IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 1921/2003

In the matter between:

GRAPHIC LAMINATES CC Applicant

and

ALBAR DISTRIBUTORS CC 1st Respondent

THE SHERIFF OF CAPE TOWN 2nd Respondent

JUDGMENT: 5 MAY 2005

VAN REENEN, J:

1] The applicant, claiming that the first respondent was indebted to it in an amount of R89 326,31 in respect of goods sold and delivered, brought an application for the winding up of the respondent under Case No 1921/2003 during March 2003.

2] When he dismissed the application on 20 March 2003, Jamie AJ did not make any reference to the liability of either of the parties for the costs of the application. The order was made on the day the matter was argued and no reasons were provided for the judgment then or subsequently. The parties not having made any attempts to have the question of costs revisited, it is reasonable to assume that the question of costs was dealt with by the parties' legal representatives in their arguments.

3] What needs to be mentioned in passing is that no answering and replying affidavits were filed and that the winding-up application was decided solely on the basis of the averments that had been made in the founding papers.

4] The applicant, on 21 May 2003, applied for leave to

appeal against Jamie AJ's order dismissing the winding-up application. That application was dismissed with costs in a written judgment that was handed down on the same date. It appears from a perusal thereof that the winding-up application was dismissed on the basis that the claim on which it was based was disputed on **bona fide** and reasonable grounds and constituted an abuse of the court's process.

5] The first respondent's attorney compiled a composite bill of costs that encapsulated the fees and disbursements of the liquidation application as well as the application for leave to appeal. The first 36 items thereof pertained to the liquidation application and the next 31 items to the application for leave to appeal. The bill of costs was on 20 November 2003 taxed in an amount of R30 441,73. Certain movable

assets, the property of the applicant, have been attached pursuant to a writ of execution issued on the basis of the taxed bill of costs and a sale in execution was arranged and advertised for 12 November 2004.

6] As the application for leave to appeal had been refused, the applicant petitioned the Chief Justice of the Supreme Court of Appeal for leave to appeal. The petition for leave to appeal was dismissed with costs. The first respondent's attorney drafted a bill of costs. It was duly taxed in an amount of R4 418,87 and a writ of execution was issued on 28 September 2004 by the Registrar of the Supreme Court of Appeal.

7] The applicant, on an urgent basis, on 10 November 2004, launched an application against the first- and second respondent's respectively, in which it claimed

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7.1 an order staying the sale in execution and setting aside the warrant of execution issued by the Registrar of this court under case no: 1921/2003 (the first writ); and

7.2 an order setting aside the warrant of execution issued by the Registrar of the Supreme Court of Appeal under case no: 243/2003 (the second writ).

8] As the first respondent conceded the relief claimed in prayer 2.3 of the Notice of Motion there is no need to consider it for the purposes of this judgment.

9] The applicant seeks a stay of the sale in execution and the setting aside of the first writ on the basis that, to the extent that an amount of R11990 thereof related to the costs of the unsuccessful liquidation

application, it is, **pro tanto,** devoid of an underlying causa.

10] The crisp issue for decision is whether, in the circumstances of this case, each party is liable for its own costs as contended for by the applicant, or, the applicant is liable for the first respondent's costs because, so the first respondent contended, the applicant, on a proper construction of the order dismissing the winding-up application, is liable for the respondent's costs.

11] It is trite that liability for costs in civil proceedings is a separate issue that is governed by its own criteria. The fundamental principle is that liability for costs is in the discretion of the court that is called upon to adjudicate the merits of the issues between the parties (See: **Kruger Bros & Wasserman v**

Ruskin 1918 AD 63 at 69) on the basis of the facts and circumstances of each individual case (See: **Cronje v Pelser** 1967(2) SA 589 (A) at 593). In the absence of express statutory provisions to the contrary, the general rule that costs follow the result is subservient to that fundamental principle (See eg: **Unimark Distribution (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd** 2003(1) SA 204 (T) at 215 E – F). It appears to me to be axiomatic that, if the question of costs has been fully ventilated, and a court does not say anything about liability for costs or specifically states that there will be no order as to costs, each party is liable for the payment of its own costs (See: **G.B. van Zyl: The Judicial Practice of South Africa** (Volume II) 894). I accordingly incline to the view that the first respondent's counsel's submission that the general rule that costs follow the

result finds application, even in the absence of an order for costs, lacks merit.

12] In a litigious setting the question of liability for costs as between party and party is one for the decision of the court and not the taxing master (See: **Gluckman v Winter and Another** 1931 AD 449 at 450; **Martens v Rand Share and Broking Finance Corporation (Proprietary) Limited** 1931 WLD 159 at 165). In the absence of an order that compelled the applicant to pay the first respondent's costs in the winding-up application, the taxing master had no authority to tax items 1 to 37 in the bill of costs and to include in the **allocatur** issued by him/her amounts totalling R11 990 in respect thereof. The taxing master by having done so clearly acted **ultra vires.** Accordingly the writ of execution issued

against the movables of the applicant for an amount of R30 441,73, was **pro tanto,** not supported by a causa; lacks validity; and falls to be set aside (Cf: **Ras en Andere v Sand River Citrus Estates (Pty) Ltd** 1972(4) SA 504 (T) at 570 E; **Le Roux v Yskor Landgoed (Edms) Bpk en Andere** 1984(4) SA 252 (T) at 257 B).

13] To the extent that the writ was issued not only in respect of the winding-up application (in which no order for costs was made) but also the unsuccessful application for leave to appeal (in which an order for costs was made), those decided cases in which it was held that, if a writ of execution is competent for part of the amount in respect of which it has been issued, it cannot be set aside (See: **Perelson v Druain** 1910 TPD 458; **Dunlop Rubber Co v**

Stander 1924 CPD 431; **Du Preez v Du Preez** 1977(2) SA 400 (C) at 403 G), in my view are distinguishable. I say so because the amount for which the first writ was issued included two amounts namely R678,10 in respect of the drawing of the bill of costs and R825,05 in respect of attending the taxation. Those amounts were arrived at on the basis of the total of the fees taxed in respect of all the items allowed ie. including items 1 to 37. It is not possible, **ex facie** the bill of costs, to determine the extent to which those amounts must be adjusted if the fees and disbursements amounting to R11 990 are to be disregarded. Not only is the first writ not in conformity with the order granted in case number 192/03 (See: **Sachs v** Katz 1955(1) SA 67 (T) at 72 D – E) but it is also incapable of being given effect to as the exact amount in respect of which the order for costs in case number 234/03 may be executed

cannot be determined.

15] I accordingly incline to the view that the applicant is entitled to an order in terms of prayer 2.1 of the notice of motion.

16] A further basis on which the applicant seeks firstly, to have the sale of execution stayed and the first writ of execution set aside - to the extent that it relates to the application for leave to appeal - and secondly, to have the second writ set aside, is that the claims in respect of which those writs were issued have been extinguished by the operation of set-off.

17] Set-off operates automatically from the moment two parties are mutually indebted in respect of debts that are liquidated and are due. The effect thereof is that the one debt extinguishes the other **pro tanto** as effectually as if payment has been made (See: **Western Cape Housing Development Board v**

Parker 2005(1) SA 462 (C) at 470 D – E). It is trite that a claim for costs become liquidated as soon as it is taxed. The applicant claims that the claims for costs in respect whereof the first- and second writs of execution have been issued have been set off against an amount of R54 500 that the first respondent is alleged to have admitted was due and owing by it to the applicant.

18] The admission of liability on which the applicant relies is contained in a facsimile transmission dated 21 February 2003 despatched by the first respondent's attorneys to the applicant's attorneys and contained in the following terms:

> "1. Our client denies its indebtedness to your client in the amount of R97382,39.
>
> 2. Our client denies that it admitted that an amount of R74463,13 is due and payable to your client.
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> 3. Our client has undertaken in good faith to deposit an amount of R54500,00 (the amount which **it** believes is not in dispute and is due and payable to your client) into

> our trust account by 12h00 on Monday, 24th February 2003. Our instructions are that our client is certainly possessed of sufficient funds and on confirmation of receipt of same into our trust account, we shall let you have proof of same.

4. Clearly there is a dispute as to **the amount** of our client's indebtedness to your client. This, with respect, does not constitute a ground for insolvency and any allegation in this regard is vehemently denied.
5. We propose that a round table conference be conducted at your offices on Thursday, 27th February 2003 at 11h30 with our respective clients to resolve the matter. Our client will prepare a full reconciliation of the account for the purposes of such a meeting.

> 6. Should your client reject this proposal and proceed with an application for the liquidation of our client, we are authorised to accept service of same. On receipt thereof we shall oppose same and bring the court's attention to the contents of this letter insofar as our client's obvious solvency is concerned and insofar as an appropriate cost order is concerned."

19] Although that facsimile was sent in response to a facsimile forwarded to the first respondents attorneys by the applicants attorneys on 19 February 2003, and the last-mentioned facsimile did not form part of the evidential material before me, it appears to be clear that it was written with a view to staving off a winding-up application that had been threatened and in fact

materialised shortly thereafter but was refused because, as foreshadowed, its contents had been brought to Jamie AJ's attention.

20] It is clear from the contents of the facsimile under consideration that there was a dispute between the applicant and the first respondent as regards the quantum of the first respondent's indebtedness to the applicant and that the applicant, despite the existence of such dispute, threatened to institute winding-up proceedings. The first respondent by having undertaken "in good faith" to deposit into its attorney's trust account the amount which "… it believes it is not in dispute and is due and payable to your client …" merely endeavoured to emasculate any suggestion that it was unable to meet its obligations to the applicant - which in terms of section 66 of the Close Corporations Act, No 69 of

1984 (as read with section 344(f) of the Companies Act No 61 of 1973) is a ground for the winding-up of a close corporation - and not as an unequivocal admission of indebtedness. A number of matters militate against the said facsimile having constituted and unequivocal admission of liability in an amount of R54 500. The first is the qualification that it is the amount the respondent <u>believed</u> is due and payable. The second is that there was no tender to immediately effect payment of that amount but merely to pay it into the attorney's trust account. The third is that the statement in paragraph 4 of the facsimile to the effect that there is a dispute as to the amount of the first respondent's indebtedness to the applicant is incongruent with its having accepted that it was indebted in a specific amount. The fourth is that the invitation embodied in paragraph 5 of the facsimile to the applicant to attend a round-table

conference with a view to resolving the matter is not consistent with the first respondent having arrived at a final figure as regards its liability to the applicant. To the extent that, by analogy of an acknowledgement of liability for the purposes of the interruption of prescription, the intention of the first respondent is of relevance (See: **Agnew v Union and South West Africa Insurance Co Ltd** 1977(1) SA 617 (A) at 623 A – C) the contents of paragraph 3 of the facsimile under consideration at best constitute an acknowledgement of potential liability, subject to agreement being reached about the **quantum** of the first respondent's liability to the applicant (Cf: **Road Accident Fund v Mothupi** 2000(4) SA 38 (SCA) at 56 F).

21] In addition to the aforegoing, the author of the

facsimile under consideration deposed to an affidavit in opposition to the relief sought by the applicant on behalf of the first respondent, in which he disputed any intention to have admitted that the first respondent was indebted to the applicant in an amount of R54 500, but conceded that the first respondent would have been prepared to pay that amount in settlement of the applicant's claim. Accordingly the averment that the facsimile under consideration constituted an admission that the first respondent was indebted to the applicant in an amount of R54 500 constitutes a **bona fide** factual issue incapable of being resolved on the papers. As the relief the applicant claims in respect of the first- and second writs of execution is final of nature, it can be granted only if the facts as stated by the first respondent together with the admitted facts in the applicant's affidavit justify the granting thereof (See:

Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 628 A). If that test is applied in the instant case it, for that reason also, cannot be found that the applicant has discharged the onus of showing that the first respondent admitted being indebted to the applicant in an amount of R54 500 or any other amount.

22] As I have found firstly, on the basis of the contents thereof and secondly, on the basis that it was properly placed in issue by the first respondent, it has not been shown that the facsimile transmission of 21 February 2003 constituted an admission that the first respondent was indebted to the applicant in an amount of R54 500 or any other amount, there was no mutual indebtedness in existence against which the amounts in respect of which the first and second writs could justifiably have been issued, could have

been set-off.

23] Accordingly the relief claimed in prayer 2.2 of the notice of motion is refused.

24] The applicant was partially successful in that the relief claimed in prayer 2.1 was granted and the relief claimed in prayer 2.3 was conceded. The applicant was unsuccessful as regards the relief claimed in respect of prayer 2.2. In the circumstances it in my view would be fair if the first respondent were to be ordered to pay 60% of the applicant's costs.

25] Accordingly the relief claimed in prayers 2.1 and 2.3 of the notice of motion are granted and the relief claimed in prayer 2.2 of the notice of motion is refused. The first respondent is ordered to pay 60% of the applicant's costs on a scale as between party and party.

26] For the sake of clarity it is recorded that the first respondent's application for security for costs was, wisely, not proceeded with, as was the objection to the late filing of the first respondent's heads of argument.

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D. VAN REENEN