REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2011/33789

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

18/9/2012
DATE

SIGNATURE

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA — Applicant

and

RENICO CONSTRUCTION (PTY) LTD — Respondent

JUDGMENT

SUTHERLAND J:

Introduction

[1] The applicant wants the respondent to pay it R953,599.91. There is no contractual privity between the parties. Their only connection is their distinct and separate commercial dealings with Roofcrafters (Pty) Ltd (Roofcrafters).

[2] The applicant factored invoices for money owing to Roofcrafters. Among such invoices were those evidencing the respondent's indebtedness to Roofcrafters. The respondent's invoices are owned by the applicant either through purchase from Roofcrafters (clause 4 of the factoring agreement) or by cession (clause 13 of the factoring agreement). Roofcrafters is now extinct, with effect from 'about' November 2009.

[3] On 13 November 2009, the applicant demanded payment of a sum from respondent, based on the purchase and cession. The accounts of Roofcrafters recorded respondent as indebted to Roofcrafters in a sum of R 2,441,791.67. Respondent refused to pay. The right of the applicant *per se* to make such a claim based on the aforementioned facts is not disputed. The respondent's justification for not paying is that it alleges that when demand was made by applicant, it no longer owed anything to Roofcrafters.

[4] The reason why respondent says it owes nothing to Roofcrafters is because the relationship between respondent and Roofcrafters involved reciprocal indebtedness. Respondent says that Roofcrafters owed it more than it owed Roofcrafters and that these reciprocal debts were extinguished by set off, leaving a balance owed to respondent by Roofcrafters, and nothing to pay over to the applicant.

[5] The controversies that were raised on the papers were:

5.1. What debts and in what sum could applicant legitimately claim from respondent based on its factoring agreement with Roofcrafters?

5.2. What were the characteristics of the debts owed by Roofcrafters to respondent, and more particularly, were they liquidated and thereby capable of set-off.?

5.3. In any event, was the applicant wrong to sue by motion when it knew of the alleged dispute of fact about the set-off? Such knowledge is not disputed.

[6] It is common cause that prior 30 September 2009 the respondent had no notice of the applicant's interest.

The applicant's claim

[7] The sum claimed is composed of two sums representing different debts owed by Roofcrafters to the applicant. R811,501.13 is for factored debts owed by respondent to Roofcrafters and a certificate of balance evidences this fact. R 151,424.72 is for an overdraft facility. As pointed out by the respondent, there is no averment on the papers that exposes the respondent to any liability in respect of the overdraft owed by Roofcrafters to the applicant.

Can set-off be applied by respondent?

The Law

[8] The defence of set–off to a claim for payment of a debt is what Roman-Dutch lawyers called *Compensatio*. What is it? *Gerard Noordt, commentarius in Digesta 16.2* articulated *compensatio* to mean that obligations are expunged *brevu manu*, a formulation applauded by Trollip J in Joint Municipal Pension Fund (Transvaal) v Pretoria Municipal Pension Fund 1969 (2) SA 78 (T) at 86B.

[9] What attributes must each debt possess to qualify for set-off? The elements are:

9.1. Both debts must be due to and owed by the same pair of persons.

9.2. Both debts must be liquidated.

9.3. Both debts must be due and payable.

[10] In a case where a cessionary steps into the shoes of the creditor, element 1 remains satisfied. Usually the difficulties arise with efforts to establish the existence of elements 2 and 3.

[11] Cloete JA remarked in Ackermans Ltd Commissioner SARS & Ano 2011 (1) SA 1 (SCA) at [8]: that:

> "It is trite that set off comes into operation when two parties are mutually indebted to one another and both debts are liquidated and fully due."
>
> (It is plain that the use of the word 'mutually' in this context is used in its popular sense of 'reciprocally').

[12] The importance of determining when the debts are due and payable is especially acute in cases of insolvency or liquidation. The critical moment must precede *concursus creditorum*. (Thorne & Ano NNO v The Government 1973 (4) SA 42 (T) at 45.)

[13] How to detect the condition of liquidity is topic of some agitation. The SCA in Thoroughbred Breeders Association v Price Waterhouse Inc 2001 (4) SA 551 (SCA) at [86] held that *mora* interest cannot ever be liquidated. Maharaj v SANLAM Life Assurance 2011 (6) SA 17 (KZN) held that the proceeds of a sickness policy was liquidated and so too was a sum derived from the reversal of commission payments.

[14] In Frank v Premier Hangers CC 2008 (3) SA 594 (C), the predicament of a litigant who wishes to invoke set-off is addressed. The court, having reiterated that unliquidated damages can never be set off against a debt, went on to demonstrate that the remedy of such a party is to seek a stay of the claim and thereupon establish by legal proceedings the damages and its quantum. (See too: Western Cape Housing Development Board v Parker & Ano 2003 (3) SA 168 (C).)

[15] The concept of a 'liquidated amount in money' has been frequently examined. In Quality Machine Builder v M I Thermocouples (Pty) Ltd 1982(4) SA 591 (W) an application for summary judgment was resisted on the premise that the plaintiff's claim was unliquidated. The claim was for the fair and reasonable remuneration for work done and materials supplied. Coetzee J held that the claim was liquidated, because, in the instant case, the bargain had been struck as between businessmen and 'usually' as between such persons, charges were

levied on some well known basis rendering the price easily and speedily ascertainable. (*Ergo,* an identical transaction between a businessman and a lay customer would not be liquidated (!)) In reaching this decision, Coetzee J distanced himself from an contrary approach by Colman J in Oosrandse Bantoesakeadminstrasie v SANTAM Versekerings Maatskappy & andere [2] 1978 (1) SA (W) at 164H – 169C, who had held that:

> "A money claim is liquidated if the amount thereof has been fixed by agreement or by the judgment of a Court. To those two cases one can perhaps add a third one (as suggested in Botha v Swanson & Co. (Pty.) Ltd., 1968 (2) P.H. F83, and in Leymac Distributors Ltd. v Hoosen and Another, 1974 (4) SA 524 (D)), namely, if the ascertainment of the amount is a mere matter of calculation. In the last-mentioned case, however, the data upon which the calculation is to be based would themselves have to be amounts about which there was no room for uncertainty, estimation or debate. *When, in order to prove his claim, the plaintiff will have to show that it, or some element in it, or some datum involved in its computation, was fair or reasonable, the claim is not liquidated.*"

(Emphasis supplied)

[16] The perspective articulated by Coetzee J is comprehensible only upon the grounds that a value judgment has been injected into the decision about whether or not a claim is liquidated. The inspiration for that approach is the Judgment of Boshoff J in Fattis Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd 1962 1 SA 736 (T) at 737. Boshoff J traversed the earlier decisions and held thus:

> "I have been unable to find a reference to the words 'debt or liquidated demand' in the law relating to the procedure of the old Courts of the Netherlands. The expression is derived from the English Rules of Court. In the case of Lagos v

Grunwalt, 1910 (1) K.B. 41 at pp. 47 and 48, FARWELL, L.J., referred to the expression as used in the English Rules of Court and came to the conclusion that a claim on a contract for quantum meruit fell within the meaning of the expression. He expressed the view that the expression pointed to the old division of common law actions. The old indebitatus counts which had from time to time been rendered more and more concise were designated, with little difference of meaning, by the terms 'indebitatus counts', 'money counts' or 'common counts'; the expression 'common counts' or 'common indebitatus counts' being often used to designate those of most frequent recurrence, namely where the debt is for goods sold and delivered, goods bargained and sold, work done, money lent, money paid, money received, interest, and upon accounts stated; and the expression 'money counts' being sometimes used to particularise those for money lent, money paid, and money received. There were also formerly in use counts of quantum meruit and quantum valebat, which were adopted when there was no fixed price for work done or goods sold, etc. These counts fell into disuse and were superseded by the general application of the indebitatus counts. Everything that could be sued for under those counts came within the description of debt or liquidated demand.

*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 it 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 G T.P.D. 304 at p. 311; Lester Investments (Pty.) Ltd v Narshi, 1951 (2) SA 464 (C) at p. 470, and the authorities referred to therein. In the last-mentioned case the Court regarded a claim in respect of repairs on all the facts before it as a liquidated claim, even though evidence had to be led on the necessity of doing the work, the nature of the work done and the reasonableness of the charge therefore. All the factors connected therewith were readily ascertainable and proof in regard thereto was ready to hand. In this connection it should be mentioned that the extinction of one debt by another does not depend upon the ability of the party relying upon it to prove its existence but upon its actual existence. In the case of Toucher v Stinnes (S.A.) Ltd., 1934 CPD 184, the Court in considering what 'liquidated' meant, at p. 189, observed that a claim for damages was unliquidated because the amount of the damages was to be determined by a Judge, and until he has given his award, the amount of damages due is not determined.

When the amount is due upon a contract and the exact amount due is simply a matter for calculation from figures in books, the claim is a

liquidated one and can operate as a set-off, but its existence and character have not yet been proved to the satisfaction of the Court.

The absence of uniformity in the decided cases is attributable to the fact that in each case a discretion was exercised according to the facts then before the Court. The inevitable result is that it is not possible to formulate precise rules as to when a claim should be regarded as liquidated in the sense that it is capable of being speedily and promptly ascertained."

(Emphasis supplied)

[17] The upshot is that a critical dimension of the concept of 'liquidity' is an intrinsically uncertain and unavoidably variable component: a randomly selected judge's discretion. A judicial discretion implies a range of 'correct' or perhaps better described, 'appropriate' outcomes which are, in turn, dependent on fact specific findings. In my respectful view, it is quite hard to admire such a principle or to genuinely appreciate the usefulness of a judicial discretion about what ought, ideally, to be a hard fact, in the sense Colman J conceived it in Oosrandse Bantoesakeadminstrasie v SANTAM Versekerings Maatskappy (supra). The utility of a judicial discretion to secure equitable outcomes is hardly to be questioned, but a judicial discretion about a fact does provoke some misgivings.

[18] Neverheless, being bound by the weight of authority to approach the matter thus, I do so. I turn to the facts.

The Facts

[19] The respondent identified what it reckoned were 5 separate 'debts' it has against Roofcrafters. They can be categorised thus:

19.1. A lease obligation breached by Roofcrafters that resulted in:

19.1.1. Arrear rentals unpaid for the period May to August 2009 of R601,215.72

19.1.2. Damages in the sum paid to an agent to re-let the premises in a sum of R127,293.77.

19.1.3. Damages in respect of loss of revenue over the period of the lease owing to the premises being re-let at a lower rental level in a sum of R1,416,654.

19.1.4. Damages in respect of the value of physical improvements made to the premises by Roofcrafters which were removed without consent in a sum of R52,195, being the cost of installation.

19.2. A Damages claim arising from Roofcrafters' breach of contract in not finishing a particular job, and respondent having to paying another contractor a premium to complete it, in a sum of R316,838.84.

[20] It was alleged that these amounts total R2, 092,612.30. Further, of the total stated in Roofcrafters' books of account to be owing by respondent of R 2,441,791.67, a sum of R421,585.52 must be deducted because this account was repudiated because of Roofcrafters' failure to complete the work. It is not alleged the sum was paid. Plainly as applicant contends, a confusion has produced a double accounting on this score. Moreover, as addressed hereafter, this not the only confusion under this head of alleged indebtedness.

Are any of these claims liquidated?

[21] Only one 'claim' is can be said to obviously liquidated; the arrear rental claim for R601,215.72; it is an exact sum for real debt in respect of a performance in the form of giving occupation of the premises.

[22] All the other claims to do with the breached lease are damages claims. The individualisation of these claims may be useful for analytical purposes but it has to be recognised that the differentiation is artificial; there is only a single cause of action: damages caused by the breach of contract by Roofcrafters. Splitting them up does not, by such a contrivance, afford them distinct and different status.

[23] The letting fee, were it deserving of a distinct status could assert a liquidated status, on the footing of exactly calculable, but the attempt to distinguish it from the globular quantum of damages is, in my view, a sleight of hand. Its true character is but a mere component of a much bigger and more complex computation which is not, remotely, easily susceptible to calculation.

[24] The fatal flaw in the respondent's case is that its true measure of damages in respect of the breached lease is not the simplistic totting up of the gross revenue that would have flowed in under the Roofcrafters' lease, less the gross revenue that will flow in under the successor lease over the next several years.

[25] The correct computation of contractual damages can never, in principle, be mere arithmetic; a value judgment is an element of the computation of the quantum which computation embraces the effects of a reasonable effort to mitigate the damages. The figure of damages cannot, under such circumstances, be determined until that debate is exhausted, as a rule, before a court. In this regard, the remarks of Binns-Ward AJ in Solomon v Spur Cool Corporation 2002 (5) SA 214 (C) are instructive:

> "[34] The fundamental principle in the quantification of contractual damages is that the object is, as far as it is possible without undue hardship to the party in breach to do so by an award in money, to place the innocent party in the position that party would have been had the contract not been breached or repudiated. See, for example, Victoria Falls & Transvaal Power Co Ltd v Consolidated

> Langlaagte Mines Ltd 1915 AD 1 at 22; Culverwell and Another v Brown 1990 (1) SA 7 (A) at 29F and Rens v Coltman 1996 (1) SA 452 (A) at 458E. How that object is to be achieved will depend on the peculiar facts of a case.
>
> [46] The judgments in Culverwell and Rens (supra) illustrate that, while on the facts of a case the dates of due performance, repudiation or cancellation may well be important in the appropriate computation of contractual damages, the overriding consideration is the calculation of a figure which fairly achieves the object of putting the innocent party in the position it would have occupied had the agreement been fulfilled. See also Mostert NO v Old Mutual Life Association Co (SA) Ltd 2001 (4) SA 159 (SCA) at 187B - E. *Whichever approach to quantification achieves that object most effectively in the context of the peculiar facts of a case is the appropriate one. This entails the application of pragmatism and common sense rather than formalism.* It will in general be appropriate in quantifying contractual damages which, from the perspective of the dates of breach or cancellation, involve a component of prospective loss, to have regard to the effect of relevant events intervening between those dates and the trial insofar as that will facilitate a more accurate achievement of the object."

[26] Moreover, until a court has pronounced, no sum is yet due and payable, save perhaps the arrear rental claim, were it proper, in this context, to disaggregate it from the other components of the damages claim. In my view it is not. It bears emphasis to remark that the condition of 'illiquidity' is not a result if the absence of evidence or proof of the indebtedness; rather it is it is the result of an inability to compute a figure in the absence of an investigation that is more than a mechanical exercise. (Cf: Lester Investments (Pty) Ltd v Narshi 1951 (2) SA 464 (C) at esp 470F – 472A.)

[27] Had the respondent sought a declaration, properly supported by the facts to justify its figures, the liquidated status of its alleged damages claim could have been demonstrated; in the absence thereof, these sums to do with the lease, are not liquidated.

[28] The claim arising from the incomplete project is problematic on the respondent's own facts. The allegations on the papers are confusing and seem to me to be contradictory. However, the high point of the respondent's case, on its own allegations seems to be this:

28.1. Roofcrafters were contracted to perform work for a price of R924,529.66.

28.2. Work began, but was abandoned.

28.3. Another contractor, Lone Star was roped in to finish the project. Respondent paid Lone Star R316,838.84.

28.4. It is not alleged Roofcrafters were paid anything for the work done, eg as a *quantum meruit*. An invoice submitted by Roofcrafters for R421,585.52 was not paid because of the alleged breach. The value of Roofcrafters work, if anything, is not stated.

28.5. Respondent seeks to set off R316,838.84 against its indebtedness to Roofcrafters.

[29] This is illogical. The only damages that respondent could have suffered could be a payment for that project in excess of the price agreed at the outset. No allegation to support that is made. Indeed, on the allegations presented, it is not apparent that respondent is out of pocket at all. The applicant in reply, demonstrates further illogicality in the respondent's case, but it would be superfluous to traverse those additional facts.

[30] As a result, upon the appreciation I have of the facts, in the exercise of my discretion, I am of the view that these facts and circumstances do not evidence a liquidated claim that can be set off against Roofcrafters 'claim against it.

Dispute of Fact question

[31] Lastly, the question of a dispute of fact existing on the papers is resolved by the rejection of the respondent's defence of set off.

Order

[32] It is ordered that:

32.1. Respondent shall pay the applicant R811, 501.13 together with interest *a tempore mora*, at the rate as prescribed from time to time, calculated from 9 November 2009.

32.2. Respondent shall pay the applicants costs.

ROLAND SUTHERLAND
Judge of the South Gauteng High Court,
15 September 2012.

Hearing: 3 August 2012.
Delivered: 20 September 2012

For Applicant:
Adv A J Michael
Instructed by: Shaun Nel Attorneys

For Respondent:
Adv W. Wannenburg
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