REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 362/2013

In the matter between:

1.1.1.1.

1.1.1.2. **WISPECO NAMIBIA (PTY) LTD**

APPLICANT

and

IGCHAAN MAJIEDT	**1st RESPONDENT**
PENDA YA OTTO N.O	**2ND RESPONDENT**
KYLLIKKI SIHLAHLA N.O	**3RD RESPONDENT**
THE LABOUR COMMISSIONER	**4TH RESPONDENT**
THE REGISTRAR OF THE LABOUR COURT OF NAMIBIA	**5TH RESPONDENT**
THE REGISTRAR OF THE HIGH COURT OF NAMIBIA	**6TH RESPONDENT**
THE DEPUTY SHERIFF FOR THE DISTRICT OF WINDHOEK	**7TH RESPONDENT**

Wispeco Namibia (Pty) Ltd v Majiedt (A 362/2013) [2013] NAHCMD 320 (6 November 2013)

Coram: SMUTS, J

Heard: 31 October 2013
Delivered: 6 November 2013

Flynote: Application to declare set-off had occurred in respect of debts. The first respondent raised the point that his debt which was under a suretyship meant that the applicant would first need to exhaust remedies against the principal debtor before set-off could occur. This point was found to be without substance. The first respondent also took the point that judgment by default had been granted by the registrar in respect of his debt and that this was unconstitutional. The court found that it was not necessary to determine this point as liability for the debt was not disputed and that set-off had occurred even in the absence of the default judgment.

ORDER

The rule is confirmed.

JUDGMENT

SMUTS, J

(b) The applicant approached this court on an urgent basis on 18 October 2013 and was granted a rule nisi calling upon the first respondent to show cause on the return date (of 31 October 2013) why an order in the following terms should not be granted:

> ‘2.1 That the indebtedness of the applicant to the first respondent in the amount of N$179,970.00 is declared to have been set off against the indebtedness of the first respondent to the applicant in the amount of N$187,875.65;

2.2 That the first, second, third, fourth and seventh respondents is interdicted and restrained from, in any manner whatsoever, taking any steps whatsoever to secure or enforce payment or satisfaction of the amount of N$179,970.00 referred to in 2.1 above. ;

2.3 That the first respondent is ordered to pay the costs of this application, including the costs of one instructing and one instructed counsel.'

(c) This court further directed that paragraph 2.2 operate as an interim order pending the finalisation of this application. Directions were also given for the filing of the first respondent's answering affidavit, a replying affidavit and heads of argument. The 2nd, 3rd and 4th respondents initially opposed the application. After the applicant undertook not to seek any costs order against them, they withdrew their opposition. I shall refer to the 1st respondent as the respondent in this judgment.

(d)

(e) The respondent filed an answering affidavit and the applicant replied. Both parties also filed heads of argument although the respondents were late. The applicant also filed an application to strike certain portions of the answering affidavit.

(f) Much of the factual matter in this matter is not in issue.

(g)

(h) In the founding affidavit, the applicant stated that it is indebted to the respondent in the amount of N$179 970 in terms of a settlement agreement reached between them. This settlement had occurred in the course of conciliation proceedings between the parties under the Labour Act, 11 of 2007. This amount was, in terms of the settlement agreement, due and payable to the respondent on 14 August 2013.

(i) The applicant further stated that the respondent is indebted to the applicant in respect of a judgment of this court under case number (P) I 846/2002 granted against the respondent on 13 July 2012 in the amount of N$95 493, 85. The applicant further stated that the amount outstanding in

respect of his judgment debt was N$187 875, 65 as at 1 July 2013. This amount included capital and interest and certain legal costs. The applicant contended that the debts had been set-off against each other and that the set-off operated automatically. Despite this, the respondent had applied for the settlement agreement reached in conciliation proceedings to be made an arbitration award and thereafter to be made an order of court in terms of s87(1)(b) of the Labour Act. The urgency contended for arose from the respondent seeking to execute the order in question. After the set-off had been pointed out by the applicant's legal practitioner, the respondent nonetheless persisted with proceeding with execution steps, giving rise to the application being brought as one of the urgency.

The respondent's opposition

(j) In the respondent's answering affidavit, he does not dispute that the debt, in respect of which judgment by default was granted, was due and payable although he states it was due and payable in about 2011 and not in October 2009 as claimed. The judgment included an award of interest *a tempore morae*. The respondent disputed that interest prior to judgment was permissible.

(k) The respondent essentially raised a two pronged defence to the application; He firstly contested the set-off by raising matters related to the surety. He secondly challenged the constitutionality of the default judgment.

(l) He firstly pointed out that he had signed as surety for the debts of another entity, National Aluminium and Glass CC (the CC) to the applicant. He contended that this entity should have been joined to this application and further contended that the applicant was precluded from claiming the debt from him when it had not exhausted its remedies against the CC.

(m) The further defence raised concerned the obtaining of the judgment debt. The respondent pointed out that the default judgment was granted by the registrar under rule 31(5)(a) of the rules of this court. He submitted that the default judgment was *ulta vires* the Constitution because he said that the registrar was 'an employee of the judiciary' and not a judicial officer or presiding

officer as contemplated by the Constitution. He contended that the default judgment was thus in conflict with arts 78, 80 and 93 of the Constitution. This point was further developed in argument at the hearing by Mr Mbaeva on behalf of the respondent. He also relied in argument upon arts 12 and 25 of the Constitution.

(n) In the applicant's replying affidavit, it was pointed out that the respondent had unsuccessfully attempted to bring a rescission application, as contemplated by rule 31(5). It had been set aside or struck out as an irregular proceeding. It was stated that the judgment remained binding until set aside and that the opposition to this application was an ill-conceived attempt to recussitate the struck rescission application. The applicant also took the point that the collateral constitutional challenge upon the default judgment had not been properly pleaded[1] and that the respondent had not given notice to parties with a direct and substantial interest in the constitutionality of the rule such the Judge-President and Attorney-General.

(o) The applicant further pointed out in reply that *mora* interest had commenced to run upon the debt when it had become overdue and payable in 2009.

(p)

(q) The applicant's notice to strike sought to strike out several paragraphs in the respondent's answering affidavit primarily on the grounds of being irrelevant and argumentative. In view of the conclusion I reach in this application, it is not necessary to deal with that application which was also not pressed in argument.

The suretyship

(r)

(s) The point taken by the respondent that the CC should have been joined (and that the application should be struck in the absence of doing so) is without substance. The CC is not a necessary party to these proceedings, given the nature of the suretyship, in which the respondent bound himself jointly and

[1]In accordance with *Lameck and Others v The President of the Republic of Namibia and Others* 2012 (1) NR 255 (HC).

severally as surety and co principal debtor *in solidum* with the CC.

(t)

(u) This leads to the point raised by the respondent that the applicant was obliged to first exhaust its remedies against the CC before it could hold the respondent liable. This point must also fail as it fails to appreciate the nature of the suretyship.

(v) The deed of surety is attached to the respondent's answering affidavit. It is entitled 'continuing covering suretyship.' In it, the respondent expressly binds himself 'jointly and severally as surety for and co-principal debtor *in solidum* with the customer (the CC) in favour of (the applicant). . . for the due performance of any obligation of (the CC) . . . to (the applicant) of an amounts which may now or at any time be or become owing to (the applicant) by (the CC).'

(w) The deed of suretyship also stated:

> 'I/We acknowledge and understand that as surety and co-principal debtor I/we waive and renounce the benefits to which I/we may be entitled to arising from the legal exceptions including but not limited to:
>
> > Excusion the right to require the company to first proceed against the (CC) for payment of any debt owing to (the applicant) before proceeding against the surety.'

(x) The terms of the suretyship on two scores relieve the applicant from first proceeding against the CC. Firstly, the respondent had expressly renounced and waived the benefit to rely on excussion. This express waiver and renunciation meant that the respondent would be precluded from requiring the applicant to first proceed against the CC.

(y) In the second place, the respondent bound himself jointly and severally as co-principal debtor *in solidum* with the applicant. This also gave the applicant the right to proceed against him without first having to exhaust its remedies against the CC.

(z) The respondent also took the point that the applicant had failed to give

notice or serve the application upon the members of the CC (the principal debtor). This point clearly demonstrates a failure to appreciate the separate legal personality of a close corporation. There is of course no need to give the members notice of the application or cite them as parties. This point is devoid of any substance.

Set-off

(aa) The principles governing set-off were recently restated by the Supreme Court[2] in the following terms:

'It is necessary to briefly pause here to explain the nature of a plea of set-off. For this purpose I can do no better than to quote from Amler's Precedents of Pleadings, where the learned author Harms in the fifth edition states:

> 'Set-off comes into operation when two parties are mutually indebted to each other and *both debts are liquidated and fully due*. The one debt extinguishes the other *pro-tanto* as effectually as if payment is made. Should the "creditor" seek to claim payment the defendant would have to plead and prove set-off in the same way as a defence of payment has to be pleaded and proved. But once set-off is established, the claim is regarded as extinguished from the moment the mutuality of the debts existed . . . Set-off is a form of payment *brevimanu*. It operates *ipso facto* and not only after or as a result of a plea of set-off.
> [Emphasis added.]

It is clear beyond doubt that –

> "only a debt that is liquidated can be set-off. If a defendant wishes to rely on an unliquidated debt, the defendant will have to file a claim in reconvention and pray for the postponement of judgment on the plaintiff's claim pending the judgment on the claim in reconvention."

The learned author sets out the essentials that must be alleged and proved by a party who wishes to rely on set-off:

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[2]In *Ndjavera v Du Plessis* 2010 (1) NR 122 (SC).

"(a) the existence of the indebtedness of the plaintiff;

(b) That both debts are fully due and legally payable;

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

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

(ii) It is admitted;

(iii) Its money value has been ascertained;

(iv) It is capable of prompt ascertainment;

(d) The reciprocal debt is owed by the plaintiff to the defendant. . . ."' [3]

(bb) In these proceedings, the respondent does not dispute his indebtedness under the deed of suretyship. He merely incorrectly considers that the applicant must exhaust remedies against the CC. In his answering affidavit he accepts that the debt of N$95 493, 85 became 'due on or about 2011' but disputes that interest should run from 2009 and says it should only run from 2011. But it is clear from the papers that the CC was *in mora* in respect of the debt after October 2009 when the amount became due. Mr Mbaeva appeared to be under the impression that interest cannot be awarded from a date which precedes the date of judgment. That assumption may to a large extent apply to delictual damages which are determined in a judgment. But it has no place in contractual claims where *mora* interest is claimed. What is of importance in such claims is when the (principal) debtor was in *mora*. That date can plainly precede the date of judgment and invariably does.

(cc) Once the respondent had accepted liability for the debt and given that it is also clear that he is liable for *mora* interest, and given the fact that the other requisites of set-off are present, it follows that the applicant's debt (under the settlement agreement) is thus extinguished by set-off.

(dd) As set-off thus finds application because the respondent's debt was due prior to and even in the absence of default judgment having been taken, it is not necessary for me to deal with the constitutional challenge mounted against the granting of default judgment by the registrar under rule 31(5)(a) and I decline to

[3]Supra at 128 – 129.

do so, including the points raised by the applicant against the challenge and the manner in which it has been raised and whether art 12 can find application to the granting of judgment by default where a debtor does not contest a claim.

(ee) It follows that the rule is to be confirmed with costs. The applicant has engaged instructed counsel and seeks a costs order to include those charges as is contained in the rule. Those costs were in my view warranted by this matter.

(ff) I accordingly make the following order:

The rule is confirmed.

(gg)

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D SMUTS

Judge

APPEARANCES

APPLICANT:	Y Campbell
Instructed by:	Behrens & Pfeiffer
RESPONDENTS:	T. Mbaeva
Instructed by:	Mbaeva & Associates