HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

(1) REPORTABLE: Yes.
(2) OF INTEREST TO OTHER JUDGES: Yes.
(3) REVISED.

…….. ……..

DATE SIGNATURE

Case No: 27238/18

In the matter between:

BANNISTER'S PRINT (PTY) LTD Applicant

and

D & A CALENDARS CC 1st Respondent
DARRYL ALBERT BANNISTER 2nd Respondent

***Case summary*: Obligations – Set-off – Claim that judgment debts for costs extinguished by set-off against prior loan debt and debt arising from services rendered and materials supplied.**
Requirements for set-off to operate considered - debts must inter alia be (a) of the same nature or kind (b) reciprocal (payable by and to the same persons in the same capacities) and (c) liquidated.
A Party may rely on set-off against a judgment debt and, if necessary, apply to stay execution on it.
The loan debt is a claim which the debtor allegedly has against one of the two indivisible co-creditors of the judgment debts. The services rendered and the materials supplied debt is a claim which the creditor has against one or alternatively the other or alternatively both jointly and severally.
The claim which the debtor might have against one of a number of indivisible co-creditors cannot be set-off against a debt owed to them as a body, and the claim which one of a number of indivisible co-debtors may have against the common creditor cannot be set-off against the debt which the debtors as a body owe to the creditor.
The alleged solidary liability of co-debtors on the services rendered and materials supplied debt could not have operated *ipso jure* as a set-off, also because the facts do not establish that their alleged liability to the creditor is capable of prompt and easy proof, and it is therefore not liquidated in the sense necessary for set-off to operate. No set-off possible.

JUDGMENT

MEYER J

[1] This is an urgent application by the applicant, Bannister's Print (Pty) Ltd (Print), against the first respondent, D&A Calendars CC (Calendars), and against the second respondent, Mr Darryl Bannister (Darryl), to stay three writs of execution that were issued against Print in respect of taxed bills of costs, pending the determination of an action that had been instituted by Print against Calendars and Darryl in this court under case no. 13780/2011 (the action). Print is controlled by Darryl's father, Mr Sonny Bannister (Sonny), and the members of Calendars are Darryl and his wife.

[2] On Friday, 13 July 2018, the sheriff served the three writs of execution at Print's business premises, and made an attachment *inter alia* of certain of Print's printing machines and equipment. In this regard Sonny states:

'The applicant conducts a printing business. It prints materials ranging from catalogues and diaries to bookbinding, and in general, any printing requirement, to and for the public. Accordingly, the machinery that it utilises in order to engage in this business is obviously vital to its production, and indeed for its day to day operations. The equipment currently attached at the behest of the first and second respondents consists of, *inter alia*, a Speedmaster Printing Machine, file cabinets and other printing accessories and equipment. Any removal of this equipment would have catastrophic consequences to the applicant's printing business. Succinctly stated, without the printing machine and its accessories the applicant would be required to close its doors, and would be unable to continue with any printing business. The printing business is the applicant's sole source of income, and means and support for my family. I should also point out that the applicant employs approximately twenty staff members, who are dependent and rely solely for their income on the applicant.'

[3] The background facts giving rise to the issue and service of the three writs of execution are not controversial. Sonny and his son, Darryl, were in business together. Their relationship soured and they are not on good terms. During April 2011, Print instituted the action against Calendars and Darryl. Therein, Print advanced two claims: One against Darryl for payment of R286 095.47 plus interest in respect of monies lent and advanced to him personally (the loan debt), and the other against Calendars, alternatively against Darryl, or further alternatively against Darryl and

Calendars jointly and severely, for payment of the sum of R2 390 707.55 plus interest in respect of printing services rendered and materials supplied in connection therewith (the services rendered and materials supplied debt). The summons commencing the action was served on Calendars and Darryl on 13 April 2011. They filed a special plea of prescription, a plea and three counterclaims against Print. They, inter alia, plead that the 'only agreements that existed, were at all times between' Print and Calendars. The action was enrolled for trial in this court on 5 February 2013. A Mr Mark Lieberthal, who was employed by the attorneys of record for Calendars and Darryl, Ian Levitt Attorneys (the Levitt firm), dealt with the litigation on their behalf. Lieberthal had completed his articles of clerkship, but had not been admitted as an attorney. Levitt states that Lieberthal, in order to escape the consequences of his failing to attend to the litigation, forged an agreement of settlement of the action. The settlement agreement was signed by Print and made an order of court when the action was called at roll call in this court, on 5 February 2018.

[4] On 3 July 2013, Calendars and Darryl launched an application in this court under case no. 23534/2013, in which they sought an order declaring that the agreement of settlement had been fraudulently created and is void ab initio (the main application). Print opposed the main application, essentially on the basis that, although the agreement might have been obtained fraudulently, Calendars and Darryl had led it reasonably to believe that Lieberthal had authority to conclude the agreement, and were thus estopped from asserting its invalidity. Print nevertheless caused a writ of execution based on the settlement agreement and court order to be issued, which resulted in Calendars and Darryl launching an urgent application that was enrolled for hearing on 1 August 2013, wherein they sought a stay of the writ of execution pending the finalisation of their main application. The interim relief was granted with costs. Once taxed, those costs were duly paid by Print.

[5] The main application was heard by Satchwell J, during November 2013. On 28 November 2013, she made the following order:

'1.1 Declaring the deed of settlement . . . to have been fraudulently created and null and void ab intiio.

1.2 Setting aside the court order granted on 5th February 2013 in terms whereof the deed of settlement referred to in paragraph 1.1 supra was made an order of court.

1.3 The costs of this application shall be costs in the cause.'

Print applied for leave to appeal the judgment and order, which application Satchwell J refused with costs, on 24 February 2013. The Supreme Court of Appeal, however, on 4 July 2014, granted Print leave to appeal to the Full Court of this division, and it ordered that the costs of the application for leave to appeal in the high court and the costs of the application for leave to appeal in the Supreme Court of Appeal are to be costs in the appeal. The Full Court (Masipa, Mashile and Keightly JJ) dismissed the appeal on the basis that the elements of estoppel had not been established. The Supreme Court of Appeal, yet again on 12 September 2016, granted Print special leave to appeal to the Supreme Court of Appeal and it ordered that the costs of the application for special leave to appeal are to be costs in the appeal. In dismissing the appeal with costs - *Bannister's Print v D&A Calendars* (1078/2016) [2018] ZASCA 17 (15 March 2018) - Lewis JA said this:

'[20] Where a lawyer exceeds his or her mandate, or acts against express instructions, but nonetheless concluded an agreement on behalf of a client, the client may be precluded – estopped – by the other party from denying the lawyer's authority. That is because it is a proper agreement, on which consensus between them has been reached.

[21] That is not what happened in this strange matter. The purported agreement of settlement was a forged document, and cannot give rise to liability on the part of Calendars and Darryl. It bore no resemblance to the agreement that Darryl intended to conclude, embodied in the document with deleted provisions, and which he signed. This conclusion is buttressed by the order of the Deputy Judge President that the agreement should not be uplifted before the original was placed in the court file. The original was not ever placed there because it was hidden behind a cupboard in the Levitt offices. If Print has suffered any loss at the hands of Lieberthal it has other remedies at its disposal.'

[6] On 18 November 2016, Print instituted an action in this court under case no. 0040901/16 against the Levitt firm. Based on the alleged fraudulent misrepresentation perpetrated by Lieberthal, Print claims damages against the Levitt firm in the respective amounts of R208 095.47 and R2 390 707.55 plus interest as well as the costs of the action against Calendars and Darryl and the costs of the appeals in the Full Court and in the Supreme Court of Appeal, inter alia averring that:

'16.1 D&A Calendars CC became dormant and has remained dormant; and

16.2 Darryl Albert Bannister liquidated the assets that he was then possessed of in the Republic of South Africa and in or about October 2016 immigrated to the United

Kingdom where he has neither means nor assets to liquidate his indebtedness to the Plaintiff.

Accordingly, the Plaintiff would be unable to recover the capital, interest and costs owing to it by the Defendant's clients in terms of the summons action.'

[7] The costs incurred by Calendars and Darryl in the application for leave to appeal before Satchwell J, the two applications for leave to appeal in the Supreme Court of Appeal, the appeal before the Full Court and the appeal before the Supreme Court of Appeal, were taxed. Print did not oppose the taxation of any of the bills of costs. The total amount of taxed costs owing to Calendars and Darryl by Print is the sum of R423 688.92 plus interest thereon at the rate of 10% per annum. The three writs of execution in respect of the taxed bills of costs were issued and, as I have mentioned, served on Print on 13 July 2018. The returns of service all record that payment had been demanded from Sonny and that he 'was unable to pay the judgment debt and costs in full or in part on behalf of the debtor'. Print now seeks the stay of these writs pending the determination of the action.

[8] Print's argument in support of the stay of the writs of execution does not appear to be that 'real and substantial justice' requires a stay, otherwise injustice would be caused. (See *Graham v Graham* 1950 (1) SA 655 (T); *Le Roux v Yskor Landgoed (Edms) Bpk en andere* 1984 (4) SA 252 (T).) The facts of this case do not establish grounds of justice and fairness upon which this court could have exercised its wide discretion to stay the execution of the costs orders in favour of Calendars and Darryl. Print is responsible for its own misfortune. There is no explanation put before me as to why Print has not satisfied the writs of execution by payment. Instead, Print argues that its indebtedness towards Calendars and Darryl (its liability to pay the taxed bills of costs (the judgment debts)) was extinguished by set-off against the debts – the loan debt and the services rendered and materials supplied debt - that are due and payable to it by Calendars and Darryl, and in respect of which debts it had instituted the action against them. Calendars and Darryl, on the other hand, argue that the requirements for set-off to operate have not been met. Furthermore, they argue, that the action pending the determination of which Print seeks the stay of the writs of execution, had been abandoned by Print in instituting action against the Levitt firm in which action the same claims are being pursued as those previously pursued in the action against them.

[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 three debts are all of the same nature or kind, money. It is also trite that any kind of debt, including a judgment debt, may be extinguished by way of set-off. A Party may thus rely on set-off against a judgment debt and, if necessary, apply to stay execution on it. In *Mosenthal Bros. v Coghlan and Coghlan* (1888) 5 HCG 87 at 90, Laurence JP said the following:

'Now with regard to those proceedings, I feel bound to express my opinion that the advice which the respondents gave their client to take out this writ, instead of allowing the amount of the taxed bill to be set-off against the larger debt evidenced by liquid documents, which, as is not denied, was due to the applicants, was wrong and erroneous advice. That, in circumstances like the present, the judgment debt is extinguished by compensation as well as by direct payment is perfectly clear from the authorities which have been cited, the passage in *Voet* and the judgment of the supreme court in the case of *Van Niekerk's Trustees vs. Tiran* [1 Juta, 358] '.

In *Mahomed v Ebraheim* 1911 CPD 29 at 32, Buchanan J said:

'But what is a judgment? It is a declaration that so much money is due, and generally an order is given for the party in default to pay the amount to be due. The payment may be made in various ways, as, for instance, in this case, any allowable set-off can be made against the amount of the judgment.'

Also in *Rainsford v African Banking Corporation* 1912 CPD 1106 at 1115, Maasdorp JP said:

'Upon the authorities it also appears that . . . set-off can take place even after judgment, when an attempt is made to enforce a writ of execution. That is the stage at which the proceedings

have arrived now. There is a claim on the writ for £165, and an admitted counterclaim for £480.'

(Also see *The Government v Regna–Adwel Business Machines Africa (Pty) Ltd* 1970 (2) SA 428 (T) at 433F.)

[11] However, the obstacle to Print's claim to set-off is 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; *Brider 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."'

[12] The loan debt is a debt which, according to Print's particulars of claim, is only due and owing by Darryl in his personal capacity. However, the taxed costs is a claim which Calendars and Darryl as indivisible co-creditors have against Print. They were co-respondents in each application for leave to appeal and in each appeal, and represented by the same firm of attorneys and counsel. Each appeal was dismissed with costs and the liability for the costs of the applications for leave to appeal followed the fate of the respective appeals. A single bill of costs was drafted and taxed in each instance; for the application for leave to appeal before Satchwell J, for the appeal to the Full Court; for each application for leave to appeal in the Supreme Court of Appeal, and for the appeal to the Supreme Court of Appeal. Calendars and Darryl have a 'simple joint entitlement' to an 'indivisible performance' performance by Print. They

are not solidary co-creditors. They are together entitled to the whole performance; one on its or his own is not entitled to demand that Print performs to it or to him. (See LAWSA Vol 5 Part 1 2nd Ed paras 421-424.) In LAWSA Vol 19 2nd Ed para 244, it is stated:

'As far as indivisible co-creditors and co-debtors are concerned, the claim which the debtor might have against one of a number of indivisible co-creditors cannot be set off against a debt owed to them as a body, and the claim which one of a number of indivisible co-debtors may have against the common creditor cannot be set off against the debt which the debtors as a body owe to the creditor.'

(Footnotes omitted)

[13] It is not even prima facie established in the case of the services rendered and materials supplied debt whether that debt and the judgment debt are owing between the same parties in the same capacities. In its particulars of claim Print claims payment of that debt plus interest from Calendars, alternatively from Darryl and further alternatively from Calendars and Darryl jointly and severely. Furthermore, I am on the scant facts before me unable to find that the services rendered and materials supplied 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.)

[14] 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.)

[15] Here, Print relies on an oral agreement that was allegedly concluded during the year 2000 between it and Darryl, both in his personal capacity and in his representative capacity on behalf of Calendars, in terms whereof Print would render printing services and supply materials in connection therewith. It was agreed, it is averred, that the account of Calendars and Darryl with Print would be reconciled against monies due to Darryl by Print. It is further averred that, pursuant to the agreement, Print rendered services and supplied materials therewith. (To whom the services were rendered and the materials supplied, however, is not averred.) The balance outstanding on the account, so it is averred, is the sum of R2 390 707.55, which amount plus interest are claimed from Calendars, alternatively from Darryl, and further alternatively from Calendars and from Darryl jointly and severally. In their plea, Calendars and Darryl inter alia deny that Darryl also entered into the agreement in his personal capacity. They plead that the agreement was concluded between Print and Calendars. Print, according to them, was obliged in terms of the agreement to supply to Calendars delivery notes, invoices, credit notes and to perform a reconciliation of the monies owed to and owed by Calendars, which it has failed to do. They deny any indebtedness owing to Print.

[16] In its counterclaims, Calendars relies on two further agreements that were allegedly concluded between it and Print. In terms thereof, Calendars avers, it would sell calendars for and on behalf of Print and refer customers to Print, in exchange for

which it would be paid commissions. Print, it avers, was contractually obliged to regularly, and not less than monthly, render to it a full account of the transactions, but it has failed to do so. Calendars accordingly claims the rendition of an account, supported by vouchers, stretching over several years, a debatement thereof, and payment to it of whatever amount appears due to it upon debate. Calendars further counterclaims for the return of artwork to it or payment of the value thereof in the sum of R450 000, as well as the repayment to it of municipal charges in the sum of R62 000, which Print allegedly had overcharged it during a time when it occupied premises owned by Print. Suffice it to say that Calendars' counterclaims are also hotly disputed by Print in terms of its pleas to the counterclaims.

[17] Print needs to establish, not only the solidary liability of Calendars and Darryl under the agreement on which it relies, but also the disputed terms of the agreement and which of the services and materials were indeed rendered and supplied for which Calendars and Darryl incurred such liability. This is also not a case where the amount is determined if liability, though disputed, can be established. Print's claim may well also necessitate a long discussion and debate. (See *Bhima v Proes Street Properties (Pty) Ltd* 1956 (1) SA 458 (T).) 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 Calendars and Darryl jointly and severally, let alone that such amount is likely to be equal or exceeds the amount of the judgment debts. (See *Toucher v Stinnes (S.A.) Ltd* 1934 CPD 184.) I am of the view, on the papers presently before me, that the alleged solidary liability of Calendars and Darryl on the services rendered and materials supplied debt 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 Print is capable of prompt and easy proof, and it is therefore not liquidated in the sense necessary for set-off to operate.

[18] In my view, therefore, Print has not succeeded in showing that it should be allowed to establish at the trial of the action, that the loan debt and or the services rendered and materials supplied debt have operated *ipso jure* as a set-off against the

judgment 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 and whether, as contended for by Calendars and Darryl, the action pending the determination of which Print seeks the stay of the writs of execution, has been abandoned by it.

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

The application is dismissed with costs, including those of two counsel.

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P.A. MEYER
JUDGE OF THE HIGH COURT

Date of hearing:	31 July 2018
Date of Judgment:	14 August 2018
Counsel for Applicant:	Adv M Basslian SC (assisted by Adv M Segal)
Instructed by:	Schoonees, Belling & Georgiev Attorneys, Maraisburg, Johannesburg
Counsel for Respondents:	Adv GI Hoffman SC (assisted by Adv JL Kaplan)
Instructed by:	Ian Levitt Attorneys, Sandton