore, the defence that the original capital amount R705,000.00 has been overpaid as Valoworx has repaid an amount of R1,080,000.00, is untenable

[20] *F & I Advisors (Edms) Bpk en 'n Ander v Eerste Nasionale Bank van Suidelike Afrika Bpk.* 1999 (1) SA 515 (SCA); [1998] 4 All SA 480 (A)

having regard to Valoworx's own statement. That statement contains details of arrear interest and intermittent capital repayments. On consideration of the statement it is quite apparent that the arrears interest is substantial and by applying the repayments first to arrears interest, it means that a substantial amount in capital was still due by December 2020. For example by 1 August 2016 the outstanding capital was R325,000.00 and the arrear interest was R 248,452,31. A payment of only R15,000.00 was made. That meant that the capital was not reduced by the R15,000.00 payment as the arrear interest had to be settled first. This had the effect that most of the initial repayments would not have reduced the capital amount.

[54] In any event, there is nothing in the record that can contradict a finding that the amount of R1,094,919.85 stipulated in the settlement agreement falls to be treated as a newly agreed capital sum under the compromise. That means that the applicant's pursuit of judgment on the unpaid portion thereof, with interest running afresh on that capital subject to the *in duplum* cap, is not unlawful and does not offend the rule.

[55] Therefore, since the parties agreed on 14 December 2020 that the indebtedness (of whatever prior composition) amounted to R1,094,919.85, and the appellants accepted that figure as the consolidated capital sum, they undertook to repay. The fact that the capital of the original loan totalled R705,000.00 does not, on the analysis above, permit the appellants now to invoke the *in duplum* rule by reference only to the original capital amount. The settlement agreement (i.e. the *transactio)* extinguished the earlier obligations and substituted a fresh capital liability of R1,094,919.85. The *in duplum* rule now once again applies to this

amount. The court *a quo* was therefore correct to use it as the starting point for the judgment granted.

[56] Consequently, the court *a quo's* decision to determine the matter on the papers does not amount to an error that justify interference.

Ground 2: Validity of Mr Head's suretyship

[57] As stated earlier, the surety that Mr Head concluded was not concluded with Merchant[21] but rather a different entity at the time known as Merchant Factors (Prop: Merchant Commercial Finance (Pty) Limited) (Registration Number 1998/018914/07) ("the 1998 Company"). Clause 27 of Mr Head's suretyship provided that the 1998 Company could cede the suretyship to any third party *"which acquires the creditor's claim against the debtors, or any part thereof."*

[58] It was argued on behalf of the appellants that the court *a quo* erred in holding Mr Head personally liable because (i) his suretyship was executed in favour of the 1998 Company, not Merchant; (ii) the sale of business agreement produced in reply was insufficient and impermissibly raised for the first time in the replying affidavit; (iii) that even if the suretyship was validly ceded, a suretyship cannot be ceded where there is no underlying debt at the time of cession, and at the date of the sale (July 2014), the indebtedness to the applicant only arose in 2016.

[59] This argument was further expanded on in a supplementary note, filed after the appeal was argued, on behalf of the appellants. The contention was now also that the settlement agreement of 14 December 2020 is vitiated, insofar as it purports to bind Mr Head in his personal capacity, by a common mistake (*iustus error*) relating to the existence and transferability of the suretyship executed by him in

[21] Merchant Commercial Finance 1 (Pty) Ltd (Registration Number 2014/075671/07)

December 2012 in favour of the 1998 company. It was submitted that the parties concluded the settlement agreement under the incorrect assumption that Mr Head's suretyship had been validly transferred to Merchant. The argument continued that the assumption was wrong in law because the principal debt was not ceded and the compromise therefore rests on a defective *causa* as regards to Mr Head.

[60] The starting point to resolve the issue of Mr Head's liability is to have regard to how the issue is raised on the papers. Mr Head's answering affidavit indeed denies liability under the 2012 suretyship on the basis that it was executed in favour of the 1998 company. However, the only *iustus error* relied upon in the answering affidavit in relation to the settlement agreement is pleaded at paragraph 41, where it is alleged that the parties concluded the settlement agreement under a common mistake in believing that *"the first agreement was binding"*, being the defence founded upon the National Credit Act. No allegation is made that the settlement agreement was concluded under a common mistake concerning the cession or transfer of the 2012 suretyship, nor are facts pleaded to sustain such a case. The *iustus error* argument sought to be advanced on appeal in relation to the suretyship is therefore not the case made out in the answering affidavit. On this basis alone the argument cannot be sustained.

[61] In any event, even if I assume in Mr Head's favour that the point is proper, the requirements for setting aside a compromise on the ground of mistake are not established. A compromise (*transactio*) is concluded precisely to settle disputes or uncertainty concerning rights and obligations. As explained in *Gollach*[22] a compromise may in principle be set aside on the ground of *iustus error*, but not

[22] *Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd and Others 1978(1) SA. 914 (A)*

merely because one party later contends that it misjudged the merits of the very disputed compromise. The enquiry is whether the alleged mistake relates to a basic assumption which the parties elevated, expressly or tacitly, to a term or condition upon which the validity of the compromise depends.

[62] The settlement agreement does not support the premise that Mr Head's personal undertaking was conditional upon the legal efficacy of the 2012 suretyship as against the applicant. On the contrary, on the facts, Mr Head signed the settlement agreement in his personal capacity and, together with Valoworx and the Trust, was defined as one of "the Debtors" who admitted indebtedness for the compromised amount and undertook, upon breach, to be liable jointly and severally for that amount. The background recordal in clause D, referring to the prior conclusion of suretyships, is not framed as an express or implied condition of Mr Head's personal liability under the compromise. In the result, even if there was uncertainty about Merchant's ability to enforce the 2012 suretyship, that would at most be part of the antecedent dispute which the settlement agreement was concluded to resolve, rather than a condition upon which Mr Head's newly assumed liability was made to depend.

[63] There is a further, fatal difficulty. A "common mistake" requires that both parties laboured under the same incorrect perception. Merchant does not admit any such error. In reply it accepted that the 2012 suretyship was executed in favour of the 1998 company, but alleged that it acquired the 1998 Company's business, including its assets, liabilities and securities, and that the suretyship was transferred to it pursuant thereto. So on the facts there is no agreement that there was a common mistake.

[64] The mistake is rather premised on an alleged misunderstanding of the legal position. The opposing legal views on the 'mistake' is this. The appellants rely on *SA Breweries*[23] as authority for the proposition that the cession of a suretyship without an underlying debt is impermissible and that a party had no right of action for the future debts of its debtors and it could not cede rights that had not accrued to it. Merchant in response rely on *Panamo*[24] and *Odendal*[25] that the suretyship was a "continuing covering suretyship" that survived even the extinction of indebtedness, and that the surety agreement permitted cession without reference to Mr Head and that it is not essential that the principal obligation exists at the time when the suretyship contract is entered into and that a suretyship may be contracted with reference to a principal obligation which is to come into existence in the future.

[65] However, the authorities are clear that a common mistake is only concerned with an error of fact. A misunderstanding by the parties on a legal position is not a basis to invoke a mistake to set aside a settlement agreement on the basis of *iustus error*. On the papers, therefore, the necessary element of a shared factual incorrect assumption or error is not established. At best for Mr Head, the parties hold opposing legal views concerning the effect of the alleged transfer of cession.

[66] Therefore, Mr Head's reliance on *iustus error* to avoid personal liability under the settlement agreement cannot succeed. The defence is not properly pleaded in the answering affidavit; and, in any event, the papers do not establish a common

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[23] *SA Breweries Ltd v Van Zyl* 2006 (1) SA 197 (SCA) and *Pizani and Another v First Consolidated Holdings (Pty) Ltd* 1979 (1) SA 69 (A) paras 9. -10

[24] *Panamo Properties 103 (Pty) Ltd v Land and Agricultural Development Bank of South Africa* 2016 (1) SA 202 (SCA).

[25] *Odendal and Another v Structured Mezzanine Investments (Pty) Ltd* (482/13) [2014] ZASCA 89 (30 May 2014), at para 9, with reference to *Trust Bank of Africa Ltd v Frysch* 1977 (3) SA 562 (A)

mistake as to one of the conditions of the compromise, nor do they establish that the parties shared the alleged misapprehension.

[67] Clauses 1, 2 and 3 of the settlement agreement provide operatively that (i) the appellants (including Mr Head) admit their indebtedness in the sum of R1,094, 919.85; (ii) the appellants undertake to repay the amount jointly and severally; and (iii) in the event of breach, they are liable jointly and severally, the one paying the other to be absolved.

[68] The settlement agreement therefore creates an independent source of liability for Mr Head as he signed in his personal capacity. He further admits in the answering affidavit that the settlement agreement was concluded. The settlement agreement is not a suretyship and is rather a compromise agreement in which Mr Head, in his personal capacity, made an admission of indebtedness and undertook an obligation to pay. Even if the underlying suretyship were invalid, the settlement agreement stands as a distinct *causa* for Mr Heads liability.

[69] Consequently, this ground does not justify interference with the court *a quo's* order.

Ground 3: Joint and several liability not sought in the Notice of Motion

[70] The appellants contend that the notice of motion did not specify that Merchant wanted judgment joint and severally against all the appellants and merely claimed judgment against them all without the words "jointly and severally." The appellants submit that if relief is granted, it should only be on a *pro rata* basis.

[71] Merchant’s response is that joint and several liability was expressly sought in paragraph 13 of the founding affidavit, which states: *"The purpose of this application is to procure a monetary judgment against the First to Fifth Respondents ('the Respondents'), jointly and severally, the one to pay the other to be absolved, together with ancillary relief."* Furthermore, the amendment to the notice of motion, which was granted by the court *a quo* in paragraph 1 of its order, is not appealed against.

[72] While the notice of motion as originally framed was inarticulately worded, the founding affidavit, which constitutes the pleadings in motion proceedings together with the Notice of Motion, expressly and unambiguously sought joint and several relief against the appellants. The appellants were not prejudiced. They understood the case against them. The settlement agreement itself provides for joint and several liability.

[73] There is thus no merit in this ground, and it does not justify interference with the order of the court *a quo*.

Ground 4: Lack of authority / *locus standi*

[74] The appellants contend that Merchant, a juristic entity, neither alleged nor proved that its directors authorised the institution of these proceedings and accordingly lacks *locus standi*.

[75] The deponent, Mr Connor, stated in paragraph 1 of the founding affidavit that he is a director of the applicant and that he is *"duly authorised to depose to this*

affidavit and to apply for the relief set out in this application." This averment was not challenged in the answering affidavit.

[76] The court *a quo* correctly dealt with this point, noting that the parties had been engaged in litigation for more than two years and the respondents had never previously disputed the authorisation for the institution of any proceedings. The point was raised as an afterthought.

[77] In *Mall (Cape)*[26] the Court accepted that where a respondent has offered no evidence to suggest that the applicant is not properly before the court, then a minimum of evidence will be required. Here there is more than a minimum: the deponent affirms he is a director and that the institution of the application is authorised. The respondent did not challenge this in the answering affidavit. No evidence has been placed before the court to suggest that the proceedings were unauthorised.

Conclusion and order

[78] Having found that none of the grounds of appeal justify interference with the order of the court *a quo*, the appeal must be dismissed. As to costs, I see no reason to depart from the ordinary rule that costs follow the result.

[79] The following order is proposed:

1. The appeal is dismissed.

[26] *Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk* 1957 (2) SA 347 (C)

2. The appellants are ordered to pay the respondent's costs of the appeal, jointly and severally, the one paying the others to be absolved, on the party and party scale, with counsel’s fees on scale B.

A Montzinger

Acting Judge of the High Court

I agree, and it is so ordered.

A Le Grange

Judge of the High Court

I, agree

N.E. Ralarala

Judge of the High Court

Appearances:

Attorneys for first and fifth applicants:	R Allom Attorneys
Counsel for first to fifth appellants:	Mr L Wilken

Attorneys for respondent:	BDP Attorneys
Counsel for respondent:	Mr A Newton