REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2020/ A5066

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: Yes

7 February 2022 **ROLAND SUTHERLAND** DJP

In the matter between**:-**

SOUTH AFRICAN TRANSPORT AND ALLIED WORKERS UNION **APPELLANT**

and

SOUTH AFRICAN SECURITISATION PROGRAMME (RF) LTD **1ST RESPONDENT**

SASFIN BANK LIMITED **2ND RESPONDENT**

THE SHERIFF JOHANNESBURG CENTRAL **3RD RESPONDENT**

Delivered: This judgment was handed down electronically by being uploaded to caselines and by circulation to the parties' legal representatives via e-mail. The date and time for hand-down is deemed to be 10h00 on 7 FEBRUARY 2022.

JUDGMENT

HEADNOTE
An appeal against an order dismissing an application that moneys to be returned by the respondent who had come into possession of the money pursuant to a writ issued on the strength of an order which was rescinded subsequent to the execution of writ, the respondent raising set-off as a defence to the application
Sole issue for decision was whether set-off could be claimed – respondent relied on an agreement with the appellant that the sum be paid to discharge an admitted debt; alternatively, the fact of an admitted indebtedness in at least the sum received in terms of the writ
The fact of the agreement and the admitted indebtedness established on the papers
Appeal dismissed with costs
Quare: whether as a matter of public policy, a party who had received goods or money pursuant to a writ that was subsequently invalided because the order upon which it was based was rescinded should, even though it has a lawful counter-claim, be allowed to remain in possession of the goods or money to the strategic disadvantage of the other litigant in the litigation – this issue not raised on the papers nor argued and hence the court was not in a position to make a finding or express a firm view – issue should await until fully ventilated for a view to be taken.

Per Sutherland DJP (with whom Twala and Opperman JJ concur)

Introduction

1. The appellant is a trade union. The first and second respondents are finance houses, who operate in collaboration with one another.[1] The dispute is about whether the appellant owed the respondents payment for the lease of office equipment. The respondents sued the appellant. A judgment by default for R12,731,774.08 was granted on 8 August 2018. A writ of execution was issued. The appellants sought to interdict the execution pending a rescission

[1] The third and fourth respondents did not participate in the matter.

application. On 11 December 2018 the interdict application was dismissed with costs.[2] The writ was thereupon executed by the sheriff, seizing R10,171,748.06 from the appellant's bank account and paying it over to the respondents. Subsequently the default judgment was rescinded by an order granted on 17 May 2019. The appellants thereupon demanded the return of the money. The respondents refused to pay.

2. As a result, an application for the return of the money was brought by the appellant. It came before McAslin AJ. He dismissed the application on 15 October 2019. This appeal lies against that order.

3. Self-evidently, once the judgment upon which the writ was based was rescinded, the position of the parties ought to have been reversed and the money should have been returned. No contest was advanced by the respondents to the proposition that they were under a legal obligation to return the money so acquired by them from the appellants under these circumstances. However, the respondents averred that the appellants were indebted to it in the sum of R10,171,748.06 and as a result of that circumstance, the respondents claimed that they were entitled to set off the respective indebtedness of each party to the other. Hence the refusal to pay.

4. The only real controversy in the appeal is whether the claim of set-off is well made.

Condonation

[2] What the rationale was for this outcome is not disclosed.

5. The appellants notice of appeal was filed on 24 November 2020. The application for the hearing of the appeal was filed on 13 August 2021 but was required by Rule 49(6)(a) of the Uniform Rules to have been filed by 24 March 2021. The appellant accordingly applied for condonation for non-compliance with this rule. Although the respondents did not take issue with the granting of condonation and expressed a desire that the matter be heard, Mr Epstein, representing the respondents, drew attention to the fact that the attorneys for the respondents had in August of 2021, alerted the appellant's attorneys to the fact that a condonation application was required but that the application for condonation which was filed during January 2022 did not deal with the delay between August 2021 and January 2022 at all. This Court then afforded the appellant an opportunity to supplement its condonation application which was duly done on 1 February 2022.

6. The explanation for the delay between March 2021 and August 2021 was that the attorneys representing the appellant had experienced a burglary at their offices, the premises had been vandalised which had resulted in electronic equipment being compromised. A case of theft had been reported and an insurance claim lodged – the particulars of which was provided to this court. Matters had to be reconstructed which process was time consuming. It took about 4 months before everything was back on track.

7. The further affidavit received on 1 February 2022 revealed that Ms Masondo, the attorney dealing with the matter for the appellant, had personal challenges with the health of her very young son who was hospitalised during this time. This is dealt with in some detail in the

supplementary affidavit. We accept the correctness of this explanation without reservation, Ms Masondo being an officer of this court.

8. Ms Masondo had not checked Caselines after December 2021 and did not realise that a date for the hearing of the appeal had been allocated. Mr Du Toit, the respondents' attorney, allerted her to this on 10 January 2022. Ms Masondo had prepared a draft condonation application which she had instructed her counsel to settle only to be told by him on 24 January 2022 that he was no longer available. She had to instruct new counsel and the application was finalised on Friday, 28 January 2022.

9. Although condonation is not there for the taking and as Mr Epstein correctly pointed out is properly and issue between the court and the applicant for condonation, there appears to be no or little prejudice in the circumstances of this case which is the overriding consideration and we accordingly deem it in the interests of justice to condone the non-compliance with rule 49(6) (a).

The critical facts

10. The respondents' basis for a claim of set-off is founded on the averment that an agreement was concluded between the parties to pay the sum of R10 250 000 in respect of an admitted indebtedness, or alternatively, even if an agreement to such an effect is unproven, there was nevertheless an unequivocal admission of an indebtedness in that sum.

11. This claim is founded on documents which are common cause; a letter from the appellant on 26 September 2018, signed by its general secretary and the deponent to the founding affidavit, and a further letter from the appellant, signed by one Edwin Joseph, on behalf of the appellant, on 28 October 2018.

[This letter is on a SATAWU letterhead]

"DATE: 26/09/2018
TO: SASFIN
ATT: The CEO
RE: Settlement Letter

Dear Sir/Madam ,

This letter serves to confirm acceptance of SASFIN's counter-proposal in regard to SATAWU's repayment of R10250 000.00 to SASFIN for the outstanding funds.

The agreements number are as follows:

1. R000088098
2. R000094349
3. R000088740
4. R000097889
5. R000099993
6. R000100684
7. R000100686
8. R000085326

The Parties have agreed that a once off payment of R 10250 000.00 (Ten Million Two Hundred and Fifty Thousand Rand) will be made in full and final settlement of the capital, interest and legal costs to be paid on or before 31st OCTOBER 2018.
The payment will be made into the following account, which has been provided to SATAWU by the SASFIN representatives:

- ODBB INC ATTORNEYS
- ABSA RANDBURG
- ACC: ….. [omitted]
- CODE: …..[omitted]
- REF: SR221/ADT

Once the above mentioned payment has been paid. SASFIN will provide a settlement confirmation letter that will be given to SATAWU and that all printer hardware financed through SASFIN becomes the property of SATAWU.
Furthermore, SASFIN will provide proof that no additional legal action will be taken and should any judgments be taken subsequent to the agreement of this settlement proposal, SASFIN will be responsible for all costs in order for the matter to be rescinded.

We hope that the above is in order.

_____
Jack Mazibuko
SATAWU General Secretary"

[This was an email]

"29 October 2018
Good Day Adriaan

This email serves to confirm that unfortunately Satawu cannot settle, as per agreement. The reasons are as follows

1. Satawu have existing judgments
2. Updated audited financials are still in process.
3. Cash flow position of the union.

Based on the above issues, we would like to have another meeting to discuss repayment of the debt.
We are happy to make a substantial payment, and then we will need to meet to discuss the repayment of the balance based on the above issues we have faced.
Regards
Edwin Joseph
Acting on behalf of SATAWU"

12. It is a point of significance that the letter of 26 September 2018 was written, and the agreement described therein was concluded, at a time when the appellant, on its own say-so, was ignorant that a default judgment had been taken against it. Therefore, insofar as it is relevant to the interpretation of the text of the agreement, it was not concluded to address the peril of an existing judgment for a higher amount.

13. The contention is advanced on behalf of the appellant that the two letters do not evidence an agreement. This construction posits that the text was a mere offer to settle which was withdrawn. That meaning is unsustainable. In the letter of 26 September 2018, the text refers to the fact that "This letter serves to confirm the acceptance of SAFIN's counter-proposal in regard to SATAWU's repayment of …". Moreover, the text goes on to detail how

performance will be made and concludes with a recording of SASFIN's obligation that, upon performance, no further liability shall accrue to the appellant; ie, the agreement settles all debts with full and final effect. The letter of 29 October 2018 can only be fairly read to be a communication that performance cannot be carried out and thereupon extends an invitation to re-negotiate fresh terms of payment. The agreement of 26 September 2018 could not be unilaterally cancelled. Importantly, both letters are unequivocal in an acknowledgement of indebtedness.

14. An attempt was made by the appellant to draw succour from a later email on 30 October 2018, the day before performance was due, from the respondent's, attorney, du Toit and Joseph's reply thereto.

"Dear Sir;
Thank you for the reply.
Client is of the opinion that to meet again will simply be a futile exercise and a waste of time and unnecessary costs.
Kindly provide your written future payment proposal as a matter of urgency upon which we will take instructions and revert.
Yours Faithfully
AD du Toit"

This email elicited this response:

"Hi Adriaan
Not a problem, I will arrange a future payment proposal to be drawn up and revert back to you in the course of today.

Regards
Edwin Joseph."

15. The notion advanced is that negotiations opened up again. This is incorrect. What du Toit says in the email is that a meeting is a waste of time. He says to the appellant that it may submit the fresh proposal and it will be looked at. There is no abandonment of the agreement confirmed by the appellant in the letter of 26 September 2018. Joseph's response later the

same day takes the matter no further. Perhaps the final nail in the coffin is a letter of 29 November 2018 from the appellant's attorney in which, although suggesting there had been only 'attempts' to settle, unequivocally acknowledges an indebtedness which she offers to be paid off in instalments.

16. The upshot is that the respondents could properly invoke the agreement, alternatively the acknowledgement, and claim set-off. The settlement is not founded on a judgment taken and therefore stands wholly independent from the default judgment and is unaffected by the rescission.

The cases as set out in the papers

17. The application was launched as an axillary proceeding to the action which, after the rescission, was now again pending. The relief sought was a release of the money taken from the bank account from attachment and that the respondents pay back or return the money. The founding papers recounted the litigation saga and made no reference to the correspondence cited above. The set-off was raised by the respondents when they answered the founding affidavit. The opportunity to refute the claim of set-off and its basis in the replying affidavit presented itself. However, very little was said. A predictable denial that set-off could be claimed was stated. The reply alludes to the fact that a set-off has been pleaded in the pending action. A misleading allegation is made that the respondents admitted in their answer that no settlement was reached, but in this, the appellant confuses the respondents' rejection of the appellant attorney's offer of 29 November 2018, which is an

irrelevance in relation to the agreement embodied in the letter of 26 September 2018. The respondents simply refused to accept a novation of the agreement. The balance of the reply is a series of grievances and arguments that do not contribute to a refutation of the settlement agreement.

18. In the heads of argument filed on behalf of the appellant many more grievances are aired but these do not assist the court in deciding the issue of the existence of the agreement. Some energy is expended in trying to show that the respondents are the 'wrong' persons to have settled with, a notion torn out from the confusion caused by the plethora of parties who were involved in the supply of the goods, and the anterior financing thereof in which agreements were ceded and sold and contractual obligations shifted from one entity to another. None of that is helpful to refute the fact that the correspondence cited above demonstrates that the respondents acted in accordance with their rights to invoke set-off. The persons from whom the appellants demand a refund are the same persons identified in the correspondence.

19. The requirements of set-off were met, namely, debts which are liquidated, due, and properly reciprocal.[3]

20. In the judgment a quo, reference is made to a submission made on behalf of the appellant that the set-off issue could not be decided because it was an issue pleaded in the action. Plainly McAslin AJ was correct to dismiss that argument. However, it does perhaps indicate that a strategic error was made in not attempting to address set-off comprehensively in the application.

[3] See: *Blakes Maphanga v Outsurance 2010 (4) SA 232 (SCA*) at para 14.

Public policy considerations

21. The facts in this matter illustrate an issue of concern. That concern is this: when a party who has come into possession of a thing or money pursuant to a writ which is, by a rescission of the anterior judgment, now invalidated, should it be allowed to retain the thing or the money, to the strategic disadvantage of a defendant? The fortuitous trumping of what seems to be the logical and proper course of events by another factor, in this case a valid set-off claim, is notable. Apparently, no relevant precedent for a trumping in this sense, has been found by counsel who addressed this court.

22. However, because the point was not raised in the papers nor argued, it is not open to this court to express a firm view or reach a decision on this question. In our view the respondents have not acted unlawfully nor, as the law presently stands, can it be said that they acted unethically. This issue may be an appropriate matter, where fully ventilated, to which consideration should be given in a future case, either as a firm principle or a factor to be weighed in the exercise of a discretion.

Conclusions

23. The upshot is that the appeal must be dismissed.

24. The respondents employed two counsel which, given the quantum at stake, the economic implications and the significance of the matter to the parties was appropriate. Costs of two counsel shall be ordered.

The Order

The appeal is reinstated and dismissed with costs, which shall include the costs of two counsel.

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SUTHERLAND DJP

I agree:

_____

TWALA J

I agree:

_____

Opperman J

Heard: 31 January 2022.
Judgment: 7 February 2022

For appellant:
Adv F Opperman,
Instructed by Masondo Malope Attorneys.

For respondents:
Adv H Epstein SC, with him
Adv S Cohen,
Instructed by ODBB attorneys.