



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case no: **9470/2023P**

In the matter between:

PHILIP FREDERICK AUGUSTYN

APPLICANT

and

TWK AGRI INSURANCE (PTY) LIMITED

RESPONDENT

(Registration Number: 1999/014168/07)

ORDER

The following order is granted:

1. Judgment is entered against the respondent in favour of the applicant for payment of the amounts of R59 321.28 and R210 311.32.
 2. The respondent is to pay the applicant's costs.
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JUDGMENT

MOSSOP J:

Introduction

[1] The applicant and his wife previously owned an insurance brokerage business in Ladysmith, northern KwaZulu-Natal, which, inter alia, dealt with agricultural

insurance. During February 2016, they sold their business to the respondent. It was a condition precedent to that sale that the applicant concludes an independent insurance marketer's agreement with the respondent (the agreement) and that he render those services to it. The agreement was concluded as required. For the services that he would render to the respondent, it was ultimately agreed that the applicant would be paid an amount of R15 000 per month plus 50 percent of the commission earned arising from new business that he wrote for the respondent.

[2] Over the period from 1 February 2016 to 30 April 2023, the applicant served the respondent in this capacity until his services were lawfully terminated by the respondent in accordance with the provisions of the agreement.

[3] In this application, the applicant claims from the respondent commissions allegedly earned by him but not paid by the respondent. The respondent denies that it presently owes the applicant anything. It admits that at one stage it was indebted to the applicant but that he, in turn, was indebted to it. By virtue of the automatic operation of set-off, the respondent contends that it is no longer indebted to the applicant. The applicant denies that there ever was a mutual indebtedness, but asserts that even if there was, it was not in a liquidated amount.

The notice of motion

[4] The applicant claims the following relief from the respondent:

'A rule nisi do issue calling upon the abovenamed respondent to show cause, why an Order should not be made in the following terms:

1.1 The Respondent be and is hereby interdicted and restrained from seeking a set-off of any alleged indebtedness that is due to it as a result of the insurance claim made by it in respect of a claim submitted by Mr Fick;

1.2 The Respondent is directed forthwith to make payment to the Applicant the sum of R59 321-28 and R210 311-32 for harvest commissions, being (sic) amount due, owing and payable in respect of commission earned by the applicant.

1.3 The Respondent is directed to pay the costs of this application on the scale as between attorney and client.'

[5] The applicant no longer seeks the interdictory relief claimed in sub-paragraph

1.1 of the notice of motion and nothing more need be said about it. No rule was ever issued in the applicant's favour and thus what is now sought is a final order.

The practice directive

[6] In the week prior to the matter being argued, as required by practice directive 9.4.2, I received a notice (the notice) from the applicant's attorneys that identified the issue to be argued before me. I was informed that the sole issue that I was to decide upon was:

'... whether the respondent is entitled to, by virtue of the provisions of common law set-off, retain the commission due to the applicant.'

[7] Practice directive 9.4.2 provides as follows:

'The party responsible for enrolling the matter shall, at the same time, deliver a list, agreed to by all the parties, of those issues in dispute and those which are common cause.'

The reference to 'at the same time' is a reference to the obligation visited upon the party that enrolled the matter on the opposed motion roll to inform the registrar whether the matter is proceeding.

[8] I, naturally, assumed that there was but a single issue to be determined. In this I was incorrect as when the matter was called, Mr Jacobs, who appeared for the respondent, stated that the respondent's attorneys had not agreed to the content of the notice. Ms Ploos van Amstel, who appeared for the applicant, indicated that she believed that the respondent had, indeed, agreed and that what was stated in the notice was the only issue to be determined. Mr Jacobs, however, indicated that the respondent also did not agree with the quantum of the indebtedness of the respondent alleged by the applicant in his notice of motion and that this was an issue that also needed to be determined.

[9] It need hardly be said that this is a most undesirable state of affairs. The purpose of defining issues is a salutary one, intended to assist the court in its preparations in focussing on the true issues. The court is overwhelmed with incoming work and has limited time within which to prepare. Often issues regarded at one stage as being of critical importance to the resolution of a matter are raised, but lose their initial lustre as the date of argument nears. If the court is not informed of

those issues that have fallen by the wayside it may unnecessarily devote time to them. Parties must therefore agree on what the issues are and inform the court accordingly.

[10] That being said, I did not understand Mr Jacobs to deny the validity of the issue identified by the applicant in the notice. That issue appears to be the central issue in the matter. The point made by Mr Jacobs was that it was not the only issue. I shall therefore firstly consider the issue of the quantum of the respondent's indebtedness to the applicant and thereafter the issue of set-off.

The first issue: the extent of the respondent's indebtedness

[11] While there is a dispute over how much was owed by the respondent to the applicant, there is no dispute that he was, at least, at one stage, owed money by the respondent. That this must be so is evidenced by the fact that the respondent raises set-off as a defence to the applicant's claim. Claiming set-off, of necessity, requires an admission of its own indebtedness by the party invoking it.

[12] The size of the mutual debts is relevant, for if they are in different amounts and set-off is found to operate, then the smaller debt and its original obligation are extinguished and the larger debt is reduced by the amount of the smaller debt. In the latter event, judgment could then notionally be entered in respect of the remaining balance.

[13] The applicant claims in his notice of motion that the respondent owes him the amounts of R59 321.28 and R210 311.32, giving a total indebtedness of R269 632.60. These are the figures reflected in sub-paragraph 1.2 of the notice of motion. The applicant explains that the amount of R59 321.28 is comprised of two identical amounts, namely two commissions in the amount of R29 660.64 each. The one amount is for commission which was due in May 2023 and the other is for commission which was due in June 2023. The second amount claimed in the notice of motion of R210 311.32 is described by the applicant as being due to him as a 'harvest commission'.

[14] Considering the two amounts of R29 660.64, the respondent admits one of them, for it acknowledges that it owed the applicant one payment in that precise amount. It is not clear, however, which month's commission is admitted.

[15] It seems to me that the other commission payment of R29 660.64 must be deemed to be admitted by the respondent by virtue of the way that it has answered to the applicant's allegations in his founding affidavit that allege that the two identical commissions are due to him. In its answering affidavit, when dealing with the subparagraph in the founding affidavit that allege the two identical commissions, the respondent states the following:

'7.5 Whilst the aim of the application is noted, it is denied that the applicant is entitled to any of the relief sought.

7.6 The relief sought is fatally flawed, ill-conceived and in fact not competent in law.' This is a general rejection of the applicant's claim that does not specifically address the precise amounts identified and claimed by the applicant. It is trite that where an allegation is not specifically addressed, it is taken to be admitted.¹ The entitlement of the applicant to the second commission of R29 660.64 must therefore be taken to be admitted.

[16] The applicant appears to concede the correctness of the 'harvest commission' of R210 311.32 because in two different documents that it caused to be brought into existence, it confirms that this is the amount due by it to the applicant in this regard. In a letter dated 7 February 2023, written by the respondent to the applicant, the respondent made a proposal to the applicant:

'Dit word voorgestel dat die kapitaal verskuldig verhaal word van die 2022/23 oesversekering kommissie wat aan jou betaalbaar is, in die bedrag van R210,311.32 ...'

In an attachment to an acknowledgement of debt that the respondent later prepared for the applicant to sign (which he declined to sign), the following wording appears:

'Totale kommissie verdienste vir 2022/2023 seisone in die bedrag van R456,087.68 waarvan R210,311.32 kommissie betaalbaar is aan Philip Augustyn ...'.

[17] However, in its answering affidavit, the respondent does not mention the amount of R210 311.32. Instead, it alleges that what it owes the applicant for the

¹ *Mostert v Nedbank Limited* [2014] ZAKZPHC 20 paras 20 and 21.

harvest commission is the amount of R203 190.90. Why there is a difference of R7 120.42 remains unexplained in the face of the respondent's own admissions as to what is due to the applicant. It appears to me that in the absence of any explanation for the difference, the respondent must be held to the figure that it has twice freely acknowledged as being due to the applicant.

[18] I therefore find that the applicant has established on a balance of probabilities that the respondent is indebted to him in the amounts of R59 321.28 and R210 311.32.

The second issue: set-off

[19] This is the principal defence raised by the respondent to the applicant's claim. For compensatio, or set-off, to operate there must be two liquidated debts, due and payable and mutually owed by the same pair of persons.² The party claiming set-off bears the onus of proving it. Set-off cannot occur where one, if not both, of the debts is unliquidated, e.g. a claim for damages, or where what is required is a:

'... prolonged investigation into disputed questions of fact.'³

[20] The respondent claims that set-off operates automatically, that it has already occurred and that it therefore is not presently indebted to the applicant. There are, in fact, two competing theories about how set-off operates.⁴ The first theory, embraced by the respondent, holds that set-off operates automatically and *ipso iure*. The second theory holds that it does not occur automatically, but must first be invoked by one party but that, once invoked, it has retrospective effect. The weight of authority seems to favour the first theory. Indeed, in *Herrigel NO v Bon Roads Construction Co (Pty) Ltd*,⁵ the court went so far as to state that 'it is trite law that set-off operates automatically'. Whichever of the two theories is applied, it appears to me that there are not many practical consequential differences that result from one theory being

² *Ackermans Ltd v Commissioner, South African Revenue Service; Pep Stores (SA) Ltd v Commissioner, South African Revenue Service* [2010] ZASCA 131; 2011 (1) SA 1 (SCA) para 8.

³ F du Bois et al *Wille's Principles of South African Law* 9 ed (2007) at 833.

⁴ See generally 31 *Lawsa* 3 ed at 244.

⁵ *Herrigel NO v Bon Roads Construction Co (Pty) Ltd and another* 1980 (4) SA 669 (SWA); [1980] 4 All SA 704 (SWA) at 676F-G.

favoured over the other: in either event, the reciprocal debts are extinguished when they first become capable of set-off.

The position of independent contractors

[21] In *Colonial Mutual Life Assurance Society v MacDonald*,⁶ the Appellate Division confirmed that in our law, while a principal is liable for the acts of an agent who is its servant, a principal is generally not liable for the acts of an agent who is an independent contractor. This was confirmed in *Stein v Rising Tide Productions CC*,⁷ when Van Heerden J stated the position to be the following:

‘As a general rule, an employer *is* vicariously liable for the delicts of his or her employee acting in the course and scope of the latter's employment, while, in general, an employer *is not* vicariously liable for the negligence or wrongdoing of an independent contractor employed by him or her. The main distinction between an employee (servant) and an independent contractor appears to lie in the fact that the former undertakes to render personal services to the employer, while the latter undertakes to perform a certain specified piece of work or to produce a certain specified result for the employer. Unlike an employee, an independent contractor is generally not subject to the control or the instructions of the employer as to the manner in which he or she performs the work or produces the result...’

[22] There may, however, still be instances where an employer may be liable for the acts of an independent contractor. In *Saayman v Visser*,⁸ Navsa JA pointed out that in English law there is an exception to this principle where:

‘... the employer himself/herself has been negligent in regard to the conduct of the independent contractor which caused harm to a third party.’⁹

The test for negligence in such circumstances was succinctly formulated in *Kruger v Coetzee*¹⁰ by Holmes JA when he explained that

‘For the purposes of liability culpa arises if -

- ‘(a) a *diligens paterfamilias* in the position of the defendant –
 - (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

⁶ *Colonial Mutual Life Assurance Society Ltd v MacDonald* 1931 AD 412.

⁷ *Stein v Rising Tide Productions CC* 2002 (5) SA 199 (C) at 205F-I.

⁸ *Saayman v Visser* [2008] ZASCA 71; 2008 (5) SA 312 (SCA).

⁹ *Ibid* para 18.

¹⁰ *Kruger v Coetzee* 1966 (2) SA 428 (A).

- (ii) would take reasonable steps to guard against such occurrence; and
- (b) the defendant failed to take such steps.¹¹

[23] In the more recent matter of *Chartaprops 16 (Pty) Ltd and another v Silberman*,¹² Ponnar JA reaffirmed the principle that a principal is normally not liable for the delicts of an independent contractor whose service he has engaged and indicated that he did not support the concept of a non-delegable, or personal duty, being visited upon a principal. This concept holds that if a person was trying to have a piece of work done, the doing of which imposed on him a duty, he cannot escape the responsibility of discharging that duty by delegating it to an independent contractor. To Ponnar JA, the effect of this would enable:

‘... a plaintiff to outflank the general principle that a defendant is not vicariously responsible for the negligence of an independent contractor where the causative agent of the negligence relied on was not an employee of the defendant but an independent contractor.’¹³

Ponnar JA continued and asserted that a definite distinction must be maintained between the vicarious liability of an employer for the civil wrongs of his employee, and the position of a principal who employs an independent contractor.

[24] Ponnar JA proceeded to find in *Chartaprops* that whether an employer should be held liable for the acts of an independent contractor must be determined by applying the principles laid down in *Langley Fox Building Partnership (Pty) Ltd v De Valence*,¹⁴ namely that the employer is required only to exercise that standard of care which the circumstances demand. This required no more than inquiring whether the principal himself has not perhaps been negligent in respect of the damage caused by the independent contractor. Thus, where the facts demonstrated the existence of an abnormally high risk, our law would expect greater vigilance on the part of the principal, i.e. a ‘higher’ standard of care, in order to prevent foreseeable harm from materialising, and vice versa where the risk of harm or danger is low.

¹¹ Ibid at 430E-F.

¹² *Chartaprops 16 (Pty) Ltd and another v Silberman* [2008] ZASCA 115; 2009 (1) SA 265 (SCA); [2009] 1 All SA 197 (SCA) (*‘Chartaprops’*).

¹³ Ibid para 29.

¹⁴ *Langley Fox Building Partnership (Pty) Ltd v De Valence* 1991 (1) SA 1 (A); [1991] 3 All SA 736 (AD).

[25] The law is thus settled that a principal is generally not liable for the civil wrongs of an independent contractor, except where the principal was personally at fault.¹⁵

[26] In its answering affidavit, the respondent stated the following proposition:

‘In law, Respondent also attracted liability for the acts or omissions of Applicant, which may cause any client to suffer damages.’

The basis for that conclusion was not stated, and, given the nature of the relationship between the applicant and the respondent, dealt with below in some detail, the basis for this conclusion ought to have been disclosed. It may well be that there is some statutory authority that serves as the foundation for that conclusion, but if that is the case, it was never mentioned and does not form part of the respondent’s defence. It is trite that it is not the court’s function to go beyond the parameters of the dispute framed by the parties in their affidavits.¹⁶

The relationship between the applicant and the respondent

[27] The relationship between the parties is defined by the terms of the agreement. That document immediately makes it plain what the nature of the relationship was:

‘2.1 The company shall contract with the consultant and the consultant shall provide services to the company in the capacity and form of independent insurance marketer.

2.2 No expectation of employment is created by this contract or by the consultant’s services with the company. The consultant agrees and certifies that the consultant is not entitled in fact or in law, nor does the consultant have any expectation of, employment with the company, and is an independent consultant with, and independent contractor to the company.

2.3 The consultant is not entitled to any of the employment benefits and conditions applicable to the employees of the company.

2.4 No employer/employee relationship of any nature whatsoever is created by the terms of this agreement, or by the consultant’s services to the company in terms of this agreement.’

¹⁵ *Chartaprops* para 42.

¹⁶ *Minister of Safety and Security v Slabbert* [2009] ZASCA 163; [2010] 2 All SA 474 (SCA) para 11; *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA); 2009 (1) SACR 361 (SCA) paras 15 and 19; *Four Wheel Drive Accessory Distributors CC v Rattan NO* [2018] ZASCA 124; 2019 (3) SA 451 (SCA) paras 21-23.

[28] The agreement imposed the following obligation, which I will refer to as ‘the best endeavours clause’, on the applicant, namely to:

‘[u]se his best endeavours properly to conduct, improve, extend, develop, promote, protect and preserve the business interest, reputation and goodwill of the company and carry out his duties in a proper, loyal and efficient manner...’

[29] The parties could not have made it any clearer that the applicant was not an employee of the respondent but was an independent contractor.

The relevant facts

[30] In the course of the rendering of services to the respondent, the applicant had dealings with a Mr Paul Fick (Mr Fick). Mr Fick is a farmer in the Ladysmith district and required hail damage insurance in respect of certain fields on his farm, Acton Valley (Acton Valley). During October 2022, the applicant called upon Mr Fick, who informed him which fields he required to be covered by the hail insurance. Mr Fick assigned numbers to the fields for identification purposes. The applicant prepared the insurance proposal and presented it to Mr Fick for his consideration, and received his approval to go ahead when Mr Fick signed the proposal. The applicant then submitted the proposal to the insurance company concerned, which accepted it and provided the requested cover.

[31] Unbeknown to both the applicant and Mr Fick, five fields that Mr Fick had identified as requiring cover were erroneously not included in the insurance policy (the excluded fields).

[32] As may be expected given the vicissitudes of life, a hailstorm struck Acton Valley and the excluded fields, which were planted to soya beans, were decimated by the hail. As is further to be expected, the insurance company concerned declined to pay out anything in respect of the excluded fields because they were not covered by the policy that it issued. Mr Fick claimed that the damage to the excluded fields came to R626 380.53.

[33] After realising that the excluded fields were not insured, Mr Fick sent an email to the applicant expressing his dissatisfaction with what had occurred. In his email he stated, inter alia, the following:

'Tot my skok en algehele verbystering verneem ek nou dat geen Sojaboon lande op Acton Valley verseker is nie. Lande A2, A4, A5, A6 en A11. Ek het wel die polisse geteken maar jou woord gevat dat alles volledig en in order is.'

[34] Upon receipt of this email from Mr Fick, the applicant forwarded it to a number of representatives of the respondent by way of a covering email, in which he stated the following:

'Ek is ook baie teleur gesteld (sic) dat ek so n bona fide fout gemaak het.'

[35] The respondent thereafter decided without reference to, or consulting with, the applicant that it should personally compensate Mr Fick for his loss. Perhaps that failure to consult the applicant is further evidence of the fact that he was truly an independent contractor. The respondent dispatched a loss assessor to Acton Valley and he assessed the value of the damage to the excluded fields at R406 390.07. Mr Fick appears to have been advised of this lesser valuation and appears, furthermore, to have accepted it.

[36] The respondent had indemnity insurance itself and consequently lodged a claim with its insurers. That claim was duly admitted and settled by the insurers, who agreed to pay the respondent the sum of R406 390.06, being one cent less than the amount the respondent had agreed with Mr Fick. The basis upon which the respondent's insurers accepted liability was not disclosed. However, the respondent was required to make an excess payment of R250 000 on its insurance policy. Rather than paying the amount of R250 000 to the insurer, that amount was simply deducted by the insurer from the amount of R406 390.06 to be paid by it to the respondent, resulting in a net payment to the respondent by the insurance company of R156 390.06. Despite that deduction, the respondent paid Mr Fick the full amount of R406 390.07.

Analysis

[37] Arising from these facts, the respondent claims that the applicant was indebted to it in the amount of R250 000, being the value of its excess deduction. It alleges that this debt arose either when the applicant admitted that Mr Fick's loss was occasioned by his fault, alternatively when the deduction of R250 000 was made by the insurance company from the respondent's indemnity insurance claim, further alternatively when payment of Mr Fick's claim was made by it in settlement of the claim. The respondent also asserts that the amount of R250 000:

'... is an amount fixed by the insurance contract, and in other words, a liquidated amount.'

Thus, so it is submitted, it is capable of being set-off against the amount that the respondent admits owing the applicant.

[38] I regret that I am not able to agree with this conclusion. In the light of the fact that the applicant was an independent contractor, the respondent will have to establish his indebtedness to it before it can be accepted that there was an existing mutual indebtedness between the parties to which set-off can then be applied. The applicant does not admit his indebtedness to the respondent. While the applicant appears to have acknowledged that he made what he described as a 'bona fide fout' (bona fide mistake), he also contends that Mr Fick reviewed and approved the insurance proposal that he had prepared before it was submitted to the insurance company. The conduct of Mr Fick, according to the applicant, is of relevance and could possibly lead to a conclusion that he was responsible for his own misfortune or that he, at least, contributed to it. That proposition is dismissed by the respondent as being both 'opportunistic' and 'disingenuous'. It may well ultimately be both of those things, but in my view it is a defence that may not simply be dismissed as being frivolous, whatever the respondent may think of it. Nor, in my view, has the applicant admitted that Mr Fick's loss was occasioned by his fault, for he denies that his error was the cause of Mr Fick's loss. Mr Jacobs argued strenuously that the applicant had admitted that his negligence caused the loss but to me it is clear that the applicant did not admit this when his founding affidavit is considered as a whole.

[39] In its answering affidavit, the respondent claims that the loss that it has allegedly suffered is contractual in nature. In advancing this proposition, it appears to rely on the best endeavours clause in the agreement. I do not see this to be the case. That clause had a general meaning prescribing how the applicant should

conduct himself. It did not instruct him how to do his work, nor could it do so, as an independent contractor himself determines how he performs his duties, not the employer. In my view, if a loss has been suffered by the respondent, it can only be delictual in nature and that loss will have to be determined by a court.

[40] It therefore follows that there is no mutual indebtedness existing between the parties and that there can be no set-off in these circumstances. The respondent is accordingly not entitled by virtue of the operation of common law set-off to retain the commission due by it to the applicant.

Costs

[41] The applicant claims a punitive costs order on the attorney and client scale in the event of his application succeeding. In *In re Alluvial Creek*,¹⁷ Gardiner JP remarked that:

'Now sometimes such an order is given because of something in the conduct of a party which the Court considers should be punished, malice, misleading the Court and things like that ...'

The applicant must have his costs, but I discern no conduct in this matter worthy of a punitive costs order. None of the factors referred to in *Alluvial Creek* appear to be present. In my view, the respondent's view of the law was incorrect, but that does not require it to suffer a punitive costs order.

Order

[42] In the result, I grant the following order:

1. Judgment is entered against the respondent in favour of the applicant for payment of the amounts of R59 321.28 and R210 311.32.
2. The respondent is to pay the applicant's costs.

¹⁷ *In re Alluvial Creek Ltd* 1929 CPD 532 at 535.

APPEARANCES

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Date of Hearing	:	20 February 2024
Date of Judgment	:	18 March 2024

