



**HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

DATE

SIGNATURE

Case No: 62041/18

In the matter between:

INDUSTRIAL PLUMBERS (PTY) LTD

Applicant

And

PROBUILD CONSTRUCTION GROUP (PTY) LTD

Respondent

JUDGMENT

SARDIWALLA J

Introduction¹

[1] This is an application for leave to appeal against the whole order by the respondent.

[2] On 4 September 2018, an application was before in the urgent court brought by the applicant against the first respondent interdicting and restraining the respondent from seeking to set-off any alleged indebtedness due to it and directing that the respondent make payment to the applicant of the sum of R1 179 239.21 as reflected in Tyrwhitt payment advice 13 annexed to the application marked "EZ11". On 4 September 2018 I handed down an order granting the relief that the applicant had sought as follows:-

1. The Respondent is interdicted and restrained from seeking a set-off of any alleged indebtedness that is due to it on the basis of penalties and other contract charges arising out of the Centre Forum sub-contract that is presently in dispute or presently payable;
2. The Respondent must forthwith make payment to the applicant in the sum of R 1 179 239.21 as reflected in the payment advice 13 annexed to this application marked "EZ11";
3. The Respondent is to pay the costs of the application.

[3] As a consequence the respondent brought an application for leave to appeal against the entire order. The appeal was before me on 12 February 2019.

¹ *The parties shall in this judgment be referred to as they were in the court a quo.*

Background

- [4] These proceedings stem from an urgent application launched by the applicant against the respondent wherein the applicant sought, in essence, to interdict the respondent from claiming to set-off of an amount of R 9 985 589,32. The applicant issued a payment invoice in the amount of R 1 179 239, 21 for services rendered on the Tyrwhitt Project in terms of invoice 13. The respondent responded to the applicant's invoice by alleging that there were levy penalties that were due to it on the Centre Forum Project and issued a payment certificate for the amount of R9 985 589,32 and therefore a set-off should operate between the two parties. It is the applicant's avers that there was no agreement between the parties to apply the principle of set-off as these were two distinct projects which were regulated by separate contracts. The applicant's further indicate that the respondent's failure to make payment on the Tyrwhitt invoice 13 has resulted in the applicant being forced to suspend work on the Tyrwhitt project and as a result of the respondent's breach in its contractual obligations it launched the urgent application.

Respondent's grounds of appeal

- [5] The respondent disputes my findings, in that it disputes that the applicant is entitled to the relief granted against it. The respondent's grounds of appeal in essence are:-

1. That the matter was not urgent;
2. That the applicant could secure adequate and substantial redress in the ordinary course;
3. That the applicant did not establish a clear right;
4. That the respondent's reliance on the operation of set-off precluded the relief sought; and
5. That the application should have been dismissed with costs.

Leave to appeal

[6] With that background it is appropriate now to consider [Section 17\(1\)](#) of the [Superior Courts Act 10 of 2013](#), which provides the test for an appeal as follows:

“(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-

(a)

(i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard...”

[7] In considering the provisions of s 17(1)(a)(ii) of the Superior Courts Act which provide that leave to appeal may be granted, notwithstanding the Court's view of the prospects of success, where there are nonetheless compelling reasons why an appeal should be heard. There is established jurisprudence in this

Court that where an appeal has become moot the Court has a discretion to hear and dispose of it on its merits.

- [8] The merits of the appeal remain vitally important and will often be decisive. Furthermore, where the purpose of the appeal is to raise fresh arguments that have not been canvassed previously before the Court, consideration must be given to whether the interests of justice favour the grant of leave to appeal. It has frequently been said by the Constitutional Court that it is undesirable for it as the highest court of appeal in South Africa to be asked to decide legal issues as a court of both first and last instance. That is equally true of this Court. But there is another consideration. It is that if a point of law emerges from the undisputed facts before the court it is undesirable that the case be determined without considering that point of law. The reason is that it may lead to the case being decided on the basis of a legal error on the part of one of the parties in failing to identify and raise the point at an appropriate earlier stage.² But the court must be satisfied that the point truly emerges on the papers, that the facts relevant to the legal point have been fully canvassed and that no prejudice will be occasioned to the other parties by permitting the point to be raised and argued.³

The Requirements for set-off

² *Van Rensburg v Van Rensburg & andere* 1963 (1) SA 505 (A) at 510 A-C. The approach has been endorsed by the Constitutional Court. *CUSA v Tao Ying Metal Industries & others* (CCT 40/07) [2008] ZACC 15; 2009 (2) SA 204 (CC) para 68.

³ *Fischer & another v Ramahlele & others* (203/2014) [2014] ZASCA 88; 2014 (4) SA 614 (SCA) paras 13 and 14.

- [9] François du Bois et al *Wille's Principles of South African Law* (9th Ed) at 832, states:

'Set-off, or compensatio, is the extinction pro tanto of debts owed reciprocally to each other by two persons. If the debts are equal both are discharged; if unequal the smaller is discharged, the larger remaining in force for the balance or excess only. Set-off is equivalent to payment, and it consequently operates ipso facto and ipso jure, or automatically, as a discharge total or partial, of the debts in question, the moment four conditions or sets of facts occur. Set-off must be pleaded by the party that wishes to take advantage of it, so that the court may give effect to it; but it is not necessary that this party, before her debt is due, inform the other party that she will claim set-off.'

The four conditions for set-off to operate are that both debts must be: (i) of the same nature, (ii) liquidated; (iii) fully due, and (iv) payable by and to the same persons in the same capacities.'

- [10] The requirement that for set-off to occur there must be reciprocity of debts (both debts must be 'payable by and to the same persons in the same capacities'). In ***Trustees of Douglas & Co.'s Insolvent Estate v Natal Bank (1883) 4 NLR 74 at 77***, Connor CJ said:

'The general rule as to compensatio is that the debt sought to be compensated must be due to the person to whom the other debt is due (Dig. 16.2.1, 16 pr., 18(1), 22, 14; Cod. 4.31.9; Grot. 3.40.6; Voet, 16.2.7; Noodt. Op. 2.282, v Revertamus; Mackeld, § 49.7; Poth. Oblig. § 631, 632, and Pand. 16.2 (15, 18)).'

(Also see ***Trustees of Long, Eben & Co. v Holmes (1853-1856) 2 Searle 307***; ***Machen's Trustee v Henrey (1884-1885) 4 EDC 22***; ***Bridger v Wills (1885-1886) 4 SC 282***.) And in ***Estate Brown v Brown 1923 EDL 291 at 296***, Graham JP said this:

"The debt must be due to the very person who opposes it in compensation" (Pothier, Oblig., vol. 1., part. 3, sec. 494), or, as stated by Green, p154, vol. III [Green's Encyclopaedia of the Scotch Law], "each of the parties mutually indebted must be a creditor of the same jural character as that in which B is the debtor. There can be no concursus as regards either party, where, for example, he is creditor in a

fiduciary or other special character, and debtor in his private capacity, for here he is in truth two different persons and concourse means the union in one person of the opposite interests involved in an obligation.”

- [11] It has been prima facie established in the case of the services rendered and the claim for interim penalties that the debts are owing between the same parties in the same capacity. However, I am on the scant facts before me unable to find that the debt is liquidated in the sense that it is capable of speedy and easy proof. It is trite that a debt is liquidated for the purpose of set-off when, as stated in *Wille’s Principles of South African Law* at 833-

‘ . . . its exact money value is certain or when the amount is admitted by the debtor, or even if the claim be disputed by the debtor, it is of such a nature that the accuracy of the amount can be clearly and promptly established by proof in court; eg an amount due under a judgment, or a taxed bill of costs, or a liquid document signed by the debtor, or a claim for goods sold and delivered, or for salary, or for commission for an agreed amount, or upon an agreed basis.

No set-off takes place where one, if not both, of the debts is unliquidated, eg a claim for damages, or for legal costs where the bill has not been taxed (unless a specific sum had been agreed upon by the parties), or a claim on an account which necessitates a long discussion and debate, or a prolonged investigation into disputed questions of fact.’

(Footnotes omitted.)

- [12] In ***Fatti’s Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd 1962 (1) SA 736 at 738***, Boshoff J said the following:

*‘Our Courts have frequently been called upon to consider whether a claim was liquidated or not for the operation of set-off. Mutual liquidity of debts is an essential pre-requisite for set-off. A debt must be liquid in the sense that it is based on a liquid document or is admitted or its money value has been ascertained, or in the sense that is capable of prompt ascertainment. The decision as to whether a debt is capable of speedy ascertainment is a matter left to the discretion of the individual Judge in each particular case: **Whelan v Oosthuizen 1937 TPD 304 at p 311;***

Lester Investments (Pty) Ltd v Narshi 1951 (2) SA 464 (C) at p 470, and the authorities referred to therein.

And in ***Bardopoulos and Macrides v Miltiadous 1947 (4) SA 860 (W) at 866***, Clayden J said the following about the requirement that the debt must be capable of prompt ascertainment:

'Now although set-off can operate even though some proof is necessary of the debt pleaded in compensation the debt must be capable of "speedy and easy proof" – see Whelan v. Oosthuizen (1937, T.P.D. 304).'

(Also see ***Standard Bank of South Africa Ltd v Renico Construction (Pty) Ltd paras 8-18.***)

- [13] Here, the respondent relies on a recovery programme clause in its standard terms and conditions to establish the applicant's alleged indebtedness. The clause reads as follows:-

"Recovery Programme

- *Should a subcontractor fall behind programme he/she will be issued with one warning to rectify the situation.*
- *If the subcontractor fails to rectify the situation within 7 working days interim late penalties will be deducted from the next payment certificate. These penalties will be reversed once the subcontractor has caught up with the delay (the interim penalty clause)."*

It is averred by the applicant, that pursuant to the clause that if the applicant was behind programme on a specific date, the respondent should have issued a written warning advising the applicant that it was behind programme and allow for a period of 7 working days to rectify the situation before making a demand for payment. The respondent, according to them, was obliged in terms of this clause to allow the applicant to perform a reconciliation of the work, which it has failed to do. It therefore denies any indebtedness owing to the respondent.

[14] The respondent needs to establish, not only the liability of the applicant under the clause on which it relies, but also the disputed terms of the clause and which of the services were indeed not rendered and supplied for which the applicant incurred such liability. This is also not a case where the amount is determined if liability, though disputed, can be established. Those issues, in my view, cannot be considered as susceptible of being easily determined. It requires an investigation that is more than a mechanical exercise (see **Lester Investments (Pty) Ltd v Narshi 1951 (2) SA 464 (C) at 470F-472A; Renico Construction (supra) at 95J-96A.**) It is not clear on the papers presently before me, not even *prima facie*, that some amount is indeed due by the applicant, let alone that such amount is likely to be equal or exceeds the amount of the Centre forum debt. (See **Toucher v Stinnes (S.A.) Ltd 1934 CPD 184.**) I am of the view, on the papers presently before me, that the alleged interim penalty liability of the applicant could not have operated *ipso jure* as a set-off, also because the facts presented in this application do not establish *prima facie* that their alleged liability to the respondent is capable of prompt and easy proof, and it is therefore not liquidated in the sense necessary for set-off to operate.

[15] In my view, therefore, the respondent has not succeeded in showing that the interim penalty debt for the Center Forum Project operated *ipso jure* as a set-off against the Tyrwhitt Project debts. My findings thus far is dispositive of the relief claimed in this application and render it unnecessary to consider whether or not the other requirements of set-off have been established as the Centre Forum Project dispute has been referred to adjudication and is still pending.

[16] In the result the following order is made:

The application for leave to appeal is dismissed with costs, including those of two counsel.

C M SARDIWALLA
JUDGE OF THE HIGH COURT

Date of hearing: 20 March 2019
Date of Judgment: 30 May 2019
Counsel for Applicant: Adv.: PW Pelger
Instructed by: Hewlett Bunn Attorneys
Counsel for Respondents:
Instructed by: Allen & Overy Attorneys