

REPORTABLE

IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(REPUBLIC OF SOUTH AFRICA)

CASE NO: 2010/42058

DATE:15/06/2011

In the matter between:

EXECUJET AVIATION (PTY) LTD

Applicant

and

MZILIKAZI GODFREY KHUMALO

Respondent

JUDGMENT

INTRODUCTION

In this application the Applicant seeks judgment against the Respondent in an amount slightly in excess of R1.1 million.

The Applicant's associated company, Execujet Flight Operations (Pty) Ltd ("Flight Operations"), allegedly rendered charter flight services to a company, Metallon Corporation (Pty) Ltd ("Metallon"). Flight Operations then allegedly

ceded its claim against Metallon to the Applicant.

Metallon failed to pay for the services rendered and the Applicant brought liquidation proceedings against Metallon ("the liquidation proceeding").

Metallon opposed the proceedings, inter alia, on the basis that the charter services rendered by Flight Operations had been rendered to the Respondent (who was the Chairman of Metallon) in his personal capacity. Accordingly, Metallon maintained that the Respondent was the debtor not Metallon.

The Deponent to Metallon's answering affidavit in the liquidation proceeding ("the LPAA"), Andile Reve, alleged that he had been informed by the Respondent that the Respondent had "undertaken to pay the amount due by him to the Applicant in instalments and the latest payment of R200 000 was made on 15 June 2010". The Respondent filed a confirming affidavit confirming the correctness of the allegations contained in Reve's affidavit. Neither Reve nor the Respondent clarified anywhere what the Respondent's payment plan was – i.e. how long the Respondent would take to pay the debt, in what instalments, and what interest would accrue on the debt.

The Respondent and Metallon also disputed that Flight Operations had validly ceded its claim to the Applicant. Accordingly, they denied that the Applicant had locus standi to bring the winding up application. However, this denial of standing was not elaborated upon in the LPAA. It also appears to be inconsistent with the language of the allegation made in paragraph 7 of Metallon's answering affidavit, in which the deponent appears to have

admitted that the holder of the claim was in fact the Applicant.

The Applicant filed a replying affidavit in the liquidation proceeding (“the LPRA”), in which the Applicant disputed the contention that the debt was a personal debt of the Respondent. The Applicant consistently maintained – and still maintains – that Metallon was its debtor.

On 11 August 2010, Metallon was voluntarily wound up in terms of Sections 349 and 351 of the Companies Act by way of special resolution. Notwithstanding the voluntary winding up, the Applicant persisted with its compulsory winding up application and filed a further supplementary affidavit (“the LPSA”) in support thereof. In this affidavit the Applicant again steadfastly maintained that the Applicant’s debtor was Metallon and not the Respondent.

Consequent upon the filing of that affidavit, the Court placed Metallon under final winding up in the hands of the Master and converted the voluntary winding up into a winding up in terms of Section 346(1)(e) of the Companies Act. The purpose of the conversion was primarily to enable the Applicant to conduct an inquiry under Section 417 of the Companies Act.

The Applicant has now brought proceedings against the Respondent claiming payment of the same debt that it previously claimed against Metallon in the liquidation proceeding(s). The Applicant continues to maintain that Metallon (and not the Respondent) is its true debtor. However, the

Applicant maintains that the Respondent's confirming affidavit in the winding up constitutes an acknowledgment of liability that the Respondent is entitled to accept and sue upon independently in these proceedings. The Respondent opposes the application.

ANALYSIS OF THE AFFIDAVITS IN THE WINDING UP PROCEEDING

In paragraph 7 of Metallon's answering affidavit in the winding up proceeding, Reve stated:

"I have been informed by Khumalo that he has undertaken to pay the amount due by him to the applicant in instalments and that the latest payment of R200 000.00 was made on 15th June 2010 and a proof thereof is annexed hereto marked 'ARJ2'.

I have been advised by my legal representatives that the company, in this instance the Respondent, cannot be held liable for the debts incurred by any of the directors in their personal capacities."

The Respondent was allegedly the Chairman of Metallon's Board of Directors at the time. In that capacity, he was the signatory to a resolution ostensibly taken by the Board of Metallon, authorising the Respondent to take all steps necessary to oppose the winding up proceedings on behalf of Metallon.

The Respondent filed a confirming affidavit in the liquidation proceeding in which he confirmed the contents of Reve's answering affidavit. By implication he therefore confirmed under oath that he was indebted to the Applicant and that he had undertaken to pay that indebtedness in instalments.

The sum of R200 000 was paid from the bank account of an entity called Mawenzi Resources and Finance Company.

In response to these allegations in the LPAA, the Applicant alleged, in the LPRA that:

“7.3 Whenever Execujet Flight Operations dealt with Khumalo, Khumalo acted on behalf of the Respondent and he did not act personally, and in this regard I refer to the following:

7.3.1 The invoices ... are all made out in the name of the Respondent, the reason being that the Respondent and not Khumalo personally contracted with Execujet Flight Operations.

7.3.2 Neither Reve nor Khumalo (whose confirmatory affidavit is annexed to Reve’s affidavit) take issue with the fact that the invoices rendered to the Respondent ... are all made out in the name of the Respondent and not Khumalo. Consistent with this is the fact that the Respondent received the invoices and no-one from the Respondent took issue with the fact that the invoices are all made out in the name of the Respondent and not Khumalo.
...

7.3.5 Furthermore, with regard to the charter quotations, whilst it is alleged ... that Khumalo signed the charter quotations in his personal capacity and not as the representative of the Respondent, Khumalo does not explain (because he cannot) why his signatures to the charter quotations are not qualified, i.e. that he signed the documents personally and not on behalf of the Respondent, and he does not explain (again he cannot) why the documents are all made out in the name of the Respondent and not

Khumalo.

7.4 The fact that whenever Execujet Private Operations dealt with Khumalo, Khumalo acted on behalf of the Respondent and he did not act personally, is further evidenced by the following: ...”

Thereafter, paragraph 7.4 sets out a list of five factors which, according to the Applicant, demonstrated that the indebtedness was one owed by Metallon and not Khumalo.

In the LPSA, the Applicant again stated:

“17. I submit that the Applicant is indeed a creditor of the First Respondent, and in this regard I refer to the contents of the affidavits already filed of record. In particular, as will be argued at the hearing of this application, the indebtedness owed to the Applicant is in fact owed by the First Respondent and not Mzilikazi Godfrey Khumalo as alleged by the First Respondent.”

[emphasis added].

All of these facts appear from the Applicant’s founding affidavit to which all of the affidavits in the liquidation proceeding have been attached.

THE FOUNDING AFFIDAVIT IN THIS APPLICATION

The Applicant’s cause of action in this application is summarised in the founding affidavit (“the FA”) in this application as follows:

“29. Whilst the Applicant still maintains that the charter flight services rendered by Execujet Flight Operations were rendered by Metallon and not to the Respondent personally, it is submitted that the contents of Metallon’s answering affidavit in the winding up application read together with Respondent’s confirmatory affidavit, constitutes an acknowledgement of liability by the Respondent in favour of Execujet Flight Operations (which acknowledgement of liability the Applicant accepts for the purposes of this application) in the amount of R1 184 359,18 (at very least) as well as the amounts of R99 781,21 and R15 336,82.

...

33. The reference in paragraph 7 of Metallon’s answering affidavit to ‘the amount due by him’ [i.e. the Respondent] to the Applicant’, confirmed by the Respondent in his confirmatory affidavit, is an acknowledgment by the Respondent of liability in favour of the Applicant (which acknowledgement of liability the Applicant accepts for the purposes of this application).”

[emphasis added].

The Respondent answered this allegation as follows:

“44. I deny that I am indebted to the Applicant in the sum claimed or for any other sum. Insofar as the answering affidavit in the winding up application is concerned, I made those statements with the understanding that the amounts were due. However, this Honourable Court has decided otherwise. Accordingly, the Applicant has proceeding for the winding up of

Metallon and obtained the final winding up order to this Honourable Court and it cannot claim the same amount from me.”

THE DEFENCES RAISED BY THE RESPONDENT

It is clear that the Respondent’s intent in making the allegation contained in paragraph 44 of the answering affidavit was to deny liability on the basis of res judicata. This was the Respondent’s main defence to the application.

In this answering affidavit, the Respondent raised the following defences to the application:

Res judicata. The Respondent maintained that, when the Court granted an order converting the winding up of Metallon, it recognised the Applicant’s claim as being one against Metallon. Accordingly, it maintained that the Applicant was precluded by res judicata from pursuing the Respondent on another basis entirely.

Waiver/election. The Respondent maintained that, when the Applicant filed its replying affidavit and supplementary affidavit, the Applicant waived its right to proceed against the Respondent and/or elected to proceed against Metallon instead of the Respondent.

The Respondent maintained that the claim against Khumalo had not been validly ceded to the Applicant because, at the time when the Applicant obtained cession from Flight Operations, it believed its claim was against Metallon and not the Respondent.

During the course of argument, I expressed concern about whether the Applicant had articulated a proper cause of action in the founding affidavit and I requested supplementary heads of argument. I then addressed correspondence asking the parties to address, inter alia, the following issues in their supplementary heads of argument:

“2.1 Whether the applicant can rely upon an acknowledgement of debt given by a third party, who on the applicant’s version was never indebted to the applicant. This requires, inter alia, an evaluation of whether there is an underlying causa for the acknowledgement of debt.

2.2 Whether the acknowledgement of debt is an offer that was still open for acceptance by the applicant in its founding affidavit in this application, and whether the applicant’s replying and supplementary affidavits in the liquidation proceedings can be construed as a rejection of the offer.”

Counsel for the parties have responded to my request and have both delivered supplementary heads of argument on 16 May 2011.

In the winding up, the Applicant asserted a claim against Metallon, not the Respondent. At the same time, the Respondent maintained that he was the true debtor, not Metallon.

Now both parties are taking up diametrically opposed positions. Although they both tried to explain their changes of position, these about faces result

in anomalies in both the Applicant's claim and in the Respondent's defences. Neither party has been able to articulate its case in the affidavits in a manner that is juristically appropriate.

The Applicant's case is based upon an acknowledgement of liability. As appears from the analysis set forth below, the Applicant's case is not really based upon an acknowledgment of liability but upon the acceptance of an alleged offer by the Respondent to pay the debt of a third party (Metallon). At the same time, the Respondent asserts that the Applicant's predecessor-in-title had a right to recovery against the Respondent, which has fallen away because the Applicant has waived that right and/or elected not to proceed with it. As appears from the analysis set forth below, when the Respondent's case is applied to the facts, the case is not so much based upon waiver of an existing right, but upon the Applicant's election to reject the Respondent's "offer" (such as it was) to pay off Metallon's debt.

Despite the fact that neither of the parties have applied the correct juristic labels to the claim and the defences, it remains possible for me to resolve the real issues between the parties based upon the largely undisputed facts set forth in the affidavits.¹

THE VIABILITY OF THE APPLICANT'S CAUSE OF ACTION

In this application, the Applicant continues to maintain that its true debtor is Metallon. However, it also maintains that the Respondent has acknowledged

¹ *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 60 (A) 24A-G.

liability and that that acknowledgement of liability constitutes an offer which the Applicant can now accept and has accepted “for purposes of this application”.

The Respondent’s counsel, Mr Bava SC, correctly queried the meaning of the term “for purposes of this application”. In my opinion, it can mean nothing other than that, while asserting a claim against the Respondent in this application, the Applicant is not abandoning its claim against Metallon. As appears from what is more fully set forth below, the retention of the claim against Metallon has juristic consequences for the Applicant.

In *Adams v SA Motor Industry Employers Association* 1981 (3) SA 1189 (A) 1198B, Jansen JA held:

“There is ample authority to the effect that an acknowledgment of debt, provided it is coupled with an express or implied undertaking to pay that debt, gives rise to an obligation in terms of that undertaking when it is accepted by the creditor; and it does not matter whether the acknowledgment is by way of an admission of the correctness of an account or otherwise ... In *Christou v Christoudoulou* 1959 (1) SA 586 (T) there are dicta to the effect that an admission in respect of an existing debt cannot ‘found an independent cause of action’ unless it amounts to a novation ... This, with respect, appears to rest on a misapprehension. There can be no objection in principle to a second obligation arising in respect of an existing debt, and this appears to have been recognised by this Court (*Smit v Rondalia Versekeringskorporasie Van Suid Afrika Bpk* 1964 (3) SA 338 (A) at 346G). The decisive question is whether the acknowledgement contains an express or implied undertaking to

pay, a matter which relates to the intention of the parties. It may well be that an acknowledgement of debt usually implies an undertaking to pay, but this an aspect upon which it is unnecessary to express an opinion now.”

[emphasis added].

At p1199G the learned Judge continued:

“... However, in our law, the matter may be clarified by reference to the position where a negotiable instrument such as a promissory note is given in respect of an existing debt. There can be little doubt that – unless a novation is intended, which is not presumed – two obligations then exist: the original obligation and the obligation arising from the note. They are interdependent. The original obligation may, in a sense, be said to be causa of the new obligation ... and defences in respect of the original obligation may be raised in respect of the new obligation; performance of either discharges the other. Fortified by two obligations in respect of the same performance, the creditor has, however, no free election to enforce the original obligation. Our cases have followed the English law that, upon acceptance by the creditor of the negotiable instrument, the right to enforce the original obligation is suspended until maturity of the instrument, and when the creditor claims payment of the original obligation he must account for the negotiable instrument ... It follows that, if the creditor were to cede (or negotiate) the negotiable instrument, the debtor is safeguarded against being sued by both

the holder (on the instrument) and the creditor (on the original application). In accordance with the name of any *nemo plus juris* rule it follows that, if the creditor were to cede the original obligation to a third party and retain the instrument, the third party would be subject to the same restrictions in relation to the old obligation to which the creditor was before the cession. There would, therefore, be no reason to preclude the creditor from enforcing the new obligation.”

[emphasis added].

The legal construct, prevents the Applicant from suing on the alleged “acknowledgement of debt” given by the Respondent while at the same time continuing to enforce the “primary obligation” against Metallon.

In *Froman v Robertson* 1971 (1) SA 115 (A) 121F, Corbett AJA (as he then was) held:

“Reverting, more specifically, to the position of the drawer of a cheque, it is clear that by issuing a cheque in due form he engages, or promises, that on due presentment it will be honoured by the bank according to its tenor and that if dishonoured he, the drawer, will compensate the holder or an indorser who is compelled to pay the cheque ... As between the payee and the drawer these promises are enforceable only if supported by *justa causa* in the above described sense; or, to put it another way, as between himself and the payee, the drawer, when sued on the cheque, is always entitled to raise the

defence that he drew and issued the same without there having been the necessary *justa causa*.”

[emphasis added].

In *Saambou Nasionale Building Society v Friedman* 1979 (3) SA 978 (A) 991, Jansen JA held:

“In this court the requirement of reasonable cause in our law once again came to the front in *Froman v Robertson* Ibid – at least with regard to the contract between payee and drawer of a cheque (which can be regarded as an example of a purely unilateral contract). Although the Court still defines reasonable cause in terms of *animus contrahendi* ... it is very clear that ‘cause’ is also linked to the underlying relationship. It will lead to greater clarity in the future if the two concepts are kept apart in order that *animus contrahendi* no longer overlaps ‘reasonable cause’ which must be sought in the underlying relationship ...

... Fortunately these complicated matters need not now be considered and for purposes of the present case, in pursuance of Hugo de Groot’s exposition, the principal agreement can be regarded as the cause for the subsidiary agreement, in the sense that without the former the subsidiary agreement would not be valid. To be consistent it would then also have to be accepted that when, e.g., the drawer issues his cheque to a creditor of another person in settlement of the other person’s debt, the other person’s

debt is the causa for the drawer's negotiable instrument contract. That the drawer can bind himself in this manner appears from the decision in *Froman v Robertson* (supra), and it follows that the debt of the other person would then be regarded as 'reasonable cause' for the drawer's contract ...

It seems quite clear that only by agreement of the parties to the subsidiary agreement can the subsidiary agreement and the principal agreement be related and can the possibility of the presence of reasonable cause for the principal agreement be created. Various difficult questions can arise in this regard, but for the purpose of the present case we can consider the negotiable instrument contract which arises if the drawer of a cheque delivers it to the payee. Payee and drawer will have to be in agreement concerning what the proceeds of the cheque are to be devoted to before there can be any talk of reasonable cause. By this agreement the bond between the negotiable instrument contract and the underlying relationship is established."

[emphasis added].

Analysis of the juristic nature of an acknowledgement of debt indicates that the contractual arrangement contended for by the Applicant does not fit neatly within this paradigm for the following reasons.

First, it was never the intention of the Respondent to undertake to pay the debt of a third party – i.e. Metallon. As far as the Respondent was concerned,

no indebtedness was ever owed by Metallon to the Applicant. The Applicant, on the other hand, believed that the debt was owed by Metallon. There was no consensus on the underlying causa and its relationship to the acknowledgment of liability as required by *Saambou Nasionale Building Society v Friedman*.

Second, given that the Applicant and the Respondent were not *ad idem* as to whether the Respondent was acknowledging a primary obligation or separately undertaking a subsidiary obligation, it is difficult to call the “undertaking” an acknowledgement of liability. Whose liability is being acknowledged?

Third, when the Applicant elected to proceed with the winding up in the face of the acknowledgement of liability, the Applicant effectively enforced the “primary obligation”. It is now no longer possible for the Applicant to undo what it did and to tender to return it to the Respondent upon payment of the amount claimed. Applying the acknowledgement of debt module, this inability to turn back the clock, makes it notionally impossible for the Applicant to proceed on the subsidiary agreement.²

Even if the alleged “undertaking” is not an acknowledgement of debt in the true sense of the word, it nevertheless remains an issue whether the alleged acknowledgement constitutes an offer by the Respondent to pay the Applicant that is open for acceptance and enforceable in these proceedings. I do not believe that it is such an offer for the following reasons:

Assuming that the acknowledgment is an offer, it could not give rise to a valid

² *South African Breweries Limited v Ribeiro t/a Docks Liquor Merchants* [1994] 4 All SA 627 (W), *Adams v SA Motor Industry Employers Association* 1981 (3) SA 1189 (A).

and binding contract until it was accepted.

The alleged “undertaking” given in the LPAA does not appear to have been seriously intended by the Respondent to bring about a binding contract – i.e. it was not made animus contrahendi. It is not in the form of a direct communication from the Respondent to the Applicant. It is a statement of fact, which the Applicant disputed – i.e. that the proper party to be pursued was the Respondent.³

As a matter of law, an offer that does not stipulate a specific time for acceptance lapses after a reasonable time.⁴ This “offer” does not stipulate a lapse date.

The offer was made on 15 June 2010, when the Respondent deposed to his confirmatory affidavit. The present application (in which the offer was supposedly accepted) was launched during October 2010 five months later. The Applicant, on whom the onus lies, has produced no evidence of what would constitute a reasonable time for acceptance of the offer. Prima facie, it appears to me a period of more than five months is not a reasonable time. An offer is terminated upon rejection⁵. In the present context, after receipt of the LPAA, the Applicant continued to steadfastly maintain in both its replying affidavit and supplementary affidavit that the “undertaking” did not avail Metallon as a defence in the liquidation proceeding. The Respondent disputed that the liability was the Respondent’s and put up evidence to demonstrate that the liability was Metallon’s. In addition, the Respondent

³ See *Societe Commercial de Moteurs v Ackerman* 1981 (3) SA 423 (A) 434A – 435D (in which the Court held that a letter advising the plaintiff that the defendant had undertaken to guarantee the indebtedness of a company, Peughold, to the plaintiff was insufficient to establish a contract between the defendant and the plaintiff directly).

⁴ *Dietrichsen v Dietrichsen* 1911 TPD 486, 496.

⁵ *Christie: The Law of Contract in South Africa*: 5th Ed: p49.

proceeded with the winding up.

There can be no doubt that the Applicant's conduct (which the Respondent labels an "election" or "waiver") constituted a rejection of the alleged "offer".⁶ In reaching this conclusion, I recognise that the Respondent was not a direct party to the winding up application. However, it is clear that, as the person who had been authorised by Metallon to defend the proceedings on its behalf, he was aware of the contents of the replying affidavit. As the chairman of the company's board of directors, he would also have been aware of the fact that, after the replying affidavit was filed, Metallon's shareholders elected to place the company in voluntary winding up, presumably in response to the replying affidavit. To conclude that the rejection was not communicated to the Respondent because he was not a direct party in the litigation would be the height of formalism.

Even assuming that the Respondent intended to make an offer in the answering affidavit, having regard to the context in which the offer was made, it must have been an implied term of the offer that the Applicant could not proceed with the winding up while at the same time accepting the Respondent's alleged offer of payment. After all, the stated purpose of the alleged "offer" was to prevent the liquidation from occurring. Having elected to proceed with the liquidation, it is no longer open for the Applicant to accept the alleged offer.

As noted above, the terms of the offer to pay are too vague to be enforceable. On its face, the undertaking is not an undertaking to pay the

⁶ *Kotze v Suid-Westelike Transvaalse Landbou Koöperasie* 2005 [2] All SA 232 (SCA) para [24]; *Sanjo Marketing CC v Bank of Athens South Africa Limited* 2002 [JOL] 9473 (W).

entire capital amount all at once. It is an undertaking to pay an unspecified number of instalments in unspecified amounts. It is also not clear when payments are to commence. The question of interest has not been dealt with. Acceptance of the offer therefore cannot give rise to a binding and enforceable contract that would entitle the Applicant to immediate judgment at this stage.

Finally, I must consider whether the Applicant can succeed if I decide this claim on the Respondent's version only. In this respect, the Respondent's testimony in the winding up application was that he was the true debtor. Based on this version only, can I grant judgment in the amount claimed? I am afraid I must conclude that I cannot for the following reasons.

First, it is not the Applicant's case that its debtor is the Respondent. The Applicant has put up convincing evidence (which was accepted by the Court in the liquidation proceeding) that its true debtor is Metallon and not the Respondent. I cannot shut my eyes to this evidence (which is before me) and simply base my decision on what the Respondent said in a previous proceeding.⁷

Second, to the extent that the Applicant may have had a right to proceed against the Respondent if he was the true debtor, the Applicant waived that right when the Applicant elected to proceed against Metallon rather than the Respondent personally.

⁷ *Administrator, Transvaal, & Others v Theletsane & Others* 1991 (2) SA 192 (A) 196 (The Court held that, where the applicants had come to Court on the basis that they had been afforded no hearing prior to their dismissal as employees, it was not permissible for them to succeed based upon allegations in the respondent's answering affidavit, which asserted that the applicants had been afforded a hearing, but described a hearing that the applicants maintained was unfair); *Al-Kharafi & Sons v Pema* 2010 (2) SA 360 (W) 389D (The Court held that the applicant could not, arising out of something that emerged from the respondent's answering affidavit, seek to make out a case that was contrary to a case made out in the founding affidavit).

In a very able argument, Mr Hollander, who appeared for the Applicant, argued that there could not be a waiver in these circumstances, because at the time when the alleged waiver occurred, the Applicant was not aware of all of the facts – i.e. that its claim was against the Respondent and not Metallon. I do not agree with this argument. At the time when the Applicant filed its replying affidavit and supplementary affidavit in the liquidation proceeding, the Applicant was aware of the fact that the Respondent alleged that he was the true debtor. At that stage, the Applicant was in possession of all of the facts upon which to base a decision as to whether to proceed with the liquidation proceeding. Nevertheless, it chose to go forward with the winding up proceeding against Metallon.

The Applicant also contends that, because the Respondent was not a party to the winding up proceeding, the Applicant's waiver or election has not been notified to the Respondent. This argument fails for the reasons stated in paragraph 40.6 above. The Respondent, as the chairman of Metallon, and the person authorised to represent it, would undoubtedly have been aware of the election or waiver.

Accordingly, I am driven to the conclusion that the Applicant has not established a contractual cause of action. As a consequence of this finding, the application must fail.

In the view I take of the matter, it not necessary for me to address the other specific defences raised by the Respondent, as summarised in paragraph [22] above.

I emphasise that the finding that I have made in this judgment is a finding

only that the Applicant cannot proceed against the Respondent personally based upon the specific cause of action sought to be enunciated in this application – i.e. that the Respondent made an offer to pay Metallon’s debt which the Applicant can now accept. Nothing in this judgment precludes the Applicant from proceeding against the Respondent personally on a basis that is consistent with the notion that the primary obligation is Metallon’s.

Accordingly, there is nothing in this judgment that would, for example, preclude the Applicant from proceeding to recover against the Respondent under section 424 of the former Companies Act or by asserting a claim based upon abuse of corporate personality, if such the claims are meritorious.

COSTS

As the Respondent has achieved substantial success in this application, the Respondent would ordinarily be entitled to costs. However, in my opinion this is an appropriate case to depart from the usual rule: “Costs are in the discretion of the Court ... and ethical considerations may enter into the exercise of that discretion”⁸.

The Respondent has abused the process of the Court. He put up an affidavit in the winding up application in which he confirmed that he had undertaken to pay the debt off in an effort to defeat the application for winding up. It is plain that the Respondent had no intention of honouring that undertaking.

As a result of this assertion, the winding up application had to be treated as an opposed matter and the Applicant was forced to file a replying affidavit and to argue the matter. Metallon then went into voluntary liquidation. This

⁸ *Mahomed v Nagdee* 1952 (1) SA 410 (A) 420-421; *Merber v Merber* 1948 (1) SA 446 (A) 423-453.

forced the Applicant to bring an application for conversion.

All of this caused the Applicant considerable expense and delay which may or may not be recoverable from the estate of Metallon, depending upon its financial position. Even if it is recoverable from the estate of Metallon, the claim for costs will ultimately come out of the pocket of Metallon's creditors.

I am therefore not disposed to award the costs of this application to the Respondent.

CONCLUSION

Accordingly, I make the following order:

The application is dismissed.

Each party is to pay its/his own costs.

P.N. LEVENBERG, AJ

Acting Judge of the High Court

Counsel for the Applicant: L. Hollander

Attorney for the Applicant: Darryl Furman & Associates

Counsel for the Respondent: A Bava SC

Attorneys for the Respondent: Cliffe Dekker Hofmeyr Inc