

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO
Edited:	YES/NO



IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)

CASE NO: **34/2020**
DATE HEARD: **03 SEPTEMBER 2021**
DATE OF ORDER: **25 OCTOBER 2021**

In the matter between:

KAROB BOERDERY (PTY) LTD
CHARL DANIEL WILKE

First Applicant
Second Applicant

And

GRIEKWALAND WES KORPORATIEF BPK

Respondent

REASONS/JUDGMENT

PER NXUMALO J:

PRELIMINARY REMARKS

- [1] It has been well said that for the laws to be respected, decisions of courts must be given as soon as possible after the events giving

rise to disputes, and must follow from sound reasoning, based on the best available evidence.¹ Litigants are thus entitled to reasons for judicial decisions within a reasonable time following upon hearings and when a judgment is appealed, written reasons are indispensable. Failure to supply reasons is a grave lapse of duty and a breach of litigants' rights and an impediment to the appeal process.² It is also inimical to the parties' fundamental right to access to courts entrenched in our Bill of Rights.³

Jurisdiction

- [2] This application was heard virtually on 3rd September 2021. Judgment was thereafter reserved, pending the parties' delivering supplementary heads of argument on or before 15th September 2021, with regard to the following issues: (a) Whether, regard being had to facts and circumstances of this case, this Court has jurisdiction over the dispute; and (b) whether the dispute between the parties would not be more conveniently determined by the Free State Division.
- [3] Even though none of the parties raised any issue with regard to this Court's jurisdiction, this Court *mero motu* raised the issue and directed the parties to supplement their heads of argument in this regard. It is so that unless submission to jurisdiction is possible, a court is obliged to raise lack of jurisdiction *mero motu*, even on appeal- *CWU v Telkom 1999 (2) SA 586 (T)*.

¹ *RAF and Another v Mdeyide 2011 (2) SA 26 (CC)*.

² *CSARS v Sprigg Investment 2011 (4) SA 551 (SCA) at 561A-E; see also Strategic Liquor Services v Mvumbi 2010 (2) SA 92 (CC)*.

³ Section 34 of the Constitution expressly stipulates that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court of law or, where appropriate, another independent and impartial tribunal, or forum.

- [4] The issue of jurisdiction became germane in light of the fact that litigation that preceded this application, commenced in the Free State Division, *vide* provisional sentence summons being issued by the respondent against the applicants.

The impugned Order

- [5] Having found that this Court indeed has jurisdiction over the matter, on 25th October 2021; it ordered as follows: (1) The respondent is ordered to repay R3 million to the applicants, plus interest on same, calculated at 10.25% *per annum a tempore morae*, from 14th September 2010, until date of payment; (2) The respondent is also ordered to repay to the applicants the amount of R435 690.77, at 10.25% *per annum a tempore morae*, from 21st April 2011; and (3) The respondent is ordered to pay the costs of these proceedings on a scale between attorney and client.
- [6] The 14th September 2010, is the date on which the applicants paid the former amount. The 21st April 2011, is the date on which the latter amount was paid to the respondent.

Request for reasons

- [7] The respondent delivered a notice requesting reasons for the impugned order on 12th November 2021, with the registrar of this Court. This notwithstanding, the said notice was only brought to this Court's attention on or about 26th January 2022, more than two months after this Court granted the said order. The question that arose then was whether the said notice was delivered to this Court within the timeframe contemplated in the rules.

[8] Rule 49 (1) (c) of the Uniform Rules of Court, expressly stipulates that when in giving an order, the court declares that the reasons for the order will be furnished to any of the parties on application, such application shall be delivered within ten (10) days after the date of the order. At that time, since there was no definitive evidence that the said notice was properly filed with the registrar, this Court was constrained to decline the said request *vide* its ruling dated 26th January 2022, for being out of time.

[9] Thereafter evidence was produced, showing that indeed the request for reasons notice was filed in Court on 12th November 2021. Contemporaneous with the said notice, the respondent also delivered a notice of application for leave to appeal, which was also regrettably only brought to this Court's attention on 26th January 2022. It is against this backdrop that these reasons are handed down so belatedly.

BRIEF STATEMENT OF THE RELEVANT FACTS

[10] The applicants in these proceedings sought an order directing the respondent to repay amounts of R3 million and R435 690.77; interest on the said amounts and costs of proceedings on a scale between attorney and client. The applicants prayed for interest on the said amounts at a rate of 10, 25% per year *a tempore morae*, the former from 14th September 2010 and the latter from 21st April 2011, until the date of final payment; respectively.

[11] It is common cause that the said amounts were paid to the respondent in terms of a provisional sentence order and judgment of the Free State High Court granted against the applicants on 19th November 2009.

- [12] The subject matter of this application thus pertains to a demand for repayment of the said monies paid by or on behalf of the applicants to the respondent in terms of rule 8 (10), after provisional sentence was partially granted against the applicants, in favour of the respondent, in the said court.⁴
- [13] Apparently after a raft of principal credit agreements entered into between the respondent and the applicants and other entities, jointly and/or severally preceding 26 January 2006, the first applicant executed an acknowledgment of debt in favour of the respondent on the said date, in terms of which the first applicant undertook to make certain payments to the respondent. The second applicant, for his own part, bound himself as surety and co-principal debtor with the first applicant for the due and punctual performance of the first applicant's obligations towards the respondent, pursuant to the said raft principal agreements and acknowledgment of debt.
- [14] It is common cause that the underlying *causa* of the acknowledgement of debt agreement was monies allegedly owed to the respondent by the first applicant for goods sold and delivered and additional financing costs as set out in annexure A of the said agreement. In terms of the said agreement, the first applicant acknowledged that it was indebted to the respondent in the amount of R12 787 871.82; of which an amount of R4 831 871.05; was already in arrears.
- [15] According to the applicants, the first applicant gave full effect to the said agreement and fully paid the determined arrear amount

⁴ Rule 8 (10) of the Uniform Rules of Court, expressly stipulates as follows; that:
"Any person against whom provisional sentence has been granted may enter into the principal case only if he shall have satisfied the amount of judgment of the provisional sentence and taxed costs, or if the plaintiff on demand fails to furnish security in terms of sub rule (9)."

indicated. The foregoing notwithstanding, the respondent maintained that the first applicant failed to adhere to its payment obligations towards the respondent.

[16] It is against this backdrop that the parties subsequently got embroiled in a major dispute with regard to the terms and conditions of the main agreement and the acknowledgement of debt agreement and/or the alleged breaches thereof. Following directly from this dispute, the respondent sued the applicants jointly and severally, by means of provisional sentence summons on 11th September 2009; based on the whole amount stipulated in the acknowledgement of debt agreement. The summons was issued from the Free State Division of the High Court.

[17] The matter subsequently served before the said Court on 19th November 2009, which granted a provisional sentence order *per* Van der Merwe J, in favour of the respondent in the amounts of R3 million and R435 690.77; respectively. The said amounts being considerably less than the full amount that was claimed as per the acknowledgement of debt agreement.

[18] In compliance with the said order, one Wilke Trust effected two separate payments to the respondent on 14th September 2010 and 21st April 2021; respectively. Whilst it is common cause that the respondent received these amounts, queerly no security *de restituendo*, to the satisfaction of the registrar, against payment of the said amounts was demanded by or on behalf of the applicants. Nor was same furnished to the applicants. According to the applicants, they saw no need to do so since the respondent was to the very best of their knowledge financially sound as well as listed on the Johannesburg Stock Exchange.⁵

⁵ Para 11.3, p12, FA.

[19] It is so that the provisions of rule 8 (10) are peremptory,⁶ and that payment or satisfaction of the provisional judgment cannot take place in a manner other than payment to the plaintiff under security *de restituendo* or upon levy of execution of a writ issued by the registrar.⁷ In the latter event, payment to the sheriff would therefore be the satisfaction of the provisional judgment.⁸

[20] It is against this backdrop that in *Re Right and Sherman and in Re O'Hea v Sherman and Right* (1898) 19 NLR 166, it was decreed that the practice of not taking a bond *de restituendo* in provisional judgments was wrong. This notwithstanding, in *Standard Bank of South Africa v Pechey Bros* (1902) 23 NLR 216, the court later enjoined that:

“The bond should be taken before levy is made, unless the defendant should waive his right to security being given.”

[21] It can be deduced from the foregoing that a defendant may waive the right to security, as the applicants did in this case.⁹ Whilst a defendant may do so, reported cases of such instances are rare and far between. Also, no provision seems to have been made in the rules for the repayment of the amount of the judgment for provisional sentence, where such a defendant has entered into the principal case and successfully obtained a dismissal of the claim and reversal of the provisional sentence, *sans* security from the plaintiff. The present situation is thus infrequent and unlikely to be one that is much encountered in practice.

⁶ *Super Eight Promotions v Dial Picture Promotions* 1976 (2) SA 748 (T) at 750D.

⁷ *Light Wall Erection v De Tweedespruit Farm* 1976 (1) SA 944 (W) at 947.

⁸ (*supra*) at 947C.

⁹ *Junius v Alberts* 1906 TH 16 at 18.

- [22] On 13th August 2014, the respondent's entire claim was dismissed with costs by the Free State Division of the High Court. Thereafter, leave was granted the respondent to appeal to the Full Court of that Division, which in turn dismissed the appeal in its entirety with costs on 8th September 2016. The respondent then petitioned the Supreme Court of Appeal, which petition was finally dismissed with costs as well on 10th January 2017. Thereafter, the applicant did not pursue the matter any further.
- [23] The applicants thereafter repeatedly demanded the monies that were provisionally paid to the respondent in terms of the provisional sentence order of the court *a quo* dated 19th November 2009, to no avail. The respondent apparently took the stance that the dispute between the parties has not become finally resolved. In the premise, the respondent maintained that it is entitled to hold on to the impugned payments. This after the respondent was unsuccessful in the main proceedings in the Free State High Court and the Supreme Court of Appeal.
- [24] It is against this backdrop that this application was lodged on 10th January 2020, for repayment of both the capital amount paid to the respondent in compliance with the said provisional sentence order, interest thereon; together with *mora* interest.
- [25] This application in the main thus turns around the respondent's refusal to refund the applicants certain monies paid by the latter in satisfaction of the amount of the provisional sentence judgment and taxed costs, handed down by the Free State High Court Division, on 11th September 2009.

THE PARTIES' MAIN ARGUMENTS- IN SUMMARY

The applicants'

[26] According to the applicants, the provisional sentence which was claimed and partially granted is the only basis which entitled the respondent to the interim payment of the impugned amounts. To the extent that that claim has now fallen away, there is no legal basis upon which the respondent can hold on to what has been previously only provisionally ordered by the Free State High Court on 11th September 2009.

[27] They also contended that notwithstanding the respondent's failure to secure payment of over R12 million against them, it is still refusing to repay the impugned amounts. They further contended that this is a simple repayment of monies which they were ordered to pay in terms of the said provisional sentence order because the respondent was unsuccessful in the main proceedings. This failure, according to the applicants, necessarily meant that the respondent was now obliged to repay both the capital amount ordered by the provisional sentence order, together with *mora* interest.

[28] As far as costs are concerned, it was contended for the applicants as follows: That there was really no reason why they should be forced to even bear the most elementary part of their legal costs because the respondent's refusal to repay the said monies was so baseless that it warrants a punitive legal cost order.

The respondent's

- [29] The respondent, for its own part, opposed the relief sought based on four points *in limine* and "a number of imbricated reasons." The points *in limine* pertain to the following contentions; that: (a) judgment in respect of this application should have been postponed and same stayed, pending the adjudication of the respondent's intended counterclaim; (b) the applicants' lack of *locus standi in judicio*; (c) the impugned amounts have prescribed; and (d) the founding affidavit did not make out a *prima facie* case for the relief sought.
- [30] Substantively, it was argued for the respondent that to the extent that the applicants do not rely on any cause of action premised on contract, delict or statute. They were obliged to resort to a cause of action based on unjust enrichment and accordingly duty bound to bring same within the ambit thereof.¹⁰ It further argued that, to the extent that at the time the impugned payments were made, the applicants were still indebted to the respondent for certain outstanding amounts, the said payments amounted to part-payment of the latter or set-off.
- [31] It was also argued for the respondent that to the extent that no allocation was made by the trust as against which particular portion of the outstanding indebtedness, the said payment should apply, the respondent was entitled to allocate same to the oldest outstanding debt first.
- [32] It was further argued for the respondent that since in terms of the accelerated clause contained in the acknowledgement of debt

¹⁰ *Kudu Granite Operations (Pty) Ltd v Caterna Ltd* 2003 (5) SA 193 (SCA) at particular 14-16

agreement, the applicants are still indebted to it, the respondent still intends to pursue same imminently by action. The respondent contended that should the said action succeed, the applicants' claim, if any, will be wholly or partly extinguished. In the circumstances, judgment in respect of this application should be postponed and this application stayed, pending the adjudication and determination of its foreshowed claim in reconvention. That such an order is permissible under rule 22 (4), in the exercise of this Court's judicial discretion.

ISSUES FOR DETERMINATION

[33] The following issues therefore fell for determination in these proceedings:

- a. Whether judgment in respect of this application should be postponed and same stayed, pending the adjudication of the respondent's intended counterclaim.
- b. Whether the applicant lacks *locus standi in judicio*;
- c. Whether the impugned payments amount to a judgment debt within the contemplation of section 11 (a) (ii) of the Prescription Act 68 of 1969 (the Act) or have prescribed;
- d. Whether the applicants made out a *prima facie* case for the relief sought;
- e. Whether the impugned payments amounted to part-payment or set-off of alleged outstanding indebtedness of the applicants to the respondent; and

f. Whether the impugned payments were validly appropriated.

[34] This Court then determined each of these issues in turn, thus.

Whether judgment in respect of this application should be postponed and same stayed, pending the adjudication of the respondent's intended counterclaim.

[35] As alluded above, the respondent in this regard *inter-alia* averred as follows. That to the extent that the applicants and the trust remain jointly and severally indebted to it in a conservative amount of at least R4 530 536.05, payment of which it intends to pursue in terms of an intended "imminent" action. Since the said amount substantially exceeds the applicants' current claim, the latter will be wholly or partly extinguished.

[36] In the circumstances, the respondent contended as follows. That judgment in respect of this application be postponed and this application stayed, pending the adjudication and determination of its claim in reconvention. That such an order is permissible in terms of rule 22 (4), in the exercise of this Court's discretion.

[37] Rule 22 (4), expressly and unambiguously stipulates as follows; that:

"If by reason of any claim in reconvention, the defendant claims that on the giving of judgment on such claim, the plaintiff's claim will be extinguished either in whole or in part, the defendant may in his plea refer to the fact of such claim in reconvention and request that judgment in respect of the claim or any portion thereof which would be extinguished by such claim in reconvention, be postponed until judgment on the claim in reconvention. Judgment on the claim shall, either in whole or in part, thereupon be so postponed unless the court, upon the application

of any person interested, otherwise orders, but the court, if no other defence has been raised, may give judgment for such part of the claim as would not be extinguished, as if the defendant were in default of filing a plea in respect thereof, or may, on the application of either party, make such order as to it seems meet.”¹¹

[38] It is evident from the provisions of rule 22 (4) that the *pari passu* determination of a claim in convention and a counterclaim cannot be claimed as of right. It is also evident from the foregoing that this Court’s rule 22 (4) discretion expressly and unambiguously only avails a defendant, who has filed a claim in reconvention (‘counterclaim’) and not one who only intends or threatens to do so.

[39] Whilst the court has a discretion whether or not to postpone the claim in convention so that both the claim and the counterclaim are heard simultaneously. In these proceedings, the respondent has not filed any claim in reconvention against the applicants. This court’s discretion can therefore not be exercised in favour of the respondent in the absence of a substantive counterclaim before it.

[40] In the premise, this Court could not find any basis for judgment in respect of this application to be postponed or for this application to be postponed or stayed.

Whether the applicant lacks *locus standi in judicio*

[41] On this point, the respondent contended as follows. That to the extent that the applicants are not impoverished as a consequence of any unjust enrichment of the respondent at the applicants’

¹¹ Emphasis supplied.

expense. The applicants do not have any *locus standi* to apply for the relief sought in terms of this application and the application should for this reason alone be dismissed with costs. It should be so, since if a person who intends to enforce an enrichment claim against another has not been impoverished as a consequence of the unjust enrichment of another at the expense of the former, the intended claimant will not have a right of recourse and consequently no *locus standi* to pursue such a claim.

[42] The basis of this point *in limine*, was therefore that to the extent that it is not the applicants, but one Wilke Boerdery Trust, which paid the provisional sentence order amounts, it is the latter that is out of pocket and not the applicants. To the extent that the applicants do not place reliance on contract, delict or statute in order to sustain an entitlement to the relief sought. They cannot contend for any contractual, delictual or statutory right and commensurately no corresponding *locus standi* to pursue any repayment of the amounts based on contract, delict or statute. In the circumstances, according to the respondent, the applicants do not have the necessary *locus standi* to pursue repayment of same.

[43] The applicants, for their own part, contended that it matters not who had paid the impugned amounts or if the applicants had paid the amount themselves. According to the applicants, in the absence of, for instance, a cession to a third party, the present applicants before court would always be the holders of the right to reclaim these payments. If the applicants have to refund a benefactor or a third party, who had stood in for the payment obligation, that has got nothing to do with the respondent as it cannot resist an order on the basis of the applicants not having made the payment themselves. In any event, the respondent

never denied the authority of the trust to pay the provisional sentence amount on behalf of the applicant when same was done.

[44] It was also contended for the applicants that when the respondent instituted action against the applicants, the applicants and not the trust were the respondent's primary debtors. The trust, was only a surety jointly with the second applicant for the said debt. Since the respondent at all material times hereto never sued the trust in any capacity, the latter was never a party to the provisional sentence proceedings. The order to make provisional payment of the impugned amounts was made against the applicants and not the trust. It was the applicants and not the trust which was able to enter the principal action after payment of the said provisional sentence amounts.

[45] As alluded elsewhere, the provisions of rule 8 (10) are peremptory.¹² The only persons against whom provisional sentence had been granted were the applicants whom in turn acquired the concomitant *locus standi in judicio* to enter into the principal case. They however could only do so after satisfying the amount of the judgment of the provisional sentence and taxed costs; or if the plaintiff, on demand, had failed to furnish due security in terms of rule 8 (9) of the Uniform Rules.¹³ It is common cause that the applicants were only permitted to enter the principal case after payment of the impugned amounts.

[46] It is so regardless, who may have satisfied the amount in question on their behalf. They were at liberty to effect the said payments either directly or through an agent. It is so simply because in our law, an agent may be appointed to do anything which the principal

¹² *Super Eight Promotions v Dial Picture Productions* 1976 (2) SA 748 (T) at 750D.

¹³ See rule 8 (10), Uniform Rules of Court.

may do, unless performance by the principal himself is required.¹⁴ Rule 8 (10), nowhere requires a defendant therein to personally satisfy the amount of the judgment of the provisional sentence or taxed costs. All it requires is that a defendant shall have satisfied same by the time he enters the principal case and nothing more.¹⁵

[47] An agent who has the power to enter into a contract for and on behalf of his principal is not a party to the contract, by which exercise of his power, he makes between his principal and a third party.¹⁶ An agent thus has no *locus standi* to sue or be sued on the principal obligation between the principal and the other party- *Springfield v Peter Maskell Auction* [2006] 4 All SA 483 (N).

[48] It has been said that even a thief who pays own or another's debts with stolen funds extinguishes those debts, provided the creditor who receives and accepts payment is innocent. Payment by electronic means is also effective if the payee acquires the unfettered or unrestricted right to the immediate use of the funds in question. Also if payment is made into a bank account, acceptance is evidenced by the corresponding credit and its non-reversal- *Absa Bank Ltd v Moore and Another* 2017 (1) SA 255 (CC) paras 32–36.

[49] It is common cause that electronic payment of the impugned amounts was made into the bank account of the respondent. Acceptance thereof is evidenced by the corresponding credit and its non-reversal. The respondent also acquired unfettered or unrestricted right to the immediate use of the funds in question.

¹⁴ *Skieibreds Rederi v Hartless* 1982 (2) SA 710 (A) at 736-737; *Belonje v African Electric* 1949 (1) SA 592 (E)

¹⁵ In terms of section 6 of the Interpretation Act 33 of 1957, in every law, unless the contrary intention appears (a) words importing the masculine gender include females; and (b) words in the singular number include the plural, and words in the plural number include the singular.

¹⁶ *Mineworkers Union v Cooks* 1959 (1) 146 (W).

[50] It is so in our law that a third party's election to sue a disclosed principal or agent is final- see *SA Metal & Machinery v Klerk [2005] 1 All SA 44 (E)*. Authority may be evinced by proof of an express authorisation or by inference.¹⁷ Actual authority may also either be in express terms or be implied or tacit.¹⁸ It therefore appears that the trust was ostensibly acting on behalf of the applicants when it effected payment of the provisional sentence amounts to enable the applicants to enter the principal case.

[51] The presence of ostensible authority of the trust to have made the said payment on behalf of the applicants can be deduced from the fact that after same was made, the applicants became entitled to enter the principal case. In our law, the presence of ostensible authority is established if it is shown that a principal created an appearance that the agent had the power to act on the principal's behalf, nothing more is required- *Makate v Vodacom 2016 (4) SA 121 (CC) at paras 46-47*.

[52] It follows from the foregoing that the applicants could thus, through the agency of the trust or anyone else, satisfy the amount of the judgment of the provisional sentence or taxed costs. Conterminously, the trust by making the said payment *qua* agent, for and on behalf of the applicants as its principals did not become a party to the contract or proceedings, by which exercise of its powers as an agent, it concluded between the applicants and the respondent.¹⁹ Nothing therefore seemed to turn around the fact that the applicants, for their own convenience or otherwise and without intending to create a right of action on behalf the trust,

¹⁷ *Inter-Continental Finance & Leasing Corp v Stands 56&57 Industria* 1979 (3) SA 740 (W).

¹⁸ *NBS Bank v Cape Produce* 2002 (1) SA 396 (SCA).

¹⁹ *Mineworkers' Union v Cooks* 1959 (1) 709 (W).

agreed that the latter should pay the impugned amounts on their behalf.²⁰

[53] In the premise, this Court came to the conclusion that regard being had to the facts and circumstances of this case and the ambit of the implicated rule, it can be surmised that the trust was either expressly or tacitly authorised by the applicants to effect the said payments on their behalf. It followed that this point *in limine* must fail.

Whether the impugned payments amounted to a judgment debt within the contemplation of section 11 (a) (ii) of the Act;²¹ alternatively prescribed on the alternative dates suggested

[54] According to the applicants, the respondent's prescription argument that the provisional sentence payments are an ordinary "debt" flowing from an ordinary *vinculum juris* between the parties and thus the three-year prescription period contemplated in section 11 of the Act applies, is fundamentally flawed.

[55] The applicants contended that the legal obligation befalling the respondent in the matter at hand is not a "debt" *per se*. They vied that it is a legal obligation, directly following upon an order of the Free State High Court. That it is so since to the extent that it was the provisional sentence order that entitled the respondent to the impugned payments in the first place, it follows that it was a later order (dismissing the action) that obliged it to repay same. In the premise, according to the applicants, their right to seek repayment is a consequence of the begotten right in terms of a

²⁰ *Barnett v Abe Swersky & Associates* 1986 (4) SA 407 (C).

²¹ 68 of 1969, hereinafter referred to simply as "*the Act*".

court order and therefore a “*judgment debt*”. In this regard they relied analogically on *ABSA Bank v Keet*.²²

[56] According to section 11 (a) (ii) of the Act, the period of prescription in respect of any judgment debt shall be thirty years. In *Absa Bank Limited v Keet* (2015 JDR 0996 (SCA) (Absa)) Zondi JA, writing on behalf of the full bench of the SCA, held as follows that:

“[i]n my view, there is merit in the argument that a vindicatory claim, because it is a claim based on ownership of a thing, cannot be described as a debt as envisaged by the Prescription Act” (Absa par 20).

[57] He added as follows; that:

“[i]n the circumstances, the view that the vindicatory action is a ‘debt’ as contemplated by the Prescription Act which prescribes after three years is, in my opinion, contrary to the scheme of the Act” (Absa par 25).

[58] Rule 8 (10), expressly impels any person against whom provisional sentence has been granted, before entering into the principal case, to satisfy the amount of the judgment of provisional sentence and taxed costs, unless the plaintiff, on demand fails to furnish due security in terms of rule 8 (9). Rule 8 (9), for its own part, expressly obligates a plaintiff, on demand by the defendant, to furnish the defendant with security *de restituendo*, to the satisfaction of the registrar, against payment of the amount under the judgment. The plaintiff’s right is therefore a qualified one: i.e. the plaintiff is entitled to *solutio*

²² 2015 (4) SA 474 (SCA)

fiduciaria, payment under security, regard being had to rule 8 (9).²³

[59] It is trite that unlike ordinary summons, in essence a provisional sentence summons is a composite document that serves a dual purpose; to *wit*: to institute an action for a definitive judgment by initiating the principal case and to institute proceedings for an interim relief. The interim relief obtainable in our law, as in Roman-Dutch law, is *solutio fiduciaria*- payment under security.

[60] It is also trite that a provisional judgment does not amount to a final or definitive order but is purely interlocutory. It is so because after being handed down, the defendant is still permitted to defend the principal case.²⁴ It only becomes final and definitive only if the defendant fails to give notice of its intention to enter the principal case. A judgment granting provisional sentence is thus provisional only and does not prevent the defendant from entering into the principal case and obtaining a dismissal of the claim and reversal of the provisional sentence since the two are inter-reliant.²⁵

[61] A provisional sentence judgment is thus only provisional, in that the defendant may still defend the principal case.²⁶ It does not amount to a final and definitive sentence but is purely interlocutory. It becomes final and definitive only if the defendant fails to give notice with regard to its intention to enter into the principal case.

²³ *Osmans v Corporate International* 2005 (6) SA 494 (W)

²⁴ *Pretorius v Weedon* 1961 (3) SA 702 (N) at 710 at 711B.

²⁵ Para 231, 161, Law SA, 3rd Ed, Vol 4.

²⁶ *Pretorius v Weedon* (*supra*) at 710 in fine 711B.

- [62] It has thus been correctly pointed out that apart from the fact that provisional sentence is only available to a plaintiff who is armed with a liquid document, two further inherent characteristics of provisional sentence have always rendered it distinguishable from other remedies. First is that it only leads to a provisional or interim interlocutory order. Final judgment is still to be considered in the principal case. In the final instance, the claim against the defendant can still be dismissed. Second is that, while on the one hand it entitles the plaintiff to payment of the judgment immediately, on the other hand it affords the defendant the right to insist on security for repayment pending the final outcome.²⁷
- [63] It follows therefore that, if a plaintiff cannot find acceptable security, it is not entitled to provisional relief and must wait for its money until; and if and only if, it can obtain a final judgment in the principal case.²⁸ The rule thus envisages that the two acts provided for in this sub-rule, namely 'demand' and 'payment', should take place simultaneously. It does not require that payment precede the demand or *vice-versa*.²⁹
- [64] Whilst it can be deduced from the foregoing that under rule 8, the plaintiff's right is a qualified one; to wit: the plaintiff is entitled to *solutio fiduciaria*, payment under security,³⁰ as alluded above, the defendant may waive the right to security- *Junius v Alberts 1906 TH 16 at 18*. This is what the applicants have done in this case.
- [65] To the extent that an application for leave to appeal the Free State Full Court's decision refusing the respondent provisional sentence was finally dismissed by the SCA's final judgment or order dated

²⁷ *Twee Jonge v Land and Agricultural Development Bank of SA* 2011 (3) SA 1 (CC) at 9A.

²⁸ *Rhoo de Construction v Cape Provincial Administration* 1976 (4) 925 (C) at 929B.

²⁹ *Van der Merwe v Bonaero* 2000 (4) SA 329 (A) at 334C-F.

³⁰ *Osmans v Corporate International (supra)* at 499H-I.

10th January 2017. It follows that the respondent's failure to prosecute the provisional sentence claim, *ipso facto* brought such proceedings to a necessary degree of finality or rendered same *res judicata*.

[66] It is so since as a "judgment or order" it has three attributes. First, it is final in effect and not susceptible of alteration by the SCA. Second, it is definitive of the rights of the parties. Third, it had the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.³¹

[67] The principle of *exceptio rei judicatae*, for its own part, is based on the irrefutable presumption that a final judgment on a claim submitted to a competent court is correct. This presumption is founded on public policy which requires that litigation should not be endless and on the requirement of good faith, which does not permit of the same things being demanded more than once-*African Farms & Townships v Cape Town Municipality 1963 (2) SA 555 (A) 564*.

[68] In the circumstances, this Court was persuaded and agreed that the said judgment rendered the repayment of the impugned amounts a "*judgment debt*" within the contemplation of section 11 (a) (ii) of the Act. This Court also agreed that this application is vindicatory, within the contemplation of *ABSA v Keet*, and therefore cannot prescribe after three years. In the premise, this Court found that same was still far from prescribing at the time this application was lodged. On this count, the issue of prescription had to fail.

³¹ *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532.

- [69] This Court then considered the respondent's contention that the impugned payments' prescribed on the alternative dates suggested. In this regard, it was the respondent's contention that the impugned payments attracted a prescription period of three (3) years, from the date upon which they became due i.e. 13th August 2018, pursuant to Justice Kruger's judgment; alternatively, 8th September 2019, pursuant to the Full Court's Judgment; further alternatively, 10th January 2020, pursuant to the Supreme Court of Appeal's order refusing the respondent leave to petition. In the premise, the respondent maintained that, absent any timeous and legally recognised interruption of prescription, the provisional sentence payments have prescribed.
- [70] According to the respondent, the applicants' own version was belied by the relief they seek i.e. payment in respect of interest on the amounts claimed – not from 13th August 2015 or thereafter, but way from the date upon which the said payments were due. The respondents referred this Court to *ST v CT*³² where the Supreme Court of Appeal at paragraph 116 held that interest on a claim based on unjust enrichment is not payable until the debtor has been placed in *mora*.
- [71] In claiming interest from 14th September 2010 and 21st April 2011, respectively, the applicants thereby implicitly contend that the respondent was already *in mora* from those dates and consequently the debt in respect of which they now pursue repayment, was already due then. The date of 13th August 2015, being the date on which Kruger J dismissed the provisional sentence claim, according to the respondent, remains "*the factual jurisdictional pillar*" rendering the debt due. It is so, according to

³² 2018 (5) SA 479 (SCA).

the respondent simply because, by then, all the facts necessary to institute proceedings were known to the applicants.

[72] It was also contended for the respondent that the applicants' contentions impermissibly sought to alleviate the provisions of rule 8 to something comparable to a *sui generis* cause of action in circumstances where a cause of action for an entitlement to substantive relief premised on the uniform rules does not exist. Furthermore, that the applicants' argument impermissibly seeks to alleviate the uniform rules to substantive as opposed to procedural status and therefore ignores the fundamental and basic distinction between substantive and procedural law.

[73] That repayment in respect of the impugned payments became due when the underlying *causa* for same was extinguished on 13th August 2015, pursuant to the Kruger J judgment. Alternatively, on 8th September 2016, pursuant to the Full Court judgment. Further alternatively, 10th January 2017, pursuant to the SCA judgment.

[74] It is against this backdrop, in sum, that it was submitted for respondent primarily that the debt sought to be claimed in these proceedings was extinguished by way of prescription on 13th August 2018. Alternatively, on 8th September 2019. Further alternatively, on 10th January 2020.

[75] The applicants, for their own part, denied that the debt has become prescribed as alleged by the respondent and contended that the prescription point is bad. They averred that it is so since the relevant court order was only uplifted on 13th January 2017, by their attorneys of record. That the applicants only became

aware of same on 16th January 2017, when their attorneys informed the second applicant accordingly.

[76] Accordingly, the applicants maintained that because the impugned debt could only have become due once they became aware of the fact that the SCA had dismissed the petition, the three-year prescription period would only have elapsed on or about 16th or 17th January 2020 and not on 13th January 2020 as is contended for the respondent.

[77] It is so that in *Makate*, the apex court held that in interpreting the Act, one must do so through the constitutional prism of section 39 (2) of the Constitution, which favours an interpretation that promotes access to courts, above those that impede it.³³ The term “debt” must thus now be interpreted in the context of the Constitution to a narrower genus; to wit: “...one that involves the payment of money, the delivery of goods or the rendering of services.”³⁴

[78] It is also so that as a rule, prescription starts to run as soon as the debt is due unless the debt is the result of a continuing wrong-section 12 (1) of the Act.³⁵ Section 12 (1) of the Act expressly stipulates that subject to the provisions of subsections (2), (3) and (4), prescription shall commence to run as soon as the debt is due. The adjective “due” *inter-alia* connotes: expected at, planned for or required by a certain time (of a person); at a point where something owed or merited; required as a legal or moral obligation; proper; appropriate; a person’s right.³⁶ What is “due”

³³ Section 39 (2) of the Constitution, expressly requires every court, tribunal or forum to promote the spirit, purport and objects of the Bill of Rights, when interpreting any legislation and when developing the common law or customary law.

³⁴ *Makate v Vodacom* 2016 (4) SA 121 (CC) at paras 87-93.

³⁵ *Standard Bank v Miracle Mile Investments* 2017 (1) SA 185 (SCA).

³⁶ *Concise Oxford English Dictionary, 10th Edition Revised*.

is thus that which is owing and has matured.³⁷ Conversely, if the debt is not due, then prescription cannot run because debts only become due when they are immediately claimable or recoverable.

[79] This means that the debt must be immediately claimable by the creditor in legal proceedings and that the debtor must be under an obligation to perform.³⁸ This also means the correlative of a debt in this sense is a right of action vested in the creditor in which the payment of money, or the delivery of goods, or the rendering of services is claimed. This further means that when payment, delivery or the rendering of services extinguishes the debt, the right of action is likewise extinguished. That is clearly why section 12 (1) of the Act expressly provides that prescription will commence to run once the debt is due.

[80] It is so that prescription in terms of the Act begins to run not necessarily when the debt arises, but only when it becomes due.³⁹ In other words, a debt must be immediately enforceable before it can be claimed.⁴⁰ Conversely, if the debt is not due, then prescription cannot run because debts become due when they are immediately claimable or recoverable. There can therefore be no doubt, that the jurisprudential basis of the legislature in enacting section 12 (1) was to delineate the difference between the coming into existence of a debt and the recoverability thereof.⁴¹

³⁷ *White v Municipal Council of Potchefstroom* 1906 TS 47.

³⁸ *Trinity Asset Management v Grindstone Investments* 2018 (1) SA 94 (CC).

³⁹ *Apalamah v Santam Insurance Co Ltd* 1975 2 SA 229 (D) 232E-G

⁴⁰ *Njongi v MEC Department of Welfare Eastern Cape* 2008 4 SA 237 (CC) 257A, 261A

⁴¹ *List v Jungers* [1976] 2 All SA 121 (A), 19793 SA 106 (A) 121C-D; see also *Eskom v Stewarts and Lloyds (Pty) Ltd* 1979 4 SA 905 (W) 908F; see also *The Master v Ivan Laubser Back & Company Ltd* [1983] 3 All SA 546 (A), 1983 1 SA 986 (A) 1004E; see also *Benson & Walters* [1984] 1 All SA 283 (A), 1984 1 SA 73 (A) 82A-B. See also *ABSA Bank v Keet* 2015 4 SA 474 (SCA), [2015] 4 All SA 1 (SCA) as to when a debt in terms of an instalment agreement became due.

[81] It is trite that a debt is not deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts giving rise to the debt. It is also trite that a party who could have acquired the knowledge by exercising reasonable care is deemed to have had such knowledge- *section 12 (3) of the Act*.⁴²

[82] Consequently, it has been held in a number of decisions in the penultimate courts that the word "debt" in section 12 (1) of the Act does not refer to the narrower concept of a "cause of action", but rather to the broader concept of "right of action", or what has come to be known as the creditor's "claim".⁴³ Harms JA succinctly put it thus in *Drennan Maud Partners v Pennington Town Board*:⁴⁴

"In short, the word 'debt' does not refer to the 'cause of action', but more generally to the 'claim' ... In deciding whether a 'debt' has become prescribed, one has to identify the 'debt', or put differently, what the 'claim' was in the broad sense of the meaning of that word."

[83] In *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd*, the court held that, for prescription to commence running, there has to be a debt immediately claimable by the creditor. Put otherwise, there has to be a debt in respect of which the debtor is under an obligation to perform immediately.⁴⁵ Similarly, in *Sentrachem Ltd v Prinsloo*,⁴⁶ it was

⁴² *ATB Chartered Accountants v Bonfiglio* [2011] 2 All SA 132 (SCA).

⁴³ See *Duvenhage v Eerste Nasionale Bank van SA Bpk* [2005] 4 All SA 46 (N) 57 and *Apalamah v Santam Insurance Company Ltd* 1975 (2) SA 229 (D) 232E-F; *Van Vuuren v Boshoff* 1998 3 SA 200 (SCA) 212F-J

⁴⁴ 1998 (3) SA 200 (SCA) 212F-J

⁴⁵ 1991 (1) SA 525 (A) 532H

⁴⁶ 1997 (2) SA 1 (A) 15B-16D

held that the word “*debt*” refers to the “*right of action*”⁴⁷ and not the “*cause of action*.”

[84] Again, in *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in liquidation)*⁴⁸ Zulman JA said: “*The concept of a ‘debt’ for the purposes of the Act, is wider than the technical term ‘cause of action’*” and Farlam JA succinctly summarised the concept when he said that: “*What prescribes in terms of the Prescription Act, 68 of 1969, is a ‘debt’, that has to say, not a ‘cause of action’, but a ‘claim.’*”⁴⁹

[85] It follows from the foregoing that a “*debt*” will not become due and claimable where there is a legal bar or administrative decision which prevents the creditor from claiming the debt.⁵⁰ This is because there can be no right to institute action where there is a legal bar preventing it. This will be the case even where the administrative decision in question is unlawful. Until the legal bar or administrative action has been removed or set aside, the debt is not claimable and prescription does not run against the creditor.⁵¹

[86] Since the applicants have averred that whilst their attorneys of record only became aware of the SCA order on 13th January 2011, the latter only advised them of same on 16th January 2011. The

⁴⁷ As can be seen from the difference in Afrikaans terminology, this is not simply a distinction without a difference: for the purposes of prescription it does not commence to run when a cause of action comes into existence. It commences when there is a right to institute the action: “the right of action”.

⁴⁸ 1998 1 SA 811 (SCA) 826A-827F

⁴⁹ *Unilever Bestfoods Robertsons v Soomai* 2007 2 SA 347 359F-H

⁵⁰ E.g. Where the benefits under a life policy fall due on the death of the deceased, prescription of the beneficiary’s claim to those benefits starts to run from the date of the insured’s death. The start of the running prescription is not postponed by any delay by the insurer in deciding whether to pay out or not: *Danielz v De Wet* 2009 6 SA 42 (C) paras 47 to 55. Traverso AJP said at para 53 that one must not in such a situation erroneously equate “the concept of a contractual right to performance, with a delayed decision on the part of [the insurer] whether to perform under the contract or not.”

⁵¹ *Njongi v MEC Department of Welfare Eastern Cape* 2008 (6) BCLR 571 (CC) 592 B

question arose as to whether this information can be imputed to the applicants. It is so in our law that the general knowledge acquired by an agent and not communicated to its principal is imputed to the latter merely by reason of the fact that the agent has acquired such knowledge, provided that the knowledge is acquired in the course of the agent's employment and further that there was a duty upon the agent to communicate the information obtained. The knowledge acquired by the applicants' attorneys on 13th January 2017, that the SCA has refused the respondent's leave to petition was therefore to be imputed to the applicants.⁵²

[87] It is common cause that the respondent's provisional sentence claim has been subject of various applications for leave to appeal and/or appeals ever since same was originally dismissed by Kruger J on 13th August 2014, until the SCA finally dismissed the application for leave to petition pertaining thereto, on 10th January 2017.

[88] Section 18 (1) of the Superior Courts Act 10 of 2013, expressly stipulates as follows:

"Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal."⁵³

[89] It follows from the foregoing that the respondent's argument of prescription erroneously equates or conflates the narrower concept of a "cause of action" with the broader concept of "right of action", or what has come to be known as the creditor's "claim".

⁵² *Std Bank v Prinsloo* 2000 (3) SA 576 (C).

⁵³ Emphasis supplied.

The word “debt” in Section 12 (1) of the Act refers to the former as opposed to the latter.⁵⁴ It is so since the word “debt” in our law refers generally to the claim and not the cause of action.⁵⁵

[90] Assuming the respondent was correct that the impugned amounts are quintessential examples of ordinary and straight forward debts which attract a prescription period of three years from the date upon which the debt became due. It follows that between the dismissal of the respondent’s provisional sentence claim by the court *a quo* on 13th August 2015 and the SCA’s dismissal of its application for leave to appeal on 10th January 2017, the applicants’ claim for repayment remained suspended in terms of section 18 (1) of the Superior Courts Act.

[91] To the extent that until 13th January 2017, the dismissal of the respondent’s provisional claim remained suspended and therefore legally barred, prescription commenced to run (i.e. the debt became due) only after the said date, if at all. The applicants lodged this application on 10th January 2020, just before same presumably prescribed. In the premise, this point *in limine* once more failed on this score too.

Whether the applicants made out a *prima facie* case for the relief sought

[92] There are a number of cases which recognise the right of a respondent, in spite of having filed an answering affidavit, to raise an objection *in limine* that the founding affidavit does not make out a *prima facie* case for the relief claimed.⁵⁶ A respondent who

⁵⁴ *Duvenhage v Eerste Nasionale Bank van SA Bpk* [2005] 4 All SA 416; see also *Apalamah v Santam Insurance Company Ltd* 1975 (2) SA 229 (D) 232E-F; *Van Vuuren v Boshoff* 1998 (3) SA 200 (SCA) 212F-J

⁵⁵ *Frieslaar v Ackerman* [2018] JOL 39600 (SCA).

⁵⁶ Erasmus, D1-65, Service 7, 2018.

files an affidavit on the merits is thus entitled to make any legal contention open to it on the facts as they appear on the affidavits and notice of such legal contention need not be given, provided that the raising of the legal contention is not, in the circumstances, unfair to the applicant. The respondent contended that the applicants have not made out a *prima facie* case for the relief sought.

- [93] Paragraphs 7.2; 8.1 and 8.2 of the founding affidavit is the fulcrum against which the applicants have predicate their motion. Paragraph 7.2 reads:

“...we seek simple repayment of an amount we were ordered to pay in terms of a provisional sentence order and judgment the Free State High Court had granted against us on 19 November 2009. The claim is thus one of simple repayment, because GWK [Respondent] was unsuccessful in the main proceeding.”⁵⁷ (sic)

- [94] Paragraphs 8.1 and 8.2, in turn read as follows:

“8.1 GWK must repay what the court had provisionally ordered us [the applicants] to pay to it on the date I have mentioned.

8.2 GWK has exhausted all legal remedies at its disposal and notwithstanding its failure to secure payment of over R12 million against us, it refuses to repay the provisional sentence judgment amount...”

- [95] The respondent, for its own part contended that the matter is not as simple and “one-dimensional” as the applicants contend. It was submitted for the respondent that the applicants should have sounded their claim in *condictio ob causum finitam*. The said cause of action is an offshoot of the *condictio sine causa specialis*.

⁵⁷ Emphasis supplied.

Its purpose is to recover property transferred under a valid *causa* which subsequently fell away- *Kudu Granite Operations v Caterna Ltd 2003 (5) SA 193 (SCA)*.

[96] The respondent maintained that the applicants, in this sense, were obliged to resort to a cause of action based on unjust enrichment and to bring it within its ambit. To the extent that the founding affidavit did not even attempt to engage the jurisdictional requirements of a cause of action based on unjust enrichment, it was wholly insufficient to sustain a cause of action. In the premise, according to the respondent, the application ought to have been dismissed on this ground alone.

[97] This Court disagreed with the respondent on this score. The applicants' cause of action is simply that of payment and nothing more pretentious. They correctly contended that they only sought restitution in the form of repayment of the provisional sentence amounts previously paid by them not as a substantive remedy but a distinct procedural remedy restoring the *status quo ante*.

[98] It is sufficient in our law for a plaintiff claiming payment to simply allege the defendant's failure to make payment. Contrariwise, a defendant wishing to rely on payment, in defence may only allege and prove the payment- *Standard Bank v Oneanate (in liquidation) 1998 (1) SA 811 (SCA)*. In the premise, this point *in limine* too had to fail because the applicants did make out a *prima facie* case for the relief sought.

Whether the impugned payments amounted to part-payment or set-off of the alleged outstanding indebtedness of the applicants to the respondent

- [99] According to the respondent, at the time the impugned payments were made, the respondents and the trust were indebted to it in an amount of at least R4 530 536.05. It was therefore argued for the respondent that to the extent that no allocation was made by the trust as against which particular portion of the outstanding indebtedness the said payments should apply, the applicant was entitled to allocate same to the oldest outstanding debt first.
- [100] The respondent contended that the provisional payments were made in part payment of the debts owed to it by the applicants. According to the respondent, it accepted the impugned payments, regardless of those payments being made in terms of a provisional sentence order and by the trust, in lawful part payment of an existing lawful debt owed to it. That in applying set-off, the total outstanding amounts owed to the respondent by the applicants and the trust are commensurately reduced and set-off.
- [101] It was thus contended for the respondent that since in terms of the accelerated clause contained in the acknowledgement of debt agreement, the applicants are still indebted to it. That the respondent still intends to pursue same imminently by action. In the circumstances, judgment in respect of this application should be postponed and this application stayed, pending the adjudication and determination of its claim in reconvention.
- [102] The applicants, for their own part, contended that the set-off argument is absurd. That it amounts to a litigating party, who has lost in all courts bar one in the land, asserting that as far as it is concerned, the money is still owed, so no matter what, it is

not going to pay it back. That it is difficult to find any legal substance to such an argument, especially since it defies the respondent's obligation post the dismissal of its provisional sentence claim.

[103] Whilst it is so that a defendant who wishes to set-off a liquidated claim against a plaintiff's claim need not file a counterclaim but may plead set-off. It is also so that a defendant who wishes to set-off an unliquidated claim is obliged to proceed by way of a counterclaim- *Muller v BDC 2003* (1) SA 651 (SCA). The counterclaim will then serve to render the illiquid claim liquid, whereupon the claim can be set-off against the main claim. The defendant would then rely in the plea on the existence of the counterclaim and request that judgment in respect of the claim or portion of it, which would be extinguished by the counterclaim be postponed until judgment on the counterclaim. Judgment on the claim must then be postponed, whether on the whole or part of it must then unless the court, on application, orders otherwise- *rule 22 (4)*.

[104] Set-off thus in effect amounts to payment *brevi manu* i.e. the one debt extinguishes the other *pro tanto* as effectually as if payment had been made- *Joint Municipal Pension Fund (Transvaal) v Pretoria Municipal Pension Fund 1969* (2) SA 78 (T); *Cf. Absa Bank Limited v Standard Bank of SA Limited 1998* (1) SA 242 (SCA). It takes place when two parties (a) are mutually indebted to each other; and (b) both debts are liquidated and fully due. Set-off operates automatically and not because of a plea of set-off- *Western Cape Housing Development Board v Parker 2005* (1) SA 462 (C).

- [105] To rely on set-off however, the defendant must allege and prove the following: (a) The indebtedness of the plaintiff to the defendant- *Porterstraat 69 Eiendomme (Pty) Ltd v PA Venter Worcester (Pty) Ltd* 2000 (4) SA 598 (C); (b) That the plaintiff's debt to the defendant is due and payable- *Schnehage v Bezuidenhout* 1977 (1) SA 362 (O); and (c) That both debts are liquidated and that the parties are indebted to each other in the same capacity- *Capricorn Beach Home Owners Association v HES Potgieter* 2014 (1) SA 46 (SCA).
- [106] It follows from the foregoing that if a creditor claims payment, the defendant must plead and prove set-off. Once set-off is established, the claim is deemed to have been extinguished (fully or in part) retrospectively (*ex tunc*) from the moment mutuality of the debts arose. It also follows from the foregoing that only a liquidated debt can be set-off.
- [107] It is trite that a debt is liquidated if and only if (a) it is based on a liquid document; (b) it is admitted; (c) its monetary value has been ascertained; or (d) it is capable of prompt ascertainment- *Fatti's Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd* 1962 (1) SA 736 (T).
- [108] The foregoing exposes at least two flaws in the respondent's argument. The first is that the debt against which the set-off contention is predicated is not liquidated but, is according to the respondent, "*parameterised*." According to the respondent, this is so because:

“It was always difficult for the GWK [respondent] to have done so pursuant to the fact that the debt that it intends to pursue emanates from numerous contracts and a multi-faceted indebtedness that has accrued over almost two decades....”⁵⁸

As matters presently stand... Wilke [second applicant] and the Trust are jointly and severally indebted to GWK [respondent] in a conservative amount of at least R4,530,536.05-payment in respect of which indebtedness GWK intends to pursue in terms of its intended imminent action.”⁵⁹

[109] The second is that in these proceedings, no counterclaim existed to be relied upon, at all material times hereto. The respondent instead relied *inter-alia* on “a judgment that it anticipates to obtain pursuant to an imminent action [which] will extinguish the judgment the applicants pursue in terms of this application”⁶⁰

[110] The respondent further averred as follows, in this regard:⁶¹

“147. GWK claims against Karob [first applicant] Wilke [second applicant] and the Trust are undoubtedly alive, as of right, GWK is entitled to pursue those claims and it is quite able, prepared and now ready to pursue payment from particularly Karob, Wilke and the Trust in relation to any amount owing to it by them respectively....”

148. GWK is in the process of finalising its summons and will shortly be instituting its action in order to pursue payment from Karob, Wilke and the Trust in relation to the aforesaid subject indebtedness. ...”⁶²

[111] In our law, it is so that only a liquidated debt may be set-off. A defendant who wishes to rely on an unliquidated debt must

⁵⁸ Paragraph 150, AA, Bundle 2.

⁵⁹ Paragraph 158, *ibid.* Emphasis supplied.

⁶⁰ Para 137, p155, Bundle 2.

⁶¹ Paras 147-148, AA.

⁶² P158, AA, Bundle 2. Emphasis supplied.

therefore first deliver a claim in reconvention and pray for the postponement of judgment on the plaintiff's claim, pending judgment on the claim in reconvention.

- [112] It is common cause that whilst the provisional sentence summons was entirely predicated against the impugned acknowledgment of debt, the provisional sentence order was granted only in part. It follows that to the extent that the alleged outstanding debt is neither currently liquidated nor based on a liquid document; nor admitted; or its money value ascertained; is incapable of prompt ascertainment; and no counterclaim has been delivered- same cannot be set-off. In the premise, this defence also had to fail.

Whether the impugned payments could be appropriated by the respondent

- [113] It is so in our that that generically, when the debtor does not appropriate the payment to any particular debt, the creditor is entitled to do so when payment is made- *Douglas Green Bellingham v Green* 1998 (1) SA 367 (SCA). It is also so that the rules of appropriation of payment operate when a debtor who owes more than one debt to the same creditor pays the creditor an amount which is insufficient to discharge the total indebtedness to the creditor- *Pfeiffer v First National Bank* 1998 (3) SA 1018 (SCA).

- [114] It is further so that if capital and interest are owing in respect of the same indebtedness, payment must be credited first to interest and thereafter to capital- *Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd (in liquidation)* 1998 (1) SA 811 (SCA). Lastly, whilst it is so that older debts are settled before more recent ones, when none of the specific rules apply, the various debts are settled proportionally.

[115] It is common cause that when payment of the impugned payments was made for the applicants, same was *ex lege* appropriated exclusively to the satisfaction of the amount of the judgment of the provisional sentence and taxed costs and nothing extrinsic thereto. Any debt or cause of action or claim falling outside the said order therefore falls outside the province of these proceedings and irrelevant.

[116] To the extent that when the Supreme Court of Appeal, refused the respondent leave to appeal, the basis of the provisional sentence granting it fell away. It follows that since the claim has now fallen away, there is no legal basis upon which the respondent can hold on to what has been previously provisionally ordered by the Free State High Court on 11th September 2009. It is so since to the extent that a plaintiff who alleges a *causa debiti*, is strictly confined thereto.⁶³ It follows that, it is impermissible for a plaintiff to chop and change the *causa debiti* or to shift the goal posts, after its principal case has been dismissed.

[117] In the premise, this Court had to find that the respondent was not entitled to appropriate the impugned payments to any other alleged debts other than the purpose for which same was paid. This defence thus also failed.

COSTS

[118] The applicants contended that there was really no reason why they should be forced to even bear the most elementary part of their legal costs because the respondent's refusal was so baseless that it warrants a punitive legal cost order. The respondent, for

⁶³ *Wustrow v Wustrow* 1980 (2) SA 308 (W).

its own part contended that, regard being had to its contentions, this application should have never been launched. In the circumstances, it sought a punitive costs order on the scale as between attorney and own client.

[119] The determination of an award of costs in favour of a successful party is *inter-alia*, to indemnify it for the actual expense to which it has been put through having been unjustly compelled to initiate or defend litigation, as the case may be.⁶⁴ Such an award is however seldom a complete indemnity.⁶⁵

[120] Regard being had to the facts and circumstances of this case, this Court concluded that the applicants have been unjustly compelled to initiate this application in order to obtain what clearly has always been due to them. This merely because they have waived their right to security *de restituendo* upon provisional payment of the impugned amounts. It should not be so. In the premise, they are entitled to be indemnified for the actual expense to which they have been put through.⁶⁶

[121] Having found in favour for the applicants. This Court agreed with the applicants that there was really no reason why they should be forced to even bear the most elementary part of their legal costs because the respondent's refusal was so baseless that it warrants a punitive legal cost order. Costs were granted accordingly.

⁶⁴ *Price Waterhouse Meyernel v The Thoroughbred Breeders' Association of SA* 2003 (3) SA 54 (SCA) 61.

⁶⁵ *Payen Components v Bovic Gaskets* 1999 (2) SA 409 (W) 417.

⁶⁶ *Price Waterhouse Meyernel v The Thoroughbred Breeders' Association of SA (supra)*.

CONCLUSION

[122] Indeed, to state that a statutory enactment, if it has no purpose, is futile, is to state an axiom.⁶⁷ It is so since it has long been recognised that giving effect to the policy or object or purpose of legislation is an accepted strategy of statutory interpretation.⁶⁸ It has thus always been the duty of our courts to give effect to the purpose of an enactment.

[123] The object of the Uniform Rules of Court is to ensure a fair trial, and they should be interpreted in such a manner that they conform to this constitutional imperative. Where the rules do not provide for a particular set of circumstances, the court has inherent jurisdiction to read the rules in a manner which enables justice to be administered, and to handle the matter along practical lines.⁶⁹ It is also so that courts have the inherent power to prevent an abuse of the legal machinery.

[124] In *Dadoo v Krugersdorp Municipal Council*, it was clearly stated that the duty of a court is to: *"...carry out effectually the object of a statute and it must be construed to defeat all attempts to do or avoid in an indirect or circuitous manner that which it has prohibited or enjoined."*⁷⁰

[125] In *Ncoweni v Bezuidenhout*, 1927 CPD 130: *per* Gardiner, JP, it was better stated that:

"The Rules of procedure of this Court are devised for the purpose of administering justice and not of hampering it, and where the Rules are deficient, I shall go as far

⁶⁷ E A Kellaway, *Principles of Legal Interpretation*, p 66.

⁶⁸ *Stopforth v Min of Justice; Veenendaal v Min of Justice* 2000 (1) SA 113 (SCA) at para 21.

⁶⁹ *Brown Bros v Doise* 1955 (1) SA 75 (W).

⁷⁰ 1920 AD 530 at 562.

as I can in granting orders which would help to further the administration of justice".⁷¹

[126] And in *Booi v Amathole District Municipality & others* (2022) 43 ILJ 91 (CC), the apex court unequivocally stated as follows:

"As always, any order that this court makes must be just and equitable in the circumstances, as demanded by s 172 of the Constitution".

[127] The provisional sentence which was claimed and partially granted is what entitled the respondent to interim payment of the impugned amounts and nothing more. It is so since it is trite in our law that if a plaintiff withdraws the principal case, it amounts to a withdrawal of the whole action, including the provisional sentence summons, because the two are interdependent.⁷²

[128] There is therefore no justification for the retention of the applicants' monies by the respondent. The obligation on the applicants to pay to the respondent fell away immediately when the Supreme Court of Appeal dismissed the respondent's application for leave to appeal. It is so since once judgment was given, the security was automatically discharged. From that date, the respondents became entitled to a return of what was paid as a result of the provisional sentence judgment. This Court therefore had no discretion in the matter because when money is paid for particular purpose, once the purpose is dispensed with, by parity of reason, the money must be repaid.

[129] It is for the foregoing reasons that this Court granted the order sought. Anything to the contrary would have been subversive of

⁷¹ Emphasis supplied.

⁷² *Reed v Reed* (1905) 3 Buch AC 261.

the purpose and jurisprudential basis of provisional sentence. It would have also flown in the face of the applicants' rights entrenched in sections 9, 25 and 34 of the Constitution.⁷³



JUDGE APS NXUMALO
NORTHERN CAPE DIVISION
KIMBERLEY

26TH APRIL 2022

Counsel for the Applicants:

ADV S GROBLER SC
Instructed by:
Haarhoffs Inc.
Kimberley
Ref: **Mr DD Pretorius**

Counsel for the Respondent:

ADV LOURENS
Instructed by:
Van De Wall Inc.
Kimberley
Ref: **S Addinall/Edna/M05699**

⁷³ The said sections respectively provide as follows: Section 9 (1), everyone is equal before the law and has the right to equal protection and benefit of the law. Section 25 (1), no one may be deprived of property except in terms of law of general application and no law may permit arbitrary deprivation of property. Section 34, everyone has the right to have any dispute that can be resolved by application of law decided in a fair public hearing before a court or where appropriate, another independent and impartial tribunal or forum.