

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED: YES / NO
30 October 2025	
DATE	SIGNATURE

CASE NUMBER: 22/22038

CASE NUMBER: 22/22039

CASE NUMBER: 22/22370

In the matter between:

JACOBUS IGNATIUS VAN NIEKERK N.O.

PLAINTIFF

(In his capacity as appointed curator bonis of
Africa Cash and Carry (Crown Mines) (Pty) Ltd
in terms of section 163 of the Tax Administration Act, 28 of 2011)

AND

AFRICA KZN PROPERTY (PTY) LTD

DEFENDANT

(Registration Number: 2006/032484/07)

AFRICA (POLOKWANE) PROPERTY (PTY) LTD

DEFENDANT

(Registration Number: 2006/032484/07)

MASTERTRADE 285 (PTY) LTD

DEFENDANT

(Registration Number: 2000/027487/07)

Heard: 21 July 2025

Delivered: 30 October 2025

Headnote: Set-off — Curator bonis — Preservation order under s 163 of the Tax Administration Act 28 of 2011 — Whether curator becomes separate legal persona — Mutuality of debts.

Summary: The plaintiff, acting as curator bonis of Africa Cash and Carry (Crown Mines) (Pty) Ltd (“Crown Mines”), sued three related companies for repayment of loans advanced by Crown Mines. The defendants relied solely on set-off, contending that Crown Mines was indebted to them through a claim ceded by Elephante Import and Export (Pty) Ltd, and that reciprocal debts were thereby extinguished. The plaintiff argued that set-off could not operate because, under the section 163 preservation order, the assets of Crown Mines had vested in the curator bonis while its liabilities remained those of Crown Mines, with the result that the debts were not owed between the same parties in the same capacities.

Held: The curator bonis does not constitute a separate juristic person but acts in a purely representative capacity. The vesting of assets under section 163 confers custody and control, not ownership. Crown Mines remained the true creditor, and the curator merely represented it. The debts were therefore owed between the same parties in the same capacities, and the requirements for set-off were met. The operation of set-off was not excluded by the preservation order.

Held: The defence of set-off succeed. The plaintiff’s claims in all three actions are dismissed with costs.

JUDGMENT

WINDELL J:

Introduction

[1] These proceedings concern three related actions in which the plaintiff, Mr Jacobus Ignatius van Niekerk N.O., in his capacity as curator bonis of Africa Cash and Carry (Crown Mines) (Pty) Ltd (“Crown Mines”), seeks repayment of loans advanced by Crown Mines to the three defendants: Africa KZN Property (Pty) Ltd, Africa Polokwane Property (Pty) Ltd, and Mastertrade 285 (Pty) Ltd. In each action, the defendants rely solely on the defence of set-off, alleging that their indebtedness to Crown Mines was extinguished by reciprocal debts arising from a claim originally held by Elephante Import and Export (Pty) Ltd (“Elephante”) and successively ceded to them.

[2] The facts and legal issues are identical in all three actions. The parties agreed that the KZN Property case (case number 22/22038) would serve as the reference matter, and that the court’s decision therein would determine the outcome of the other two cases, Polokwane Property (case number 22/22039) and Mastertrade 285 (case number 22/22370).

[3] The existence and quantum of the loans are not in dispute. As of 1 July 2022, the respective loan debts amounted to: Case number 22/22038 (KZN Property) R28,104,880; Case number 22/22039 (Polokwane Property) R13,301,644; and, Case number 22/22370 (Mastertrade) R244,674.

[4] It is further common cause that Elephante held a claim against Crown Mines exceeding the aggregate of the Crown Mines loans. That claim was successively ceded from Elephante to KZN Property, then to Polokwane Property, and finally to Mastertrade,

each cession being used, according to the defendants, to discharge the recipient's indebtedness to Crown Mines by operation of set-off.

[5] The parties are agreed that the chain of cessions is valid and that the amounts are liquidated. The sole issue for determination is whether set-off could lawfully operate after the appointment of the plaintiff as curator bonis under a preservation order granted in terms of section 163 of the Tax Administration Act 28 of 2011 ("the TA Act"), which vested the assets of Crown Mines in the curator.¹

The parties' argument

[6] Set-off, or compensation (*skuldvergelyking*), operates automatically by operation of law when certain requirements are satisfied.² The essentials are well-established:³

- (a) the debts must be between the same parties in the same capacities;
- (b) the debts must be of the same kind (money or fungibles of the same species and quality);
- (c) both debts must be liquidated, due and enforceable; and
- (d) set-off must not be excluded by agreement or statute.

[7] The plaintiff contended that one of the requirements for set-off was not met because the debts were not owed between the same parties in the same capacities. The argument proceeded as follows: The curator bonis was appointed pursuant to a preservation order under section 163 of the TA Act. In terms of clause 4 of that order, all

¹ See section 163(4) of the TA Act.

² *Great North Farms (Edms) Bpk v Ras* [1972] ALL SA 124 (T); 1972 (4) SA 7 (T); *Absa Bank Limited v Standard Bank of SA Limited* [1997] 4 All SA 673 (A); 1998 (1) SA 242 (SCA).

³ *Capricorn Beach Home Owners Association v HES Potgieter t/a Nilands and Another* 2014 (1) SA 46 (SCA) para [13]; *Road Accident Fund v Myhill NO (MyHill)* 2013 (5) 426 (SCA) para [23].

the rights, title and interest in the assets of Crown Mines vested in the curator bonis, not in Crown Mines, whilst the liabilities of Crown Mines remained with the latter. The plaintiff contends that the cession agreement vested the defendants with a right to claim from Crown Mines the debt owing to Elephante by Crown Mines, whilst Crown Mines' appointed curator bonis remained vested with the right to claim the debts owing by the defendants to Crown Mines. This, it is argued, constitutes an apt example of debts not owed by the same parties in the same capacities, resulting in the requisites for set-off to take place not being met.

[8] The plaintiff further submitted that the preservation order itself precluded any operation of set-off. Clause 8 of the order prohibited anyone other than the curator bonis from dealing with or disposing of Crown Mines' assets. Allowing the defendants to extinguish the loans by set-off would amount to an unauthorised dealing with those assets and undermine the protective purpose of the order.

[9] The defendants, on the other hand, advanced the opposite contention. They argued that the curator bonis does not constitute a separate legal persona but acts merely as the representative of Crown Mines, in whose stead and for whose benefit he litigates. The vesting of assets under section 163(7)(b) of the TA Act (which includes personal claims (vorderingsregte)) was said to confer only custody and control, not ownership, and is analogous to the vesting that occurs in liquidators, trustees, or executors. Consequently, there remained only two parties to each transaction—Crown Mines and the relevant defendant—and the debts were reciprocal.

[10] In support of their argument the defendants relied on *Gainsford and Others NNO v Tanzer Transport (Pty) Ltd (Gainsford)*⁴ for the proposition that it is 'pedantic' or 'illusory' to distinguish between a company in liquidation and its liquidator cited *nomine officii*. They argued that the same reasoning applies to a curator bonis: the curator merely steps into the shoes of the company. On that basis, the requirements for set-off—reciprocity, liquidity, and due performance—were all satisfied, and the set-off operated automatically by law to extinguish the debts owed to Crown Mines.

[11] Finally, the defendants submitted that nothing in section 163 of the TA Act, or in the terms of the preservation order itself, alters the ordinary principles governing set-off. The purpose of the order, they argued, was protective and administrative—to secure and preserve the taxpayer's assets pending assessment and recovery of tax—not to create a new juristic person or to interfere with existing civil rights. The order was never intended to preclude the automatic operation of set-off between mutual debtors where the common-law requirements are satisfied.

Evaluation

[12] The issue for determination is whether, on a proper interpretation of the preservation order made under section 163 of the TA Act, mutuality of indebtedness existed between Crown Mines and the defendants so as to permit the operation of set-off.

⁴ 2014 (3) SA 468 (SCA) para [14].

[13] It is well established that set-off cannot operate between debts owed by or to a person in different legal capacities. A debt owed to a person in a representative capacity cannot be extinguished by a debt owed to or by that person personally.⁵

[14] However, our law also recognises that a person acting in a representative capacity does not become a separate juristic person merely by virtue of that appointment. In *Gainsford*,⁶ the Supreme Court of Appeal confirmed that a liquidator acts *nomine officii* on behalf of the company; the company remains the true litigant.

[15] Against that background, the nature and purpose of the curator's appointment under section 163 of the TA Act must be considered. The section empowers the Commissioner for the South African Revenue Service to apply for a preservation order to secure the collection of a tax debt and, where necessary, for the appointment of a curator bonis 'in whom the assets vest'. Such vesting does not transfer ownership or create a new juristic person; it authorises the curator to manage and preserve the taxpayer's assets under the authority of the court for the satisfaction of its tax obligations.

[16] The wording of the preservation order in this case accords with that interpretation. It vested in the curator 'the rights, title and interest in all the assets' of Crown Mines, while expressly providing that its liabilities remained those of the company. The curator's role was administrative and protective: to control and realise the assets on behalf of Crown

⁵ See *Christie, The Law of Contract in South Africa*, 8ed at 581; *LAWSA Vol 31 para 245; Road Accident Fund v Myhill NO 2013 (5) SA 426 (SCA) para 23.*

⁶ 2014 (3) SA 468 (SCA).

Mines, subject to the court's authority. The order therefore neither extinguished the company's legal personality nor conferred on the curator an independent estate.

[17] This understanding finds support in *Minister of the Interior v Cowley NO*,⁷ where the court described a curator bonis as 'no more than a superintending guardian who supplements the patient's lack of capacity to contract or litigate'. The curator therefore represents, but does not replace, the person or entity on whose behalf he acts.

[18] By analogy, the curator bonis in this matter stands in the same position as a liquidator or trustee. The debts owed to and by Crown Mines remain those of the company, even though the curator is the person authorised to enforce or discharge them. Accordingly, there is no want of mutuality between the parties: the debts exist between the same legal persons—Crown Mines and each defendant—notwithstanding that Crown Mines acts through the curator.

[19] Nor does clause 8 of the preservation order alter this conclusion. The clause prohibits any person other than the curator from dealing with Crown Mines' assets, but it does not purport to exclude the operation of set-off as a matter of substantive law. Its purpose is administrative—to prevent unauthorised interference with the assets under the curator's control. Set-off, by contrast, is a legal consequence that arises automatically when reciprocal liquidated debts exist. To interpret clause 8 as extinguishing that consequence would go beyond its text and purpose.

⁷ 1955 (1) SA 307 (N).

[20] Accordingly, this court finds that the mutuality requirement was satisfied and that the set-offs pleaded by the defendants operated automatically by operation of law to extinguish the debts owed to Crown Mines. The plaintiff's contentions to the contrary cannot be sustained.

Conclusion

[21] It follows from the reasoning above that the defence of set-off must succeed. The debts owed by the defendants to Crown Mines, represented by the curator bonis, were reciprocally matched by the debts owed by Crown Mines to the defendants through the Elephante claim as successively ceded. The requirements of liquidity, reciprocity, and due performance were all satisfied, and there is no statutory or contractual bar to the operation of set-off.

[22] The plaintiff's contention that the preservation order created a new legal persona, or otherwise interrupted the mutuality of the debts, cannot be upheld. The curator bonis acts merely in a representative capacity and not in substitution of Crown Mines. The legal position is therefore that the loans relied upon by the plaintiff were extinguished by operation of law through set-off.

[23] As the parties agreed that the outcome in the KZN Property action would determine the other two matters, the same result follows in the cases of Polokwane Property and Mastertrade 285 (Pty) Ltd, which are factually and legally identical.

[24] In the circumstances, the following order is made:

1. The plaintiff's claims in all three actions — case numbers 22/22038, 22/22039, and 22/22370 — are dismissed.
2. The plaintiff is ordered to pay the defendants' costs in each action on Scale C, including the costs of senior counsel.

L WINDELL

Judge of the High Court

Gauteng Division, Johannesburg

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 30 October 2025.

Appearances

For the plaintiff:	Ben Swart SC
Instructed by:	EY Stuart Incorporated
For the defendants:	PF Louw SC
Instructed by:	Essack Attorneys Inc.
Date of Hearing:	21 July 2025
Date of Judgment:	30 October 2025