THE SUPREME COURT OF APPEAL
**REPUBLIC OF SOUTH AFRICA**

# JUDGMENT

Case number: 081/08
No precedential significance

In the matter between:

**SILTEK HOLDINGS (PTY) LTD**
**(in liquidation) t/a WORKGROUP** **APPELLANT**

**v**

**BUSINESS CONNEXION**
**SOLUTIONS (PTY) LTD** **RESPONDENT**

**Neutral citation:** *Siltek v Business Connexion* (081/2008) [2008] ZASCA 136 (26 November 2008)

Coram: Streicher JA, Jafta JA et Boruchowitz AJA

Heard: 6 November 2008

Delivered: 26 November 2008

Summary: Set-off – requirements therefor restated.

## ORDER

**On appeal from**: Pretoria High Court (Mabuse AJ)

1. The appeal is upheld with costs.
2. The order of the court a quo is set aside and replaced with the following order:

(a) The defendant is ordered to pay the sum of R436 430-97 with interest calculated at the rate of 15.5% from the date of default to the date of payment.

(b) The defendant is ordered to pay costs of the action.

## JUDGMENT

**JAFTA JA (**Streicher JA, Boruchowitz AJA)

[1] This is an appeal against the judgment of the Pretoria High Court (Mabuse AJ) in terms of which the appellant's claim was dismissed with costs. The appellant had instituted an action against the respondent for the payment of the sum of R436 430-97. The respondent's defence, which was upheld by the trial court, was that the claimed debt had been extinguished by set-off. The appeal is with the leave of this court.

[2] By agreement between the parties the trial court was presented with a set of facts in the form of a stated case and requested to answer the following question:

'Whether set-off applies between, on the one hand, a debt that is due but not payable (ie that which is owed to the Plaintiff) and, on the other hand, a debt that is both due

and payable (ie that which is owed to the Defendant).'

In the circumstances of the present case the question posed was incomplete because it did not refer to the fact that the appellant's liquidation commenced prior to its debt becoming payable.

[3] The facts on which the court below was asked to decide the above question were the following. During August to October 2001 the appellant sold and delivered goods to the value of R436 430-97 to the respondent. In terms of the parties' agreement the respondent had to pay the purchase price within 30 days from the date of delivery. On 16 October 2001 and before the period of 30 days lapsed, an order liquidating the appellant for failure to pay its debts, was issued.

[4] Meanwhile the parties had entered into another agreement in terms whereof the appellant agreed to pay the respondent commission for introducing new customers, if a sale between such customers and the appellant occurred. The respondent introduced Telkom which purchased goods to the total value of R5 589 806. As a result a commission in the sum of R594 032-34 (inclusive of VAT) became due and payable by the appellant to the respondent. This amount became payable before the appellant was liquidated. But the respondent did not demand payment, nor did it claim set-off prior to liquidation. The respondent raised the issue of set-off for the first time in its plea to the claim by the appellant's liquidator.

[5] The real issue in this appeal is whether the liquidator's claim had been extinguished by set-off in circumstances where such claim was not yet payable at the time the liquidation commenced. In order to determine

this issue it becomes necessary to outline briefly the requirements of set-off in our law, within the specific context of this case.

[6] In our law set-off takes place if two parties owe each other liquidated debts which are payable. In essence set-off constitutes a form of payment by one party to the other. In *Schierhout v Union Government*[1] Innes CJ explained set-off in the following terms:

'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.' [2]

[7] As early as 1907 the authorities emphasised that the reciprocal debts must both be payable for set-off to come into operation.[3] In *Colonial Treasurer* Innes CJ said:

'But for set-off to operate there must not only have been a debt due by the Government to Schoeman, but there must have been at the same time a debt due by Schoeman to the Government. Was this the case on the 1st September, 1900? To ascertain that we must have regard to the terms on which he obtained his loan. He bound himself "to pay the aforesaid loan within five years from date, along with interest at 3 per cent, payable at the Treasurer-General's office". So that he had five

[1] 1926 AD 286.
[2] Ibid at 289-290.
[3] *Colonial Treasurer v Schoeman* 1907 TS 273; *Mohamed v Nadgee* 1952 (1) SA 410(A); *Thorne and Another v The Government* 1973 (4) SA 42(T) and *Roman Catholic Church v Southern Life Association Ltd* 1992 (2) 807 (A).

years within which to pay the money, and upon the face of the document the Government could not have demanded it until the five years had expired. He might have paid sooner had he wished. But the Government had no right to demand payment from him until the five years had elapsed. And as those five years had not expired by the 1st of September, 1900, it is clear that on that date there was no debt due by the defendant to the Government. And if that be so, set-off cannot operate.'[4]

[8] In this case, before the debt due by the respondent to the appellant became payable, the latter was liquidated and this changed the circumstances relating to set-off. Once the *concursus creditorum* was established, set-off could not come into operation in this matter. In *Thorne*. [5] Margo J stated:

'In regard particularly to the question of set-off, the rule is that once a *concursus creditorum* has been established, there can be no compensation unless mutuality between the respective claims existed at the date of the order…. The mutuality here required is that the reciprocal debts both existed and that both were liquidated and payable, before the *concursus creditorum* was established.'

[9] In order to overcome the difficulty created by the appellant's liquidation, counsel for the respondent argued that mutuality giving rise to set-off existed before liquidation, and as a result the respondent could claim set-off after the *concursus creditorum*. He submitted that such set-off operated retrospectively to the period before liquidation, and that it automatically came into force in terms of the law. There is no merit in this argument. On the authority of this court and other courts, mutuality comes into existence only when both debts are due and payable.[6] In this case, as stated earlier, the appellant's debt became payable after

[4] Above n 3 at 274-5.
[5] Above n 3 at 45F-H and the authorities there cited. This decision was confirmed on appeal to this court in the *Government v Thorne and Another NNO* 1974(2) SA 1(A).
[6] Above n 3.

liquidation.

[10] Allied to the above argument was the submission that a party such as the respondent, whose debt has become due and payable, ought not to be denied the right to set it off against another debt which such party owes, solely on the ground that the second debt is not yet payable. For this proposition counsel relied on the following statement by De Wet and Van Wyk[7]:

'Die skuldenaar wat 'n teenvordering in verrekening bring, betaal eintlik die hoofvordering met die geld wat die hoofskuldeiser in sy besit het, en aan die teenskuldeiser verskuldig is. As hy dan die hoofvordering deur betaling kan voldoen voordat dit opeisbaar is, waarom sal hy dit nie deur skuldvergelyking kan uitwis nie? A skuld aan B honderd rand terugbetaalbaar na vyf jaar. Nou word B skuldenaar van A vir 'n gelyke bedrag, onmiddellik betaalbaar. A kan B vir betaling aanspreek, die geld ontvang en weer aan B betaal voor verstryking van die termyn. Dit kan niemand ontken nie. Waarom kan A dan nie eenvoudig maar die geld by B laat en hom meedeel dat hy dit in verrekening bring teen wat B van hom te vorder het nie? Ons howe dink daar anders oor, na my mening, sonder genoegsame redes. Volgens ons howe kan daar geen verrekening plaasvind voordat die hoofvordering opeisbaar is nie. Nou is dit wel waar dat *Van Leeuwen* en *Voet* vereis dat die skulde van weerskante opeisbaar moet wees, maar hulle probeer nie eens om hulle houding te verantwoord nie. Na my mening moet *Van Leeuwen* en *Voet* se ondeurdagte opmerkings wyk voor die voorskrifte van gesonde verstand en algemene beginsels in verband met voldoening. Is die hoofvordering nog nie vervulbaar nie, kan die teenvordering nie daarteen in verrekening gebring word nie, net so min as wat die hoofvordering deur betaling voldoen kan word. Gevolglik tree skuldvergelyking nie in werking teen 'n voorwaardelike hoofvordering voordat die voorwaarde vervul is nie.'

[11] I shall assume in the respondent's favour, without expressing any view as to the correctness of the assumption that a party to whom a debt

[7] *Die Suid-Afrikaanse Kontraktereg & Handelsreg,* 5 ed, Volume 1 pp 278-9.

has become payable, can set it off against a debt which is due but not payable, provided the other requirements for set-off are met. But, in such a case set-off cannot logically be considered to have taken place at a time earlier than the time when the election to effect payment by way of set-off is made. On this basis the respondent would still be precluded by the liquidation and the resultant *concursus creditorum* from claiming set-off after liquidation. It follows that the appeal must succeed.

[12] In their stated case the parties had agreed that should the court find that set-off did not apply, it may grant judgment in favour of the appellant in the terms specified therein. Accordingly I will grant an order in those terms.

[13] The following order is made:

1. The appeal is upheld with costs.
2. The order of the court a quo is set aside and replaced with the following order:

(a) The defendant is ordered to pay the sum of R436 430-97 with interest calculated at the rate of 15.5% from the date of default to the date of payment.

(b) The defendant is ordered to pay costs of the action.

**C N JAFTA**
**JUDGE OF APPEAL**

APPEARANCES:

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|---|---|
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