IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, PIETERMARITZBURG

Case no: 13452/2013

In the matter between:

SA TAXI SECURISATION (PTY) LTD	**APPLICANT**
(Registration number: 2005/021852/07)	
and	
BOOYENS AD CO. INC.	**FIRST RESPONDENT**
PHAMBUKA LINDELANI BLESSING	**SECOND RESPONDENT**
SHERIFF OF THE HIGH COURT, DURBAN COASTAL	**THIRD RESPONDENT**

JUDGMENT

Delivered on: 24 April 2015

MBATHA J

INTRODUCTION

On the 4th of March 2015 I made an order dismissing the Applicant's claim with costs and I indicated that my reasons will follow.

[1] The Applicant is SA Taxi Securisation (PTY) Ltd (Registration number 2005/021852/07) a company registered and incorporated with limited liability in accordance with the laws of the Republic of South Africa. It has it principal place of business at 179, 15th Road, Randjespark, Midrand.

[2] The First Respondent is Booyens and Co. Incorporated, whose principal place of business is at 1A Holwood Park, corner Armstrong Avenue and Canegate Road, Umhlanga Rocks, cited in their capacity as attorneys of record for the Second Respondent.

[3] The Second Respondent is Phambuka Lindelani Blessing, an adult male person of 120 Mzansi Road, Ward 03, Umzinto, cited in his capacity as a Lessee to the Applicant.

[4] The Third Respondent is the Sheriff of the High Court, Durban Coastal, entrusted with the execution of the writs issued by the First Respondent. No relief is sought against him.

[5] The Applicant seeks the setting aside of the writs of execution and attachments undertaken by the Third Respondent, which was effected pursuant thereto, on the basis that the Second Respondent's claims were settled or extinguished by a set-off. The writs of execution were issued in terms of the taxed bills of costs under case number 8821/2011 and 2968/2012.

THE APPLICANT'S AND RESPONDENTS' SUBMISSIONS ON THE MERITS OF THE CASE.

[6] In support of its case, the Applicant made the following submissions:-

- That the amount due in terms of the taxed bills of costs have been extinguished by a set-off before the writs were issued, a fact of which the First Respondent has been aware, and in addition, in respect of the second taxed bill of costs, a letter of demand was not served on the Applicant and therefore the writ stands to be set aside;

- That the Applicant is a company that provides finance for motor vehicles. It provided finance to the Second Respondent by leasing motor vehicles that were used by him in his taxi business. The Applicant states that the Second Respondent defaulted in making payments in respect of the motor vehicles as a result that it instituted actions against him under case number 8821/2011 and 2968/2012;

- That the costs arose as a result of a dismissal of a summary judgment application against the Applicant and also in terms of Rule 41(1)(c) of the Uniform Rules of Court where it had been ordered to pay the Second Respondent's costs. The First Respondent having taxed the bills of costs proceeded to issue the writs of execution and attachment against it. Furthermore, the Applicant submits that the Respondent was not entitled to issue a writ for payment of the costs in respect of both matters and pleads a set-off, as the insurance had not settled in full the indebtedness of the Second Respondent;

- It is the Applicant's contention that the shortfall of R118 296,29 not settled by the insurance company is a liquidated claim. Being a liquidated claim, an automatic set-off should take place in respect of the taxed costs awarded in favour of the Second Respondent;

- That the lease agreement was between the Applicant and the Second Respondent, but the insurance agreement was between the Second Respondent and the insurer, a third party who had to insure the leased motor vehicle. The Second Respondent signed the agreement and signed for the settlement amount which left a shortfall to the amount due and payable to the Applicant. He should therefore be bound by the terms of that settlement agreement, though he disputes that he signed the agreement. It is submitted that he under insured the motor vehicle;

- It is submitted that the shortfall from the insurance pay-out is a liquidated amount, being a claim for a fixed, certain or ascertained amount. In this regard, I was referred to various authorities including ***Fattis Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd***[1];

- Upon the rescission of judgment application, the Applicant learnt that motor vehicle was involved in a collision and the insurance company decided to write it off. The value of the motor vehicle was R252 288,59 and it settled at R133 992,30 on the 6th of July 2012. The balance outstanding is the sum of R118 296,29. The lease agreement between

[1] 1962 (1) SA 736 (T) at 739.

the Applicant and the Second Respondent states that the Second Respondent will be liable for any shortfall should the insurer not settle the entire amount; and

- It was further submitted that the shortfall was due and payable and did not form part of the rescheduling order and should the Court find that it fell within a restructuring agreement, the Court should order that the Second Respondent pay to the Applicant an amount of R2 659,69 per month in terms of the debt restructuring agreement. Therefore, a set off should also take place automatically and *ipso jure* in respect of this agreement.

The gravamen of the Applicant's case is that the writs should be set aside as the debt upon which Second Respondent relies upon is no longer in existence as it has been extinguished by set-off.

[7] The Respondents are opposing the application on the basis that the Second Respondent is not indebted to the Applicant at all. The motor vehicle leased from the Applicant was written off after it was involved in a collision. The insurance which had been arranged by the Applicant paid out the Applicant in full. Therefore, there were no monies owed by the Second Respondent to the Applicant. If there is any shortfall as alleged by the Applicant, it was not due to any fault of the Second Respondent as the Applicant had under-insured the motor vehicle;

7.1 The Respondents' submissions are that the costs were awarded as both actions were withdrawn by the Applicant. In case number 2968/2012, the Second Respondent had applied for a rescission of judgment on the basis that he does not owe the Applicant any monies. The Applicant consented to the rescission of judgment, withdrew its action, and tendered the Second Respondent's costs. No further proceedings were instituted by the Applicant save for this application;

7.2 It is further submitted that both actions pertain to one and the same credit agreement concluded between the Applicant and Second Respondent, on which no judgment was granted; and

7.3 That the documents that the Applicant rely on were signed by a P.H. Phambuka and not the Second Respondent;

7.4 In reply the Respondents submit that in law a set-off can only take place when both parties are indebted to each other, the debts are liquidated and due and payable. Furthermore, the Respondents herein dispute the indebtedness to the Applicant, therefore, making Applicant's claim not a liquidated claim and not due and payable. The basis for this argument being that the Applicant has failed to respond to the First Respondent's notice in terms of section 110 of the National Credit Act 34 of 2005, whereby a request was made for the current balance of the account and the amount credited or debited against the Second Respondent's account for the past three (3) years. This appears in the letter from the First Respondent to the Applicant's

attorneys dated the 23rd of August 2012. Therefore, this correspondence indicated the existence of a dispute between the parties;

7.5 That the Applicant was notified of the taxation on the 28th of January 2014 and there was no objection from the Applicant in the matter under case under 2968/2012. The other bill of costs was in respect of the costs due to the correspondent attorney WHA Compton Attorneys and has got nothing to do with the subject matter in this case;

7.6 That Wanless AJ in dismissing the Application for summary judgment by the Applicant found that the agreement between the parties had not been cancelled and that it was a subject of a debt restructuring order. Therefore, the only payments that were due and payable were in terms of that order. That issue is not before this Court; and

7.7 That the Second Respondent notified the Applicant that by issuing summons it was repudiating the agreement. The Repudiation cancelled the agreement and that the insurer had settled his indebtedness to the Applicant. The Applicant consented to the Rescission and withdrawal of its action. It never proceeded with any action against the Respondent thereafter. Second Respondent submits that, therefore, a set-off cannot be applied here by reason of the fact that the claim is disputed and it is not a liquidated claim.

[8] In support of their case the Respondents relied on various authorities, including **Bamabas v Govender**[2] which spelt out the requirements for reliance on a set-off, which stated as follows:-

> *"It is quite clear on the law that there can only be compensation or set-off in the case of mutual debts, each is liquidated, absolute and presently due."*

And in **Ford Brothers v Clayton and Clayton**[3] where it was stated as follows:-

> *"Where a claim is disputed especially upon grounds which affect the very basis upon which it is framed, it can hardly be said to be promptly established. Such uncertainty as existed in this matter appears to me as fatal to the existence of a right of set-off until the dispute is settled and this uncertainty dispelled by the judgment of a competent Court."*

[9] **CONSIDERATION OF THE APPLICATION.**

9.1 The question to be decided by this Court is whether the Applicant's claim is a liquidated claim and if so, whether it can be set-off against the claim of the First and Second Respondents for taxed costs.

9.2 It is common cause that the actions instituted by the Applicant against the Second Respondent were withdrawn. This led to an award of costs in favour of the Respondents. The Respondents taxed their bills of costs and

[2] 1928 NPD 260.
[3] 1960 TPD 06 at 208.

demanded payment from the Applicant. Later on they proceeded to execute and attach against the Applicant. The Applicant avers that an amount of R118 296,29 is still outstanding, due and payable by the Second Respondent and it is entitled to set-off any amount owed to the Second Respondent because of this debt.

The claim of R118 296,29 is disputed by the Second Respondent as being non-existent and an unliquidated claim and that it should not be set-off against any taxed costs due and payable to the Respondents.

[10] It is common cause that the Applicant after consenting to a rescission of judgment on the 14th of May 2015; it withdrew the action. This put an end to the matter. At this stage the motor vehicle had been written off as a result of an accident which occurred on the 2nd of March 2012. It is not in dispute that the founding affidavit to the rescission of judgment application categorically states that the Second Respondent disputes any indebtedness to the Applicant. The Applicant having withdrawn its action under case number 2968/2012 never made any demand for any shortfall by the insurance company, irrespective that it had been paid less by the insurance company. The set-off defence only arose when the Applicant proceeded with a warrant of execution upon failure by the Applicant to settle payment in respect of the taxed costs.

[11] I am of the view that the Second Respondent had every right to believe that the insurance claim had been settled in full. The insurer of the motor vehicle was chosen by the Applicant. It was a material term of the agreement

between the Applicant and the Second Respondent that the motor vehicle should be comprehensively insured. It is common knowledge that a comprehensive insurance cover offers greater protection than any other limited cover. This was a requirement from the Applicant and it provided the insurer who had to comprehensively cover such a risk. The provision of the insurer by the Applicant can be accepted as a guarantee to the Lessee, in this case, that the insurer was *au fait* with the terms of the Lessor's insurance requirements.

[12] If one looks at Annexure RA3 at page 163 of the indexed papers, the insurance was brokered by the Applicant. The proposal form states that the Broker is SA Taxi Risk Management Services (PTY) LTD. It goes on further to state that:-

> *"SA Taxi Risk Management will act in its capacity as your insurance broker unless you provide alternative cover that meets your contractual obligations to SA Taxi prior to the signature of the contract."*

Then it goes on to state at page 164 of the indexed papers that:

> *"This insurance policy will be ceded to SA Taxi for the duration of the agreement as per clause 4.6 of the contract."*

Clause 4.6 of the Lease Agreement states as follows:-

> *"The Lessee hereby cedes his entire right, title and interest in and to every insurance policy effected in terms of this agreement to the Lessor including the right to receive any payment from the insurer in terms of*

each such policy, and the Lessee undertakes upon demand, to deliver each such insurance policy to the Lessor…"

Paragraph 4.9 of the Lease agreement goes on further to state that:-

"When an insured event occurs in terms of either of the insurance policies referred to above, the Lessor shall have the sole and exclusive right to accept payment of, compromise or agrees to a settlement with the underwriter of the amounts payable under either of the policies, which payment shall be made to and received by the Lessor, upon receipt of which the Lessor shall be obliged to credit the amount of such payment against any amount outstanding by the Lessee to the Lessor in terms of the agreement."

[13] There was an out and out cession to the Applicant and the Applicant had the sole discretion to accept payment from its insurers and this had nothing to do with the Second Respondent. In the light thereof, I find that it should have comprehensively insured the Second Respondents' motor vehicle.

[14] The contract signed by the Second Respondent also provides that any shortfall by the insurer will be paid by the insured person. It cannot be construed that this meant that the insured had to pay almost the same amount as the insurer. The duty therefore lay upon the Applicant to select a comprehensive cover for the Lessee. We need to look at the purpose of the comprehensive insurance cover as well as the intention of the parties. The purpose was to provide protection against the risk and the intention to settle the indebtedness of the Second Respondent in the event of an accident or any

other loss. In coming to that conclusion, I am guided here by the judgment of Wallis JA in **Natal Joint Municipal Fund v Endumeni Municipality**[4].

[15] The agreement of settlement is signed by one Philani Phambuka, whereas the Respondent is Lindelani Blessing Phambuka. It does not even state where it was signed. Furthermore, if one looks carefully at the agreement of loss, no salvage/scrap value is given for the motor vehicle. However, the very same insurance company states in the very same document that:

> *"The salvage of the above motor vehicle shall be disposed for the benefit of the Hollard Insurance Company Limited and I further relinquish by rights to the abovementioned vehicle to Clarendon Transport Underwriters (Pty) Limited and Hollard Insurance Company."*

[16] My view is that this benefit was relinquished only on the basis that the insurer would have fully extinguished the liability of the insured. It cannot make sense that the insured is left to foot the unsettled claim, whilst the Applicant keeps all the spoils. It goes against the grain that the Applicant would require a comprehensive cover, and then select an insurer that would not give the required protection against the risk, being the people who provided the insurance.

[4] (920/2010) [2012] ZASCA.

[17] If the Applicant was *bona fide*, and had a genuine claim against the Second Respondent it would not have withdrawn its second action against the Second Respondent. Even if it had a claim against the Second Respondent, it should have first obtained judgment against the Second Respondent, as the Second Respondent had denied being indebted to the Applicant at all. The Applicant's debt is inclusive of legal costs and I accept the submissions made on behalf of the Second Respondent that without a Court order or a taxation of such fees, the Applicant's claim is not liquidated.

[18] It is also trite that a liquidated claim in money is an amount which is either agreed upon or which is capable of speedy and prompt ascertainment. In my view, the Applicant's claim does not fall within that category as it requires an enquiry into the nature of the claim by the Applicant. It is also trite that a set-off can take place if both debts are liquidated in the sense that they are both capable of speedy and easy proof.

Treasurer-General v Van Vuren[5];

Fattis Engineering Co. (Pty) Ltd v Vendick Spares (Pty) Ltd[6].

[19] I accept the Respondents' submission that there can be no set-off. They have correctly relied on ***Barnabas v Govender***[7], a full bench decision of this division which spells out the requirements for reliance on a set-off:

[5] 1905 TS 582 at 589.
[6] 1962 (1) SA 736 (T) at 738 F-G.
[7] 1928 NPD 260.

"It is quite clear on the law that there can only be compensation or set-off in the case of mutual debts each is liquidated, absolute and presently due."

[20] A set-off comes into operation when parties are mutually indebted to each other and both debts are liquidated and fully due. This comes on automatically.

Absa Bank Ltd v Standard Bank of South Africa Ltd[8].

It is only a liquidated claim that can be set-off. The Applicant in this case has not obtained a judgment against the Second Respondent or the First Respondent who have categorically denied his indebtedness to the Applicant. I am saying this as the party who is relying on this remedy bears the *onus* of proving the indebtedness of the Respondents to the Applicant and that the Defendant's debt or liability is also due and payable.

[21] A party wishing to rely on set-off must allege and prove the following:-

"a) The indebtedness of the of the Plaintiff to the Defendant;

b) That the Plaintiff's debt is also due and legally payable;

Mohamed v Nagalie[9]*,*

Sonnehage v Bezuidenhout[10]

c) That both debts are liquidated debts. A debt liquidated if:

(i) it is liquid in the sense that it is based on a liquid document;

[8] 1997 (4) All SA 673 (A), 1998 (1) SA 242 (SCA).
[9] 1952(2) All SA 11 (A), 1952 (1) SA 410 (A).
[10] 1977 (1) SA 362 (O).

(ii) it is admitted;

(iii) its money value has been ascertained;

(iv) it is capable of prompt ascertainment; and

Fattis Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd[11].

d) That the reciprocal debt was owed to by the Plaintiff to the Defendant.

Potterstraat 69 Eiendomme (Pty) Ltd v PA Venter Worcester (Pty) Ltd[12].”

These principles appear in **Amler’s Precedents of Pleadings, 7th Edition at page 352**.

[22] I am also of the view that since there is a dispute as to the validity and authority of the signature on the insurance settlement document, this amongst other things, does not make the Applicants claim ascertainable, or admitted. In respect of the alternative prayer by the Applicant, there is nothing in the application before me where a case is made out for such a prayer in terms of the restructuring order, nor did the Applicant present any evidence in support thereof.

23.1 I have observed that the Applicant since the inception of its actions against the Second Respondent, does as it pleases. In the first case, case number 8821/2011, it took judgment with full knowledge of the existence of a debt restructuring order. The Second Respondent was granted leave to defend

[11] 1962 (1) All SA 578 (T), 1962 (1) SA 736 (T).
[12] 2000 (4) SA 598 (C).

the action after its application for summary judgment. The Applicant then withdrew the action without tendering costs and the Second Respondent had to bring an application to Court to get his costs.

23.2 It then issued a new summons under case 2968/2012, did not serve it at the *domicillium citandi* of the Second Respondent, but served it at his employers' address. The Second Respondent did not receive the summons as he was in Malawi. Default Judgment was entered against the Second Respondent. The Second Respondent had to bring an application for rescission of judgment irrespective of the irregularity being pointed out to the Applicant in writing. The Applicant only consented to a rescission of judgment later and tendered costs. Both costs were not settled by the Applicant.

23.3 The Applicant had applied for Default Judgment having been aware that the motor vehicle had been involved in a collision and had been written off. This kind of ambush litigation needs to be discouraged at all costs, as in most cases the Defendant would not be in a financial position to defend all these actions. However, irrespective of all these irregularities, the Applicant has the audacity to seek an order for costs on an attorney and client scale.

CONCLUSION.

[24] I therefore find that the Applicant's claim is unliquidated and a set-off remedy cannot be applied thereto.

Accordingly, for these reasons I gave the order dated the 4th of March 2015.

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MBATHA J

Appearances

Date of hearing:	4 March 2015
Date for reasons for judgment:	24 April 2015
For the Applicant:	Adv. M.E. Jan Jaarsveld
Instructed by:	Marie-Lou Bester Inc.
	c/o Nicholson & Hainsworth
For the Respondents:	Adv E. Crots
Instructed by:	Booyens and Co. Inc.
	c/o WHA Compton Attorneys