Reportable: Yes / No
Circulate to Judges: Yes / No

Circulate to Magistrates: Yes / No

IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape Division)

Case no: **809/99**

Date heard: **2002-05-07**

Date delivered: **2002-05-10**

In the matter of:

YELLOW JACKET CC **FIRST PLAINTIFF**

USABCO (PTY) LIMITED **SECOND PLAINTIFF**

versus

LONG DISTANCE TRANSPORT (PTY) LIMITED **DEFENDANT**

Coram: **MAJIEDT J**

JUDGEMENT

MAJIEDT J:

1. This matter was set down for hearing on the issue of the quantum of the respective claims herein only. The parties

have settled most of their outstanding differences including the quantum of damages payable to each other. That settlement is embodied in what is labelled a "*Settlement Agreement*", the terms whereof I have been asked merely to note at this juncture given the fact that there are still outstanding issues between the parties. These outstanding issues are the following:

a) Whether the Plaintiffs are entitled to interest on the amounts claimed from the date of service of summons on the Defendant and if not, from which date should such interest run?

b) What costs awards should be made in the circumstances?

3. It is important to note at the outset that the dispute as between the First Plaintiff and the Defendant had been settled on the basis of an apportionment of 65/35 in favour of the First

Plaintiff. The dispute as between Second Plaintiff and Defendant had been settled on the basis that the Defendant pays to the Second Plaintiff an amount which equals 50% of the Second Plaintiff's agreed quantum.

4. The nett result of the aforementioned agreement is that the Defendant is indebted to the First Plaintiff in the sum of R120110,38 and to the Second Plaintiff in the sum of R55726,85.

5. The dispute in respect of the date from which interest should run arises as follows:

5.1 For the First Plaintiff Mr Combrinck has submitted that set-off should apply whereby the respective debts would be extinguished and interest should be awarded on the amount which in the nett result the Defendant would owe to the First Plaintiff. Such interest should then run at the

legally prescribed rate from the date of the service of summons. In respect of the Second Plaintiff Mr Combrinck has submitted that interest should run from the date of service of summons.

5.2 Mr Amiradakis for the Defendant on the other hand, has submitted that set-off should not apply and that I should give judgement on the claim in convention as well as the claim in reconvention and make the usual orders as to interest on the respective claims. In addition he has submitted that the Plaintiff's particulars of claim does not meet the requirements set forth in sec 4(ii) of the Prescribed Rate of Interest Act, no. 55 of 1975 ("*the Act*") and in Uniform Rule of Court 18(10). With regard to the Second Plaintiff's claim for interest, he has submitted that the Second Plaintiff is only entitled to interest as from 24 April 2002, the date on which a letter was written by the Second Plaintiff's attorneys to the Defendant's

attorneys containing a description of the movables destroyed in the collision which is the subject matter of the dispute and which had not been particularized in that manner in the particulars of claim of the Second Plaintiff.

6. I find it convenient to deal first with the submissions advanced by Mr Amiradakis concerning the adequacy of the Plaintiffs' particulars of claim regarding the damages allegedly incurred by them. Rule 18(10) requires a plaintiff suing for damages to set them out in a matter which would enable a defendant reasonably to assess the quantum of such damages. In addition, sec 4(ii) of the Act reads as follows:

> "'demand' means a written demand setting out the creditor's claim in such a manner as to enable the debtor reasonably to assess the quantum thereof."

Rule 18(10) quite clearly envisages that there should be more than a mere broad statement of principles as to the basis on which damages are being claimed. See **Sasol Industries**

(Pty) Ltd t/a Sasol 1 v Electrical Repair Engineering (Pty) Ltd t/a LH Marthinusen 1992(4)SA 466(W) at 472.

On the other hand, however, there is a concomitant responsibility on a Defendant to take the necessary steps to make a reasonable assessment of the Plaintiffs' damages: a defendant is not a mere passive party in this process. See: **Simmonds v White and Another 1980(1)SA755(C)** where Friedman J said the following at 759A:

> "The Rules do not contemplate that a defendant can sit back and expect to be supplied with all the information he might require in order to make an adequate tender. It is expected of a defendant that he should make his own investigations."

In the present instance Mr Amiradakis' complaint is that the First Plaintiff has, unlike the Defendant in its counterclaim, had failed to specify the make and model of its vehicles and had simply furnished the registration numbers thereof. With regard to the Second Plaintiff, the complaint is that it had failed to specify the damaged goods, as it has done in the aforementioned letter of 24 April 2002. It is notable that the

Defendant, if indeed it had a valid complaint regarding the adequacy of the Plaintiffs' particulars of claim, has failed to avail itself of the various remedies available to it. So for instance it has failed to:

a) Request assessors' reports and the like from the Plaintiffs;

b) Request from the authorities details of the vehicles on the strength of the registration numbers of the vehicles furnished by the First Plaintiff in his particulars of claim;

c) File an exception as to the pleading being vague and embarrassing or proceeding in terms of Rule 18(12) read with Rule 30;

d) Requesting details of the vehicles and movables in a written request for further particulars to prepare for trial.

In my view Mr Amiradakis' complaint has no merit and I am further of the view that Plaintiffs' particulars of claim pass muster when regard is had to Rule 18(10). A Defendant, confronted with particulars of claim framed as those are in the present matter would, with a little effort on its part, be in a position to ascertain the

quantum of the Plaintiffs' damages. Section 4(ii) of the Act, quoted above, to my mind imposes no further obligation on a pleader of fact in as much the section is almost identically worded to Rule 18(10). What I have held therefore in respect of Rule 18(10) applies equally to sec 4(ii) of the Act.

7. I now turn to the question of set-off as contended for by Mr Combrinck for the Plaintiffs. It is well settled in our law that set-off comes into operation when two parties are mutually indebted to each other and both such debts are liquidated and fully due. One debt would extinguish the other *pro tanto* as effectually as if payment has been made. Once set-off has been established, the claim is regarded as extinguished from the moment the mutuality of the debts existed.

   See in this regard: **Schierhout v Union Government (Minister of Justice) 1926 AD 286** at 290;

   Mahomed v Nagdee 1952 (1) SA 410 (A).

   It is not in dispute that:

   a) the parties hereto are mutually indebted to each other; and

b) both such debts are liquidated (having been agreed upon) and are fully due.

Set-off should be clearly distinguished from payment of a debt in the ordinary course of business.

See: **Absa Bank Ltd v Standard Bank of SA Ltd 1998(1) SA 242 (SCA)** at 251 G.

In my view what Mr Amiradakis proposes would amount to a simple payment of a debt as agreed between the parties. His proposal may lead to startling results in practice. One such startling result as advanced by Mr Combrinck is that the Defendant may be able to execute on a writ as a consequence of a judgement in its favour, whereas the Plaintiffs may not be able to do so, for example by reason of the fact that the Defendant does not own sufficient realisable assets to satisfy the writ. In the premises therefore I am of the view that set-off operates in this matter and that I should indeed eventually grant judgement in an amount in favour of the Plaintiffs once set-off has been applied.

8. Section 2A of the Act, introduced by way of amendment on 5 April 1997, drastically altered the common law in that interest may now be claimed on an unliquidated debt. The material portions of section 2A reads as follows:

> "2A(1) Subject to the provisions of this section the amount of every unliquidated debt as determined by a court of law, or an arbitrator or an arbitration tribunal or by agreement between the creditor and the debtor, shall bear interest as contemplated in s 1.
>
> (2)(a) Subject to any other agreement between the parties the interest contemplated in ss (1) shall run from the date on which payment of the debt is claimed by the service on the debtor of a demand or summons, whichever date is the earlier.
>
> .....
>
> (5) Notwithstanding the provisions of this Act but subject to any other law or an agreement between the parties, a court of law, or an arbitrator or an arbitration tribunal may make such order as appears just in respect of the payment of interest on an unliquidated debt, the rate at which interest shall accrue and the date from which interest shall run."

Interest is generally to be awarded in terms of the provisions

contained in sec 2A(2). In certain overriding, discretionary instances, interest could be awarded in terms of sec 2A(5) *supra*.

See: **Adel Builders (Pty) Ltd v Thompson 1999 (1) SA 680 (SE)** at 692 G as confirmed on appeal at **2000 (4) SA 1027 (SCA)** at 1032 G-I.

In the present matter the Plaintiffs ask for interest to run as from the date of service of their summons. Mr Amiradakis has, based on his earlier submissions advanced in respect of the adequacy of the Plaintiffs' particulars of claim as regards the quantum of the damages, contended for a much later date. For the reasons which I have set forth herein, I am of the view that interest should indeed run as contended for by the Plaintiffs. There are no compelling considerations why it should not run from the date as provided for in sec 2A(2). In any event, even if I had had to exercise my discretion in terms of sec 2A(5), the end result would have been the same.

9. There remains the question of costs. I shall deal with the position of the Second Plaintiff first, since it is the easier of the

two. There has been agreement between the parties as per a letter between the attorneys which was handed in by agreement at the hearing as exhibit E, that the Defendant will be liable for 50% of the Second Plaintiff's costs up to and including the 9th February 2001 which is the date of the said letter. At the previous hearing when the merits were dealt with, counsel for the Plaintiffs had indeed placed on record that Second Plaintiff is not proceeding with its claim as against the Defendant. The reason for that recordal is clearly in view of the contents of exhibit E which had not been placed before me at that time. Be that as it may, it seems to me therefore that Mr Combrinck is correct that I should in accordance with exhibit E order that the Defendant pays

a) 50% of the Second Plaintiff's costs up to and including 9th February 2001; and

b) the Second Plaintiff's full costs as from 16th February 2001 until date of payment.

With regard to the position of the First Plaintiff, Mr Amiradakis has advanced the following contentions: Firstly that I should disallow the qualifying fees of the expert witness *Lubbe* who testified during the merits for the Plaintiffs, and secondly that I should make an apportionment as to the costs similar to the apportionment agreed between the parties, i.e. 65/35.

The first contention is based on the startling submission that, according to Mr Amiradakis' instructing attorney, the Plantiffs' lay witnesses were of such good quality that it was not necessary to have called *Lubbe*. This contention is so misguided that it warrants no further comment. Suffice to say that since the matter had been settled on the merits, and no judgement on the credibility or otherwise of any witnesses had been necessary in the circumstances, the contention should be rejected without much ado. The Plaintiffs were quite clearly entitled to advance such evidence as they deemed necessary in the circumstances to prove their case on a balance of probabilities. Such evidence to my mind include that of the expert witness *Lubbe*.

As to the second contention I am of the view that it is not advisable to make apportionments when it come to costs. The First Plaintiff has been substantially successful and deserves

the normal costs order which follows the result.

10. In the premises I issue the following order:

a) **The terms of the settlement agreement, marked X and initialled by me and dated 7th May 2002, is made an order of Court.**

b) **Judgement is entered for First Plaintiff as against Defendant in the sum of R120110.38.**

c) **Defendant is ordered to pay interest on the aforesaid sum of R120110.38 at a rate of 15.5% per annum from date of service of summons to date of payment.**

d) **Defendant is ordered to pay First Plaintiff's cost of suit.**

e) **Judgement is entered for the Second Plaintiff as against the Defendant in the sum of R55726.85.**

f) **Defendant is ordered to pay interest on the aforesaid sum of R55726.85 at the rate of 15.5% per annum from date of service of summons to the date of payment.**

g) **The Defendant is ordered to pay 50% of the Second Plaintiff's costs up to and including 9th February 2001 and to pay the full costs of the Second Plaintiff from 16th February 2001.**

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SA MAJIEDT

JUDGE

ADVOCATE FOR THE PLAINTIFF**:** **L COMBRINCK**
ADVOCATE FOR THE DEFENDANT: **AG AMIRADAKIS**

ATTORNEY FOR THE PLAINTIFF: **DUNCAN & ROTHMAN**
ATTORNEY FOR THE DEFENDANT: **VAN DE WALL & PARTNERS**

DATE OF HEARING: 2002-05-07
DATE OF JUDGEMENT: 2002-05-10