

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH**

CASE NO: 4490/2015

DATE HEARD: 02/03/2017

DATE DELIVERED: 30/03/2017

In the matter between

GUTSCHE FAMILY INVESTMENTS (PTY) LIMITED

First Applicant

HEATHER WENDY LYNCH N.O.

Second Applicant

DENYS CLAUDE WESSELS N.O.

Third Applicant

NEVILLE CARSTENS SCHONEGEVEL N.O.

Fourth Applicant

**HILARY ALEXANDRA EVELYN DUDLEY N.O.
as representative of CITADEL FIDUCIARY
(PTY) LIMITED**

Fifth Applicant

**(the Second to Fifth Applicants being cited in their
capacities as Trustees of the LYNCH TRUST)**

and

METTLE EQUITY GROUP (PTY) LIMITED

Respondent

JUDGMENT

ROBERSON J:

[1] This is an application in terms of s 31 (1) of the Arbitration Act 42 of 1965, for the arbitration award made in favour of the applicants on 28 May 2008 to be made

an order of court, and that the respondent be ordered to pay the applicants the sum of R7 866 081.28, interest thereon and the costs of the application. The respondent opposed the application on the ground that the award had been extinguished by set-off and payment.

HISTORY

[2] The matter has a long history. The facts are largely common cause. On 22 April 2003 the applicants and a company Mettle Operations Ltd entered into a written agreement entitled “Sale of Shares and Claims”, in terms of which the applicants sold to Mettle Operations Ltd the entire issued share capital of the company Formex Industries (Pty) Ltd (Formex) and all shareholders’ claims on loan account in and against Formex. The purchase price was R24 000 000.00, payable by an initial payment of R18 000 000.00, with the balance of R6 000 000.00 to be paid not later than 31 March 2004. The agreement contained a number of warranties by the sellers. These warranties will be referred to later in this judgment. On 27 October 2003 Mettle Operations Ltd ceded all its rights and delegated all its obligations in terms of the sale agreement to the respondent.

[3] The respondent paid the initial payment of R20 000 000.00. On 31 March 2004 it paid R1 483 270.11 leaving a balance of R4 803 558.89 (which included interest) on the purchase price. The respondent did not pay this balance because it claimed that it had suffered losses in this amount caused by breaches of various warranties by the applicants. These losses were set off against the balance of the purchase price.

[4] The non-payment by the respondent formed the subject of a dispute which was referred to arbitration. Although arbitration proceedings commenced in 2004, for reasons which are not necessary to relate in this judgment, the arbitration hearing only resumed on 5 May 2008 and ran until 13 May 2008.

[5] In their statement of claim in the arbitration, the applicants claimed payment of R4 803 558.89, interest on the capital sum of R4 516 729.89 at the prime overdraft rate charged by First National Bank from time to time plus 2%, and costs as between attorney and own client. The interest rate and the scale of costs were provided for in the sale agreement.

[6] In its statement of defence, the respondent admitted the indebtedness to the applicants, but claimed set off of that amount by the amount alleged to be owed to it by the applicants, namely its losses caused by the applicants' breaches of six warranties. These alleged breaches were:

[6.1] A breach of the warranty that the premises from which Formex conducted its business satisfied the requirements of relevant authorities for the grant of the trade licences required by Formex to conduct its business. This breach was referred to as "Regulatory Compliance." The alleged breach was a failure to comply with certain sections of the Occupational Health and Safety Act 85 of 1993 and certain regulations of the Machinery and Occupational Safety Act 6 of 1983.

- [6.2] A breach of the warranty that Formex had valid licences for its software. This breach was referred to as “Illegal Software”. This breach involved the lack of licences for 27 installations of Microsoft Office 97 and “Auto Cad 2000”.
- [6.3] A breach of the warranty that all amounts due and owing to Formex by its trade debtors as at the completion date would be recovered within 90 days of the completion date. This breach was referred to as “Debtors Book”. It was alleged that an amount owing by a debtor had not been recovered within 90 days and had to be written off because the contract between Formex and the debtor had been cancelled.
- [6.4] A breach of the warranty that Formex had no liabilities, as at the effective date of the agreement. This breach was referred to as “Undisclosed Liability.” The allegation was that Formex had not disclosed a liability to a particular service provider and that the respondent had to pay the service provider.
- [6.5] A breach of the warranty that Formex’s contracts were in full force and effect and that Formex was not in breach of any of the contracts and had complied with its obligations in terms of the contracts. This breach was referred to as “Tool Rework”. It was alleged that Formex had failed to manufacture tooling in accordance with its obligations and the respondent was required to remedy the work.
- [6.6] A breach of the warranty that the books and records of Formex were up to date and had been properly kept according to law.

This breach was referred to as “Obsolete Stock”. It was alleged that books and records had not been properly kept and that a number of stock items were reflected in the books which were in fact obsolete stock items.

[7] Various amounts representing the losses caused by the breaches were alleged, the total of such losses being R5 398 394.91.

[8] Further in its statement of defence the respondent referred to clause 22 of the sale agreement which provided that if either party breached one or more of their obligations in terms of the agreement, including a warranty, and failed to remedy such breach within 30 days of receipt of written notice from the other party, the other party would have the right to seek specific performance of the defaulting party’s obligations, or the right to cancel the agreement and seek restitution, in either instance without prejudice to the right of the other party to claim damages it may have suffered by such failure. The respondent alleged that the applicants had waived their right to written notice, alternatively alleged that it had given notice.

[9] The respondent brought a claim in reconvention to the extent that after set off the applicants remained indebted to the respondent, alternatively if the defence of set off did not succeed. It claimed an indemnity in respect of the losses it had allegedly suffered as a result of the applicants’ breaches of warranties in the total sum of R5 398 394.91, alternatively payment of that sum, interest at the prescribed

legal rate and costs on the attorney and client scale. Clause 8.5 of the sale agreement provided:

“The Sellers hereby jointly and severally indemnify the Purchaser against any loss or damage which the Purchaser may sustain or incur arising from, or relating to, the breach of any one or more of the Warranties.”

[10] In their statement of defence to the claim in reconvention the applicants denied knowledge of the alleged breaches of warranties or damages suffered. They further contended that notice in terms of clause 22 had not been given and denied having waived the requirement of notice. They denied any obligation to remedy any alleged breaches.

[11] In his award the Arbitrator found that notice in terms of clause 22 was required, that it had not been given, and that the applicants had not waived the requirement of notice. He consequently did not uphold the counterclaim. Evidence was however led at the hearing by the respondent on the alleged breaches of the warranties. Evidence was not led in respect of the claims in respect of tool rework and obsolete stock. The Arbitrator said in his award that in his award of 23 August 2004 he had found that the respondent had not given notice of these two claims, and during the 2008 proceedings ruled that the respondent was not entitled to proceed with those claims. In his award the Arbitrator said:

“It is not necessary for me to have regard to the provisions of clause 18¹ as I have found that there was no waiver. However, just as the parties requested me to express my views on the Respondent's claims – even if I found against the Respondent on clause 22 and waiver – I assume that they would derive benefit from my views on clause 18 if the matter should proceed on appeal.”

¹ Clause 18 was the non-waiver clause

[12] The Arbitrator found that the respondent had established its losses in respect of illegal software and debtors book, and a portion of its claimed losses in respect of regulatory compliance. He found that the respondent had not established its loss in respect of undisclosed liability.

[13] The Arbitrator made the following award:

“The Respondent is ordered to pay the Claimants:

- (1) the sum of R8 434 579,17 together with accrued interest thereon from 6 May 2008 (calculated at the Prime Rate defined in the Sale Agreement);
- (2) costs as between attorney and own client (as provided for in terms of clause 24.2 of the Sale Agreement), which costs shall include:
 - (a) the costs of two counsel where they have been employed;
 - (b) the costs of the exception in August 2004;
 - (c) any costs occasioned by the Respondent’s unsuccessful application to amend its claim in reconvention during the course of the arbitration;
 - (d) any costs occasioned by the unsuccessful applications to allow further documents to be introduced by the Respondent as well as for a postponement.”

[14] The respondent appealed against this award. It appealed against the finding: that it was required to give notice; that it had not given notice; that the applicants had not waived the requirement of notice; that the full claim in respect of regulatory compliance had not been proved; and that the respondent was prohibited from proving its claims in respect of tool rework and obsolete stock. It also appealed against the costs order. The respondent prayed for an order that the award be set aside and substituted with an award upholding the plea of set off and awarding the respondent R411 776.65 together with interest thereon. Alternatively it prayed for an

order setting the award aside and substituting it with an award upholding the applicants' claim and the respondent's counterclaim in the amount of R4 104 953.24 together with interest thereon. Further relief claimed was for: the costs of the arbitration; the costs of an exception which was heard in August 2004; the costs of an application for an amendment which was brought during the course of the arbitration proceedings; an order granting the amendment; and an order that the matter be remitted to the Arbitrator to hear evidence on the claims for tool rework and obsolete stock.

[15] The applicants filed a conditional cross-appeal against the Arbitrator's findings that the respondent had proved its claims to the extent that he found.

[16] On 12 June 2009 the Appeal Tribunal upheld the respondent's appeal against the findings that notice was required, that notice had not been given, that a portion of the claim in respect regulatory compliance had not been proved and that the respondent was not entitled to proceed with the claims in respect of tool rework and obsolete stock. The Appeal Tribunal found that the respondent had established its claim in respect of regulatory compliance in a higher amount than that found by the Arbitrator. The applicant's cross-appeal was dismissed. The claims in respect of tool rework and obsolete stock were remitted to the Arbitrator for adjudication. The final amount for which the applicants were liable to the respondent was to be calculated after the determination of these two outstanding claims.

[17] The applicants unsuccessfully (in the High Court and the Supreme Court of Appeal) applied to review and set aside the decision of the Appeal Tribunal.

[18] The Arbitrator did not adjudicate the two claims which the Appeal Tribunal had remitted because on 7 October 2013 the parties concluded an arbitration agreement in the following terms:

“A. INTRODUCTION

1. The Claimants have an award of R8,434,579.17 together with accrued interest thereon from 6 May 2008 (calculated at the Prime Rate as defined in the Sale Agreement) in their favour (“the Award”).
2. The Claimants contend that the award of interest at the Prime Rate is an omission on the part of the Arbitrator *a quo* and that such award should have been at the stipulated contractual rate of the Prime Rate +2% and accordingly the Award serves to be corrected in accordance with the provisions of section 30 of the Arbitration Act, 1965.
3. The Respondent contends that no interest should have been awarded on the amount of R286 829.00, since this was not prayed for in the statement of claim and accordingly the Award contains a patent error and serves to be corrected in accordance with the provisions of section 30 of the Arbitration Act, 1965.
4. The Respondent has obtained an appeal award in its favour which has directed the arbitrator to:
 - 4.1 determine that the Respondent's claim as set out in paragraph 3.7 and 3.8 of its statement of defence in respect of the tool rework and obsolete stock; and
 - 4.2 thereafter determine the final amount for which the Claimants are liable to the Respondent.
5. The Claimants have admitted the Respondent's loss in respect of the claims set out in paragraph 4.1 above in an amount of R 303,303.00, which admission has been accepted by the Respondent and the aforesaid claim is therefore no longer in dispute.²
6. In view of the settlement of the claim referred to in paragraph 5 above, the Parties are agreed that the aggregate of the Respondent's claims in reconvention is R4,288,754.00.
7. The Parties have been unable to mediate a final resolution of the dispute and accordingly all remaining issues now serve to be resolved by arbitration.
8. The Parties have agreed to refer those remaining issues, identified in Part B below, to arbitration before a new arbitration tribunal and wish to record such agreement in writing.

B AGREEMENT

1. The following issues are hereby referred to arbitration and the arbitration tribunal is empowered to determine such issues:
 - 1.1 the entitlement of Claimants to a correction of the interest rate accruing on the Award in accordance with the provisions of section 30 of the Arbitration Act, 1965;
 - 1.2 the entitlement of the Respondent to a correction of the amount in respect of which interest was awarded, in accordance with the provisions of section 30 of the Arbitration Act, 1965;

² The amounts claimed in the counterclaim for these two claims were R457 102.58 and R149 236.13 respectively.

- 1.3 the date from which interest shall run on the component parts or whole of the Respondent's claim in reconvention of R4,288,754.00 and the rate at which such interest shall accrue;
- 1.4 the costs of the Claimants' exception and objection to the Respondent's amendment to its claim in reconvention; and
- 1.5 the costs of the arbitration, including proceedings before the arbitration tribunal.
2. The Parties further agree that:
 - 2.1 no further evidence will be led at the resumed hearing and that the issues raised in paragraph 1 above shall be determined on the record of the arbitration as prepared for and used in the appeal to the SCA under case number 115/2011, and those portions of the record of the appeal arbitration not included in the SCA record; save that the Respondent shall be entitled to lead evidence in relation to the tender it made on 8 May 2008 and the document attached by the Claimants to their closing argument in the arbitration, marked HOA1;
 - 2.2 the arbitration tribunal will consist of a panel of three arbitrators one of whom shall be the present arbitrator, Adv J Myburg SC and the additional members being Piet Streicher (retired judge) and Adv S Burger SC. To the extent that either Piet Streicher or Adv S Burger do not accept the appointment as arbitrator, such position shall be filled by a retired judge or senior counsel to be agreed upon by the parties. In the absence of agreement as to the appointment of an arbitrator in replacement of Piet Streicher or Adv S Burger (as the case may be), then the outstanding appointment shall be made by AFSA from those retired judges or senior counsel who are on its panel of arbitrators;
 - 2.3 the Parties agree that there will not be any right of appeal against the award made by the arbitration tribunal;
 - 2.4 the arbitration shall reconvene at Port Elizabeth on a date to be agreed, failing agreement on a date to be determined by the arbitration tribunal; and
 - 2.5 the arbitration tribunal shall determine the procedure to be adopted for the hearing."

[19] The issues identified in paragraph B1 of the arbitration agreement were determined by the Arbitration Tribunal on 11 August 2014. The Arbitration Tribunal made the following award:

- "1. The Claimants are entitled to a correction of the Award by the addition of the words 'plus 2%' after the words 'Sale Agreement' in paragraph 125(1) thereof.
2. The Respondent is entitled to a correction of paragraph 125(1) of the Award by the substitution of the figure 'R8 434 579.17' with the figure 'R4 803 558.89' and the substitution of the words 'thereon from 6 May 2008' with the words 'on the amount of R4 516 729.89 from 31 March 2004'.

3. Interest on the component parts or the whole of the claim in reconvention runs from 10 June 2004 at the legally prescribed rate of interest being 15.5%.
4. The costs of the Claimant's exception and objection to the Respondent's amendment to the counterclaim are to be paid by the Claimant on the scale as between attorney and own client.
5. (a) The Claimants are awarded their costs, on the scale as between attorney and own client, in respect of their claim in the first arbitration.
(b) The Respondent is awarded its costs, on the scale as between attorney and own client, in respect of its counterclaim in the first arbitration.
6. No costs order is made in respect of the proceedings before us."

[20] After this award, on 23 September 2014 the respondent paid the applicants the amount it calculated was owing by it, basing its calculation on set off of its counterclaim against the claim having taken place on 28 May 2008, and set off of costs awards in its favour which costs were taxed in 2012 and 2013. It included in its calculation interest on the claim and the counterclaim. As a result of an error in its calculation, after the payment the respondent still owed a further amount which it undertook to pay on or before 11 March 2016.

DISCUSSION

[21] The dispute between the parties essentially concerned the date when set off of the respondent's counterclaim against the applicants' claim occurred. The date was significant because of the higher rate of interest running on the claim than that running on the counterclaim. The respondent accepted that its defence of set off as at 31 March 2004 could not have succeeded because its claims were illiquid. It however contended that set off of the counterclaim against the claim as a matter of law had occurred on 28 May 2008. The Arbitrator had finally determined three of the claims on 28 May 2008. The Appeal Tribunal had increased the amount proved in one of those claims. The effect of that increase substituted the Arbitrator's

determination as at 28 May 2008. Reliance was placed on the judgment in *General Accident Versekeringsmaatskappy Suid-Afrika Bpk v Bailey NO 1988 (4) SA 353 (A)*.

I quote from the English headnote as follows:

“A judgment debt is payable on the day upon which the trial Court hands down its judgment, irrespective of whether the judgment is substituted or amended on appeal, so that the eventual judgment debt is only determined on appeal. Where an appeal against a judgment succeeds and the amount of the judgment debt is altered, there is no question of a new judgment, but of an amended judgment which the trial Court should have given and such judgment is of force and effect retrospectively to the date of the trial Court’s judgment.”

[22] These three claims, so it was submitted, therefore became liquidated on 28 May 2008 and set off of those claims against the applicant’s claim occurred on that date.

[23] With regard to the claims for tool rework and obsolete stock, it was submitted on behalf of the respondent that the admission in the 2013 arbitration agreement of the amount of these claims (R303 303.00) was a formal admission of the merits of these claims. This admission related to a dispute which the Arbitrator ought to have determined but was no longer required to do so. The admission therefore was to be considered as taking effect on 28 May 2008, even though it was made at a later date. With regard to the principle expressed in *Bailey (supra)* it was submitted that the position should be the same where a matter is remitted to the court *a quo* for determination and the court makes such determination. It would not be fair for an appellant to lose the advantage of this principle merely because the appellate court was unable to substitute the decision of the court *a quo* with its own. This submission was taken further to the effect that the position should also be the same if, subsequent to a remittal, a defendant or respondent admits a claim. If it were not, a claimant would be obliged to refuse to accept an admission in order to avoid losing

the benefit of the claim being determined with effect from the date of the original decision. This would result in unfairness to a claimant and would not be in the interests of justice in that it would discourage settlement of matters where there is no real dispute.

[24] Further with regard to the date on which the respondent's claims were liquidated, it was submitted that each claim constituted a separate cause of action. They involved breaches of different warranties, different *facta probanda*, and a decision on one or more claims would not found a defence of *res judicata* if grounds for a further claim for breach of a particular warranty were discovered at a later date.

[25] The applicants' stance was that set off only occurred on 7 October 2013, when the final amount of the counterclaim was determined. It was submitted that set off only applied if there had been an award or an agreement on the counterclaim. The effect of the decision of the Appeal Tribunal was that the total amount of the counterclaim was still to be determined. The Appeal Tribunal did not make a partial award and considered the counterclaim to be one claim. Reference was made to the respondent's notice of appeal where it was prayed in the alternative that the Arbitrator's award be set aside and substituted with an award upholding the claimants' claim and the respondent's counterclaim in the sum of R4 104 953.24. If the respondent had achieved that relief on appeal, so it was submitted, it would have had a liquidated counterclaim. The first time the respondent had an award was on 7 October 2013 which was when the counterclaim was finally liquidated. There was nothing in the arbitration agreement of 7 October 2013 to suggest that the parties

agreed that the award was retrospective. Paragraphs 4 and 5 of the agreement were couched in the present tense.

[26] With regard to the submission that the counterclaim consisted of separate causes of action, it was submitted that the cause of action was the claim for an indemnity. This was how the counterclaim was pleaded.

[27] I think that it is important that although the Arbitrator and the Appeal Tribunal did not expressly make awards on the counterclaim, their determinations of the various claimed losses remained in place and, together with the admitted amount of R303 303.00, made up the amount on which interest was granted by the Arbitration Tribunal in 2014. The date from which interest was to run, 10 June 2004, was, according to the Arbitration Tribunal, the date of the counterclaim. Had the Arbitrator ruled in the respondent's favour on the question of notice, the respondent would have led evidence on all the losses it alleged it had suffered, and an award would have been made on the counterclaim, which at that stage would have been set off against the claim. This was not a case of judgment on a claim being stayed pending a decision on a counterclaim. The claim and the counterclaim were heard and were to be decided upon at the same arbitration proceedings.

[28] Going further, if the claims which the Arbitrator and the Appeal Tribunal found had been proved, were separate causes of action, then set off of those claims would have occurred as at 28 May 2008. This follows from the finding of the Appeal Tribunal that the arbitrator erred in finding that notice was required. If he had not so found, he would have upheld those claims. In my view the respondent's claims for

the six breaches of warranties were separate causes of action. They involved different warranties each breached in a particular and different manner. The short précis of each claim contained in paragraph [6] above, indicates the different *facta probanda* involved in each claim. Support for my view is to be found in *Samancor Chrome Ltd v Rham Equipment (Pty) Ltd* [2014] ZASCA 66 (19 May 2014) where Lewis JA said at para [14]:

“There is no reason why there cannot be separate and distinct claims arising from a single contract. Indeed such claims are commonplace. A contract may give rise to multiple obligations and a breach of two or more may give rise to different causes of action and thus different debts.”

[29] If the respondent's claims constituted different debts then the time that they became liquidated was the time that set off took place. The claims which the Arbitrator determined, as increased on appeal in one respect, were effectively determined on 28 May 2008.

[30] With regard to the applicant's submission that there was a single cause of action, namely the claim for an indemnity, it is so that the relief claimed in the main in the counterclaim was that the applicants indemnify the respondent in the total amount of R5 398 394.91. However in its prayer for the indemnity, the respondent specifically prayed that the applicants indemnified it in respect of the losses it had suffered as referred to in paragraphs 9 and 10 of the claim in reconvention. Paragraph 9 of the claim in reconvention was a repetition of the allegations set out in paragraphs 3.3.1 to 3.9 of the respondent's statement of defence. These paragraphs dealt separately with each alleged breach. Further in my view the indemnity clause envisaged breaches of different warranties, each requiring its own indemnity. I therefore do not think that the claim for an indemnity in the total amount detracts from the position that the claims were separate causes of action.

[31] The claims for tool rework and obsolete stock require a somewhat approach with regard to the date they became liquidated. The Appeal Tribunal could make no decision on the *quantum* of these claims because no evidence had been led. The Arbitrator's decision not to allow those claims to proceed was reversed on appeal. The intention of the Appeal Tribunal was that they be determined by the Arbitrator. However this did not happen because the parties concluded the October 2013 agreement. If the Arbitrator had decided these two claims, such a decision would in my view, applying the *Bailey* principle, have been the decision he should have given when he made the award, on 28 May 2008. It would have been unfair if the date those claims became liquidated was a later date, merely because the Arbitrator had originally erred.

[32] In my view the same result should occur when the order of the Appeal Tribunal was not carried out and the applicants admitted the claims in a quantified amount. That admission substituted the decision the Arbitrator would have made had he been called upon to do so, and the decision he should have made on 28 May 2008. The applicants admitted that the respondent had suffered a loss in that amount. It was not necessary for the respondent to prove that amount. I do not think it was going too far to submit, as counsel for the respondent did, that this amounted to a formal admission of the merits of the claim. The admission must be seen in the context of the Appeal Tribunal's order that the Arbitrator was to adjudicate the two outstanding claims. Again, it would be unfair if the respondent, who had had to wait all this time for a final determination of the outstanding claims, was denied the advantage of an earlier liquidation of these claims because the Arbitrator erred.

[33] In my view therefore, the respondent's claims, which were separate causes of action, were liquidated on 28 May 2008 and fell to be set off against the applicants' claim as at that date.

[34] I do not think that the wording of the October 2013 agreement changed this legal position. If set off took place at the time the respondent's claims were liquidated and effectively awarded, then there was no need to mention it in the agreement or expressly to record that the award on the counterclaim was retrospective.

[35] It was submitted on behalf of the applicants that the respondent was suggesting that this court had a discretion to revisit the award made by the Arbitrator. I do not agree. The respondent accepted that the award was made and that it stood. Its opposition was based on set off and payment. As was submitted on behalf of the respondent, the issue was one of law, namely the legal consequences of the Arbitrator's award and the award of the Appeal Tribunal and whether or not the respondent's claims were separate causes of action. The applicants seek enforcement of the award and the respondent contends that there is nothing to enforce. I am satisfied, for the reasons given above, that the respondent's contention is correct.

[36] The application is dismissed with costs, such costs to include the costs of two counsel.

**J M ROBERSON
JUDGE OF THE HIGH COURT**

Appearances:

For the ApplicantS: Adv R G Buchanan SC, instructed by Rushmere Noach Incorporated, Port Elizabeth

For the Respondent: Adv J Blou SC with Adv MA Wesley, instructed by Burman Katz, Port Elizabeth