**Republic of South Africa**

**IN THE HIGH COURT OF SOUTH AFRICA**

**(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No. 1152/2019

Before: The Hon. Mr Justice Binns-Ward

Date of hearing: 20 April 2023

Date of judgment: 20 April 2023

In the matters between:

**CANCAPE (PTY) LTD** Applicant / Defendant

and

**STUART GUY STOKES** Respondent / Plaintiff

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**JUDGMENT**

**(Application for leave to appeal)**

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**BINNS-WARD J:**

[1] The defendant in the action in case no. 1152/2019 has applied for leave to appeal to the Full Court '*against that part of the order and judgment relating to set-off of the amount of R146 771,22 and costs*'.[1] The judgment concerned was delivered on 28 November 2022. It is listed on SAFLII, *sub nom*. *Stokes v Cancape (Pty) Ltd* [2022] ZAWCHC 241 (28 November 2022); (2023) 44 ILJ 431 (WCC). The part of the judgment that is relevant for the purposes of the current application is in para 35 to 37 thereof.

[2] The principles applicable in respect of the determination of applications for leave to appeal are well established. They are codified in s 17(1) of the Superior

[1] I quote from the notice of application.

Courts Act 10 of 2013. It is not suggested that the current matter raises a contentious point of law that usefully might enjoy the attention of an appellate court or that there is any comparable compelling reason why an appeal should be heard. The enquiry is thus confined to the point of whether this court is satisfied that there is a reasonable prospect that another court might on appeal decide the issue in question differently.

[3] The nub of the application is in paragraph 3 of the application, which reads:

> 'Notwithstanding the learned Judge correctly concluding that the Plaintiff had failed to prove his contract, the learned Judge erred in failing to conclude that the indebtedness of the Plaintiff in respect of his overdrawn profit-share account in the amount of R146 771.00 (which amount was common cause) was liquidated, due and payable and, as a consequence, was to be set off against the amount of R287 030.67 (the amount due to the Plaintiff).'

[4] It is convenient to quote from the defendant's counsel's written submissions in support of the application:

> '12. Set off operates automatically *ipso jure* when:
>
> 12.1 two parties are mutually indebted;
>
> 12.2 both debts are in balanced existence.
>
> 13. At worst for [the defendant] the debts were in balanced existence when the learned Judge concluded that [the plaintiff's] claim for his profit-share was not established.
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> 14. While it is clear from the pleadings and that which was before the learned Judge, [the defendant], from the outset, relied upon a set-off.
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> 15. Thus, at worst for [the defendant], at the moment the learned Judge concluded that [the plaintiff] failed to prove his profit-share claim axiomatically and consequent upon the agreement that the figures

were common cause, [the plaintiff] was indebted to [the defendant] in an amount of R146 771.22 in respect of his overdrawn profit-share.

16. [The plaintiff] was thus only entitled to payment of the sum of R140 295.45 calculated (sic) and, as [the defendant] conceded its indebtedness to [the plaintiff] as set out above, the set off applies retrospectively.'

The defendant's counsel agreed that the passage that I have quoted articulated the essence of the defendant's case in the application for leave to appeal. He sought support for the submissions contained in it in *Schierhout v Union Government (Minister of Justice* 1926 AD 286 at 289-290 and *Transkei Development Corporation v Oshkosh Africa* 1986 (1) SA 150 (C) at 153C-G.

[5] For the reasons that follow, the argument has not satisfied me that there is a reasonable prospect that it would be held on appeal that this court erred in the relevant respect. On the contrary, it seems to me that counsel has misunderstood the authority upon which he relied.

[6] Whilst the defendant's counsel is correct, as indeed noted in the principal judgment, that the various component amounts used in the contesting calculations were not in issue at the trial, the way in which they fell to be used in determining the plaintiff's case was, however, very much in dispute. Everything depended on what the terms of the contract between the parties were.

[7] If the plaintiff had established the contract in the terms that he alleged, he would have succeeded in his claim for R753 689.67. This court held that he failed to discharge the onus in that regard, and granted judgment in his favour only in the amount that the defendant admitted owing him. This court recorded (in para 34 of the principal judgment) that if the plaintiff's claim had been entirely reliant on his pleaded version of the contract it would have made an order of absolution from the instance.

[8] The gist of the defendant's complaint is that the court, in granting judgment in the plaintiff's favour in the amount that the defendant admitted having been indebted to him, misdirected itself by not setting off the amount of R146 771.22 in which the defendant had alleged the plaintiff's profit-share account had been overdrawn. The defendant's counsel argued that it followed '*axiomatically*' from this court's conclusion that the plaintiff had failed to establish the existence of the contract alleged in his particulars of claim that the plaintiff was indebted to the defendant in the amount in which *the defendant* alleged that the plaintiff's profit-share account was overdrawn.

[9] Counsel's proposition does not bear scrutiny. It was *not* common cause that the plaintiff's profit-share account was withdrawn. The profit-share account would only be overdrawn if it were established that *the defendant's* version of the contract applied. The plaintiff put the defendant's version of the contract in issue. If the defendant had pleaded set-off, as it behoved it to have done if it wished to rely on that defence, *it* would have attracted the onus to establish its version of the contract. The court's finding that the plaintiff had failed to prove the existence of the contract *he* relied on, did not expressly or by necessary implication contain within it a finding that *the defendant* had established the existence of a different contract – one that the plaintiff denied. Put differently, a failure by the plaintiff to discharge the onus in respect of *his* claim did not discharge the onus that *the defendant* would have borne to establish the contract that was necessary for a defence of set-off to have succeeded.

[10] The pertinent principles were expressed by Innes CJ with customary clarity in *Schierhout* supra loc. cit.:

> 'The doctrine of set off with us is not derived from statute and regulated by rule of court, as in England. It is a recognised principle of our common law. When two parties are mutually indebted to each other, both debts being liquidated and fully due, then the doctrine of compensation comes into operation. The one debt extinguishes the other *pro tanto* as effectually as if payment had been made. Should one of the creditors seek thereafter to enforce his claim, the defendant would have to set up the defence of

*compensatio* by bringing the facts to the notice of the court as indeed the defence of payment would also have to be pleaded and proved. But, compensation once established, the claim would be regarded as extinguished from the moment the mutual debts were in existence together. (Underlining supplied for emphasis.)

[11] The defendant did not plead set off. Had the defendant done so, it would have had to prove that the contract between the parties not only entitled the plaintiff to share in the company's profits, but also obliged him to share in its losses. For it is only if there was a contract in the terms contended for *by the defendant* that the plaintiff could have incurred a debt to the defendant arising from a liability to share in the company's losses.

[12] Had the defendant pleaded set off, the issues in the trial would have been different. This may be illustrated by pointing out that if set off been a pleaded issue I would not have said, at para 30 of the principal judgment, '[t]*he incidence of the onus, and the weight of the objective evidence made it understandable that the defendant would not feel it necessary to call Adams*'. Had set off been a pleaded issue, it would have been one in respect of which the defendant, *not* the plaintiff, bore the onus. It would also have been an incidence of the case which would have raised the question whether an adverse inference could be drawn against the defendant for not calling Mr Adams. The question was not raised because the defence was not pleaded, and a determination whether the defendant had discharged the related onus did not fall to be made.

[13] The application for leave to appeal is dismissed with costs (on the High Court tariff).

**A.G. BINNS-WARD**
**Judge of the High Court**