REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: No
(2) OF INTEREST TO O

[redacted]

DATE

Case No: 2022-034996

In the matter between:

ENGEN PETROLEUM LIMITED — Applicant

and

JAI HIND EMCC t/a
EMMARENTIA CONVENIENCE CENTRE — First Respondent

DUKHI, AVISHKAR HARILALL — Second Respondent

JUDGMENT

This judgment is deemed to be handed down upon uploading by the Registrar to the electronic court files.

Gilbert AJ:

1. The applicant launched application proceedings against the respondents seeking payment of various amounts outstanding in terms of a written agreement for the lease and operation of a service station. The first respondent is the lessee and the second respondent bound himself as surety and co-principal debtor for the indebtedness of the first respondent to the applicant.

2. The first respondent has since been placed under winding-up and the applicant no longer seeks any relief against the first respondent in these proceedings.

3. The applicant in its founding affidavit deposed to by its legal advisor *inter alia*:

    3.1. describes the operating lease and sets out some of its express terms. The terms include that a certificate in a particular form shall constitute *prima facie* proof of the existence of the debt and the amount thereof, that interest at an specified rate would be payable on overdue amounts and that legal costs were to be taxed and paid on the scale as between attorney-and-own client;

    3.2. describes how pursuant to various litigation, initially by way of arbitration proceedings and then High Court proceedings, the first respondent was evicted from the premises on 31 July 2022;

    3.3. sets out the first respondent's indebtedness to the applicant under the operating lease for what is described as the sale and supply of fuel, the sale and supply of lubricants and for levies for the operation by the

first respondent of a Quickshop, bakery and Woolworths outlet from the premises. The applicant refers and attaches to its founding affidavit statements of account reflecting how these outstanding amounts are calculated. The applicant also refers and attaches to its founding affidavit a certificate of balance;

3.4. describes how a payment guarantee in its favour up to R500 000.00 was called up by it and that such amount has been taken into account in reduction of the indebtedness claimed in these proceeding;

3.5. states that the first respondent, upon being evicted from the premises, instructed its bank to reverse certain debit order payments that had been made by the first respondent to the applicant, which reversals the applicant contends were unlawful;

3.6. describes the conclusion of the deed of suretyship by the second respondent in favour of the applicant and its terms.

4. I have given some detail of what is set out in the founding affidavit as it will be relevant in considering what issues were properly placed before the court by the second respondent in resisting the applicant's claim against him as surety for the first respondent.

5. The answering affidavit is deposed to by the second respondent. The second respondent, before addressing sequentially some of the averments in the founding affidavit, sets out various amounts that he alleges were owing by the

applicant to the first respondent and so as were set off against the indebtedness owed by the first respondent to the applicant.

6. The second respondent says in his answering affidavit that the debit order payments that were reversed during August 2022 after the first respondent's eviction from the premises were not unlawful because as at 31 July 2022 when the first respondent vacated the premises there was nothing owing to the applicant, presumably because of the operation of set off, and as nothing was owing, the debit order payments could be reversed.

7. The substantive focus of the answering affidavit is the amounts that the second respondent alleges were set off against the first respondent's indebtedness to the applicant. Although there was some uncertainty on the part of both parties in the papers whether some of the amounts alleged by the second respondent to be owing by the applicant to the first respondent were being counterclaimed rather than being the subject of set off, both counsel clarified that the defence being raised and appreciated by both of them was that of set off. The second respondent's counsel during argument disavowed any reliance upon counterclaiming these amounts as a basis for challenging the second respondent's indebtedness but that these amounts are to feature as set-off.

8. This is important because of the differences, as both counsel appreciated, between relying upon set off as a basis for resisting a claim and relying upon counterclaims.

9. Both parties accepted the trite principle that for set off to operate, each debt must possess the following attributes:

    9.1. both debts must be due and owed by the same pair of persons;

    9.2. both debts must be liquidated;

    9.3. both debts must be due and payable.[1]

10. Both parties accepted that if the debts were not liquidated, they could not be set off against each other. But where the parties differed is whether in each instance the debts alleged and relied upon by the second respondent as owing by the applicant to the first respondent were liquidated or otherwise satisfied the requirements for set out. The second respondent contends that those debts were liquidated, and so were capable of, and were, set off. The applicant contends they were not, assuming for purposes of argument that the debts existed which the applicant does not in all respects.

11. Both parties accept that if the debts that the second respondent contends were owing by the applicant to the first respondent were not liquidated, then they should have been the subject of counterclaims, and not set off, and in which instance the appropriate relief would have been for the second respondent to seek a stay of judgment on the applicant's claim and so to enable the counterclaims to first be determined and in that way liquidated. As

---

[1] See, for example, *Standard Bank of South Africa Limited v Renico Construction (Pty) Limited* 2015 (2) SA 89 (GJ) para 9, a decision to which the second respondent specifically referred, albeit in support of a different proposition.

stated, the second respondent's counsel disavowed any reliance upon counterclaims. This is consistent with the relief sought by the second respondent, which is a dismissal of the application and not a request for the stay of these proceedings to enable counterclaims first to be determined.

12. The parties also accepted that the second respondent as surety is entitled to rely upon a defence of set off as operating as between the applicant as creditor and the first respondent as principal debtor.[2]

13. It is therefore necessary to examine each of the debts asserted by the second respondent as having been set off against the indebtedness owed by the first respondent to the applicant to see whether those debts satisfied the legal requirements for set off and so were capable of *ipso facto* set off against the indebtedness owing by the first respondent to the applicant.

14. This exercise must be done in the context of opposed motion proceedings that are on affidavit, and where, generally speaking, a *bona fide* dispute of fact will rebound to the benefit of the second respondent. This does, as will appear below, bring some complexity to the exercise.

15. Before examining the various debts relied upon by the second respondent to see whether they satisfy the requirements for set off, it is necessary to deal with further challenges to the applicant's claim that was raised by the second respondent's counsel during argument.

---

[2] *Standard Bank of South Africa Ltd v SA Fire Equipment (Pty) Ltd and another* 1984 (2) SA 693 (C) at 696G-H.

16. Those challenges were:

16.1. that the deponent to the founding affidavit does not make sufficient factual averments to demonstrate that he had the requisite personal knowledge of the facts set out in the founding affidavit, and therefore a case had not been made out by the applicant on its own founding papers, with the result that the application should be dismissed on that basis and without the need to have regard to the answering affidavit;

16.2. that it is evident from the applicant's own founding affidavit that the indebtedness alleged to be owing by the first respondent to the applicant cannot be correct and that the application should be dismissed on that basis, again without the need to have regard to the answering affidavit.

17. To repeat, neither challenge was raised in the answering affidavit nor in the second respondent's heads of argument but only during the course of argument. Nor in a supplementary answering affidavit that was delivered within a month of the hearing before me.

18. As to the first challenge, the second respondent's counsel submitted that the deponent to the founding affidavit, who is described as a legal advisor, does not set out any factual basis to support his averment that the facts in the affidavit are within his own personal knowledge. This includes facts relating to his knowledge of how the indebtedness of the first respondent to the applicant is constituted. The submission continued that the deponent is not then in a position to confirm that what is set out in the statements of account

referred to in and annexed to the founding affidavit, as too in relation to the certificate of balance.

19. The second respondent's counsel referred me to *FirstRand Bank Limited v Kruger and Others* 2017 (1) SA 533 (GJ). Spilg J found that in a number of unopposed applications before him made by financial institutions against defaulting debtors, the deponents had not made sufficient averments to demonstrate that he or she had the requisite personal knowledge of what was contained in his founding affidavit to sustain a case. Spilg J accordingly refused to grant default judgment and instead afforded the applicants leave to deliver supplementary affidavits.

20. In the present instance, of course, the proceedings are not unopposed. The second respondent did deliver an answering affidavit. The second respondent in answering the averments made by the deponent to the founding affidavit placed certain averments in dispute but not others. An averment of the deponent to the founding affidavit that was not placed in dispute in the answering affidavit was that the facts in the founding affidavit are within his own personal knowledge. The second respondent's counsel did not contend otherwise on a reading of the affidavits.

21. It is trite that once a defendant or respondent admits an averment made by the applicant or plaintiff, the plaintiff or applicant is relieved from adducing

evidence to prove that averment.[3] It is also trite that the affidavits in motion proceedings constitute both the pleadings and the evidence[4] and that the issues and averments in support of both parties cases must appear from those affidavits.[5]

22. The second respondent in his answering affidavit neither placed the deponent's personal knowledge in dispute nor raised it as one of the issues. The second respondent had taken out of play a challenge to the deponent's personal knowledge. This decisively distinguishes the present instance from the unopposed applications that were the subject matter of the proceedings in *FirstRand v Kruger*.

23. The second respondent's counsel sought to counter this by submitting that albeit that the second respondent had not taken issue in the answering affidavit to the deponent's personal knowledge, that he was nonetheless entitled on behalf of the second respondent to raise it during argument. This, the submission continued, is because the court *mero motu* is entitled to raise the issue, whatever may, or may not, be contained in the answering affidavit or may, or may not, have been admitted by the second respondent. The second respondent's counsel referred to *Tulip Diamonds FZE v Minister for Justice and Constitutional Development and Others* [2013] ZACC 19

---

[3] Apart from case authority, see section 15 of the Civil Proceedings Evidence Act 25 of 1965: *"It shall not be necessary for any party in any civil proceedings to prove nor shall it be competent for any such party to disprove any fact admitted on the record of such proceedings"*.

[4] *Transnet Ltd v Rubenstein* 2006 (1) SA 591 (SCA), para 28.

[5] *Minister of Land Affairs and Agricultural and others v D&F Wevell Trust and others* 2008 (2) SA 184 (SCA) at 200D/E.

(13 June 2023) where the Constitutional Court *mero motu* raised the issue of whether the applicant had sufficient standing to the seek the relief that it did, albeit that the respondents in that matter had previously conceded that standing. The Constitutional Court found that in that matter the fact that the respondents had erroneously conceded the applicant's standing did not preclude the court from itself considering the issue where that issue constituted a legal point and where the failure by the respondents in not raising that error of law did not preclude the court from doing so.[6]

24. The Constitutional Court cautioned that prejudice to the applicant would provide a reason as to why this should not be done, depending on the circumstances. [7]

25. In my view, this is one of those instances. As stated, there is no suggestion that I could find, nor was I directed to any, that the second respondent had any difficulty with the state of the personal knowledge of the deponent to the founding affidavit and which foreshadowed, whether for the applicant's or the court's benefit, that such challenge would be raised. Had that issue been raised timeously, the applicant may have been able to address the deficiency, such as by way of a supplementary affidavit, for which leave was specifically granted in *FirstRand v Kruger*.

26. In any event, I have doubt whether *Tulip Diamonds* is presently apposite. This is not an instance of the court *mero motu* raising the issue – it is the second

---

[6] Paras 24 to 26.

[7] In para 26.

respondent that does so. That the court could do so but does not do so, does not entitle the second respondent to do so.

27. The challenge has no merit.

28. Insofar as the challenge is concerned that the applicant on its own founding affidavit does not establish the quantum of the indebtedness alleged to be owing to it, here again the challenge is made for the first time during the course of the second respondent's counsel's argument. During the course of argument, I was directed to the statements of account referred and attached to the founding affidavit and second respondent's counsel invited me to observe that certain entries that appear in those statements did not, at least *ex facie* the documents, accord with or were not clearly linked to that which is alleged in the founding affidavit itself as being owing and demonstrable by the statements. So, for example, the second respondent's counsel pointed out that whereas the founding affidavit asserts that the amount is outstanding in respect of fuel, when regard is had to the supporting statement of account annexed to the founding affidavit in support of that averment, the entries that appear on that statement that do not *ex facie* their descriptions in the statement of account relate to fuel. Similarly, when regard is had to statements of account attached in support of the amount that the deponent to the founding affidavit contends is outstanding for lubricants, the entries that appear on the referenced statements do not *ex facie* the document corollate to lubricants.

29. I have several difficulties with the argument.

30. Firstly, I specifically invited the second respondent's counsel to point me to the denials in the answering affidavit that would have alerted the applicant that but for set off, the extent of the first respondent's indebtedness to the applicant was being disputed. The denials that I was referred to do not, when read in context, in my view, do not go beyond denying the indebtedness because there has been set off. In both instances, where the denials feature, they are immediately preceded or followed by averments of set off. In my view, upon a fair reading of the answering affidavit, the quantum of the applicant's claim is not placed in dispute but for set off.

31. This is not only my view upon reading the answering affidavit. The applicant in its replying affidavit expressly states that but for the defence of set off, the indebtedness is not disputed in the answering affidavit.

32. The second respondent did not seek to correct this view expressed by the applicant in its replying affidavit, such as in its heads of argument or in a practice note. It would only be in argument that this challenge would be raised. A party cannot by way of vague averments permit the attention of the other party, and the court, to go in a particular direction, and then when the matter is heard, to go another direction, at least not without adequate explanation.

33. Secondly, the challenge, as was the case with the first challenge, may have been capable of being readily addressed by the applicant if timeously raised, such as in its replying affidavit. The applicant was denied an opportunity to do so by the belatedness of the second respondent raising this issue.

34. Thirdly, and closely related to the second, is that the challenge is made with reference to the documents that are annexed to the founding affidavit but without having been canvassed in the answering affidavit. Another trite principle, as appears from *Minister of Land Affairs* above at 200C is that:

> *"[i]t is not proper for a party in motion proceedings to base an argument on passages in documents which have been annexed to the papers when the conclusions sought to be drawn from such passages have not been canvassed in the affidavits. The reason is manifest - the other party may well be prejudiced because evidence may have been available to it to refute the new case on the facts."*

35. Fourthly, the applicant does rely upon a certificate of balance which constitutes *prima facie* evidence. The belated submissions raised by the second respondent in argument are not sufficient, in my view, to displace the *prima facie* evidential value constituted by the certificate of balance, and which constituted 'sufficient proof' in the absence of admissible countervailing evidence.[8] Nor are those belated submissions sufficient to create a *bona fide* factual dispute in relation to the indebtedness that would preclude the issue being resolved on affidavit. The second respondent did not challenge the certificate of balance other than on the basis that the deponent to the founding affidavit did not have sufficient personal knowledge in relation to the certificate and its contents. But it is not a requirement for the deponent of an affidavit to have personal knowledge of what was certified in the certificate. Often the deponent to the affidavit is a different person to the signatory to the certificate, as it is in the present instance. It is not even necessary that the signatory to

[8] *Senekal v Trust Bank of Africa Ltd* 1978 (3) SA 375 (A) at 382H-383A.

the certificate must have personal knowledge of its contents.[9] The certificate features as *prima facie* evidence because of the contractual arrangement between the parties to that effect, provided that the certificate falls within the ambit of what is required of such a certificate as determined by the agreement. The second respondent did not challenge the certificate on that basis.

36. The second challenge too has no merit.

37. While in certain instances there may be satisfactory explanations for challenges being belatedly raised, this is not one of those instances. No explanation as proffered. The second respondent has throughout been legally represented by experienced legal practitioners. As appears from the papers in this matter, the respondents have litigated now for many years against the applicant on an opposed basis, including by way of arbitration proceedings, then high court proceedings and with applications for leave to appeal to both the Supreme Court of Appeal and the Constitutional Court. The second respondent is not a stranger to litigation and "*is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must be extend a procedure-circumventing lifeline*".[10]

38. The deficiencies in the answering affidavit, such as failing appropriately raise, or at least foreshadow, the challenges that would subsequently be made is to be deprecated. The courts have stated on several occasions that care must

[9] *Senekal* above at 381H, pointing out that it may otherwise have required a large number of persons to give evidence as no single person may have sufficient personal knowledge. It may even be in today's computerized world that no such person exists.

[10] *MEC for Health, Eastern Cape v Kirland Investments (Pty) Limited* 2014 (3) SA 481 (CC) para 82.

be taken in the drafting of affidavits, and to the extent that an affidavits does not upon a fair reading raise the issues that the such party seeks to raise cannot redound to the detriment of the other party. In this regard, I do mention that the second respondent's counsel who argued the matter before me was not responsible for the drafting of the answering affidavits.

39. To conclude this aspect of the judgment, it has been repeatedly stated that litigation is not a game. The belated raising of challenges which have not been foreshadowed in any way, whether in affidavits, heads of argument or even practice notes, should not be countenanced, absent satisfactory explanation, of which there is none in these proceedings. Again, I do not say that this was by design by the second respondent, but in effect that is what occurred.

40. Having disposed of these belated challenges, I now move to the defence that was raised by the second respondent in his answering affidavit, namely that there were sufficient debts owing by the applicant to the first respondent that when set off against the first respondent's indebtedness to the applicant, no indebtedness remained outstanding by the first respondent, and so too by the second respondent, to the applicant.

41. The first amount that the second respondent contends was set off against the indebtedness owing to the applicant is set out in paragraph 7 of his answering affidavit and relates to what the second respondent contends was an over-charging by the applicant for water and sewerage utilities.

42. The second respondent explains in his answering affidavit that apart from the first respondent's fuel service station that operated from the applicant's property, so did a KFC fast food outlet. What would transpire is that the City of Johannesburg would invoice the applicant on a monthly basis for the water and sewerage for the whole property. The applicant in turn would invoice the first respondent and the KFC business for what should have been their respective shares for water and sewerage charges.

43. The second respondent goes on to explain that the first respondent at some time appointed the services of a third party "*to attend to the audit of the amounts charged for utilities … for the period 1 January 2017 to 16 January 2021*". The report is attached to the answering affidavit. The second respondent explains that the third party followed various procedures in reconciling the amounts that should have been charged by the applicant to the first respondent for water and sewerage, doing so by obtaining all invoices issued by the applicant and then summarising those invoices, by obtaining invoices issued by the City of Johannesburg for the water and sewerage and then summarising those invoices, by obtaining copies of schedules by third parties who read the meters for the water and by preparing summaries of those schedules, by then comparing invoices raised by the applicant, the City of Johannesburg and the meter reader vendors, and thereby quantifying errors and/or differences (presumably between these different source and other materials), and then quantifying the value of the errors before finally adding interest.

44. The second respondent asserts that the value of the overcharges as appears from the report, which is dated 22 June 2021, is R576 733.49. The second respondent then continues that once interest is added, as at 22 August 2022 the indebtedness owed by the applicant to the first respondent for these overcharges was R660 045.74. This is the amount that the second respondent contends was set off.

45. The applicant in its replying affidavit, and again during argument, raised what it submitted was the hearsay nature of the report on the basis that what was set out in the report is not confirmed under oath by those who undertook the 'audit' and compiled the report. There may be merit to this objection to the report as being hearsay, but I assume in favour of the second respondent the admissibility of its third party report.

46. One of the requirements for set off is that both debts must be liquidated. Both parties accepted that what this required was that in the absence of the amount having been fixed by agreement or by judgment of a court, it must be capable of prompt ascertainment. Where the parties differed was whether the amount asserted of R660 045.74 for water and sewerage utilities together with interest was capable of prompt ascertainment and therefore liquidated.

47. The second respondent's submission is that the amount is capable of prompt ascertainment as is evidenced by its third party report which quantifies the amount, with reference to various schedules which in turn summarised various invoices and other documents.

48. The applicant on the other hand submits that this is not so. The applicant in its replying affidavit produces its own report by a third party that arrives at a different conclusion, which is that the overcharge by the applicant to the first respondent was for a lesser amount of R316 194.80 but that does not take into account overcharges the recovery of which will have prescribed and so which would reduce the overcharge, by an as yet indeterminate amount. It should be said, as acknowledged by the applicant's counsel, that the applicant's third party report too may be hearsay.

49. Leaving aside the potentially hearsay nature of the third party reports, there is clearly a factual dispute as to the extent of the overcharges. I raised with both counsel that in light of such a factual dispute, how the determination of the issue is to be approached. I posited that the court may be precluded from finding in favour of the applicant on motion bearing in mind factual disputes are to be resolved in favour of the second respondent based upon the usual *Plascon-Evans* principle in circumstances where the second respondent's version as to the quantification of the indebtedness could not be rejected as farfetched and fanciful.[11]

50. After consideration and following upon useful debate with both counsel, in my view the approach that recommends itself, in this instance, is to ascertain

---

[11] Final relief can only be granted on motion if the facts as stated by a respondent, together with the admitted facts in the applicant's affidavits, justify the granting of the relief: *Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Limited* 1984 (3) SA 623 (A) at 634 E-G, as reaffirmed in *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at 290 D-G. Effectively, any factual disputes ought to be resolved by accepting a respondent's version, save where such version is "*so far-fetched or clearly untenable that the court is justified in rejecting (it) merely on the papers": Botha v Law Society, Northern Provinces* 2009 (1) SA 277 (SCA) at para 4, with reference to *Plascon-Evans Paints*.

whether, on the second respondent's' own factual version (i.e. without regard to the applicant's countervailing factual version in its replying affidavit) the amount of the overcharges are sufficiently capable of prompt ascertainment so as to be liquidated. If not, then it follows on the second respondent's own version that the overcharges could not be set off.

51. Boshoff J for the then Full Bench of the Transvaal Provincial Division in *Fatti's Engineering Co (Pty) Limited v Vendick Spares (Pty) Limited* 1962 (1) SA 736 (T) said at 738F:

> "*Our courts have frequently been called upon to consider whether a claim was liquidated or not for the operation of set-off. Mutual liquidity of debts is an essential prerequisite for set-off. A debt must be liquid in the sense that it is based upon a liquid document or as admitted or its main value has been ascertained, or in the sense that it is capable of prompt ascertainment. The decision as to whether a debt is capable of speedy ascertainment is a matter left to the discretion of an individual Judge in each case.*"

52. Boshoff J continued at 739A:

> "*When the amount is due under a contract and the exact amount is simply a matter for calculation from figures in books, the claim is a liquidated one that can operate as a set-off, but its existence and character have not yet been proved to the satisfaction of the Court.*
>
> *The absence of uniformity in the decided cases is attributable to the fact that in each the discretion was exercised according to the facts before the Court. The inevitable result is that it is not possible to formulate precise rules as to when a claim should be regarded as*

liquidated in the sense that it is capable of being speedily and promptly ascertained."

53. In that matter the Full Bench found that the plaintiff's claim for a specific amount for work done and labour supplied constituted a liquidated claim.

54. Having read this Full Court decision, I was somewhat uneasy as to whether a claim was liquidated is a matter to be decided by the court in its discretion. I was comforted to then find that Sutherland J, as he then was, in *Standard Bank of South Africa Ltd v Renico Construction (Pty) Ltd* had this same sense of unease.

55. After commenting that the concept of a "*liquidated amount in money*" had been frequently examined,[12] Sutherland J referred to a decision of this Division by Colman J in *Oos-Randse Bantoesake Administrasieraad v Santam Versekeringsmaatskappy Bp en andere* 1978 (1) SA 164 (W) at 168H to 169C, which held that:

> "*A money claim is liquidated if the amount thereof has been fixed by agreement or by the judgment of a Court. To those two cases one can perhaps add a third one (as suggested in Botha v Swanson & Co (Pty) Ltd 1968 (2) PH F83, and in Leymac Distributors Ltd v Hoosen and Another 1974 (4) SA 524 (D)), namely, if the ascertainment of the amount is a mere matter of calculation. In the last mentioned case, however, the data upon which the calculation is to be based would themselves have to be amounts about which there was no room for uncertainty, estimation or debate. <u>When, in order to prove his claim, the plaintiff will have to show that it, or some element in it, or some</u>*

[12] Para 15.

> *datum involved in its computation, was fair or reasonable, the claim is not liquidated.*" [Emphasis supplied.]

56. Sutherland J then points out that Coetzee J in this Division in *Quality Machine Builder v MI Thermocouples (Pty) Limited* 1982 (4) SA 591 (W) distanced himself from the approach by Colman J in *Oos-Randse Bantoesake Administrasieraad v Santam* in finding that a claim for fair and reasonable remuneration for work done and material supplied can constitute a liquidated claim.

57. Sutherland J then continues in paragraph 16 that:

> "*The perspective articulated by Coetzee J is comprehensible only upon the grounds that a value judgment has been injected into the decision about whether or not a claim is liquidated.*"

and that:

> "*The inspiration for that approach is the judgment of Boshoff J in Fatti's Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd 1962 (1) SA 736 (T) at 738A – H.*"

58. Sutherland J then goes on to cite *inter alia* that portion of the Full Bench decision in *Fatti's Engineering* as set out above and concludes on this aspect as follows in paragraph 17:

> "*The upshot is that a critical dimension of the concept of 'liquidity' is an intrinsically uncertain and unavoidably variable component: a randomly selected judge's discretion. A judicial discretion implies a range of 'correct' or perhaps, better described, 'appropriate' outcomes which are, in turn, dependent on fact-specific findings. In my respectful*

> *view it is quite hard to admire such a principle or to genuinely appreciate the usefulness of a judicial discretion about what ought, ideally, to be a hard fact, in the sense Colman J conceived it in Oos-Randse Bantoesake Administrasieraad v Santam Versekerings-maatskappy Bpk supra. The utility of a judicial discretion to secure equitable outcomes is hardly to be questioned, but a judicial discretion about a fact does provoke some misgivings.*
>
> *[18] Never[t]heless, being bound by the weight of authority to approach the matter thus, I do so. I turn to the facts.*"

59. In my view the claim against the applicant for overcharges is not capable of prompt ascertainment. This is so particularly if am entitled to exercise a discretion, as the Full Bench in *Fatti's Engineering* says I can. Nevertheless, even if it was a not a matter of discretion, I still would not have found that the claim for overcharges was or is capable of prompt ascertainment. I say so for the following reasons.

60. The second respondent himself describes the process that was required to quantify the claim as an "*audit*" of charges for a period exceeding four years, from 1 January 2017 to 16 February 2021. That "*audit*" required consideration of many invoices emanating from multiple sources as well as other documents such as meter readings and a compilation of an extensive schedules and then various calculations. The exercise was not one of mere calculation or prompt ascertainment.

61. It is self-evident when regard is had to the period of overcharges that prescription looms large, at least for some of the debt constituted by the overcharges. The applicant raised in its replying affidavit that certain of the

over-charges would have prescribed. As stated, I do not have regard to the countervailing facts in the replying affidavit but refer to the replying affidavit to demonstrate that it is not the court that has *mero motu* raise the issue of prescription.

62. That there is a sound basis for prescription to feature on the second respondent's own factual version, and so render the amount unliquidated, appears from the period to which the overcharges relate, which, as set out above, spans four years from 1 January 2017 to 16 February 2021. The first respondent instituted court proceedings to recover these overcharges in December 2021. Accepting then in favour of the respondents that such proceedings may have interrupted prescription, many of the charges that feature in the report dates back more than three years before that.

63. The second respondent in his answering affidavit says that the sum of the overcharges, before interest, constituted R576 733.49. When regard is had to the report itself, this amount is made up two components. The first component, being overcharges for the period 1 January 2017 to 30 June 2021 which, when interest is added for that period, totals R560 207.13. The second component is in respect of the applicant overcharging for water and sewerage for the months of July and August 2016, which, after interest is added, totals R16 526.36. When these two amounts of R560 207.13 and R16 526.36 are added together, it totals the amount averred in the answering affidavit of R576 733.49 (before further interest is added). Both components have elements that are distinctly in danger of having prescribed.

64. The extent to which prescription may come into play renders the amount not capable of prompt ascertainment. There may be a counter to prescription but the point is that until that issue is determined (such as in the first respondent's proceedings instituted in December 2021), on the second respondent's own factual version the amount is not liquidated.

65. I therefore find that claim by the first respondent against the applicant for overcharges in respect of water and sewerage totalling R660 045.74 (inclusive of interest) is not liquidated and therefore was not capable of being set-off.

66. The second category of amounts that the second respondent contends was set off relate to electricity charges that the applicant is liable to pay to the first respondent. These are described in paragraph 8 of the answering affidavit.

67. The second respondent explains that the City of Johannesburg would invoice the first respondent on a monthly basis for the electricity used by both the fuel service station and the KFC business. The first respondent would then in turn invoice the applicant, presumably for the share of electricity used by the KFC business, and the applicant in turn would recover that amount from the KFC business.

68. The second respondent then states that the first respondent did so claim the electricity utility usage from the applicant for the month of April 2022 in an amount of R67 186.15 (paragraph 8.3 of the answering affidavit), for May 2022 in an amount of R73 595.19 (paragraph 8.3 of the answering affidavit) and for July 2022 in an amount of R76 190.82 for July 2022 (paragraph 8.5 of

the answering affidavit). The second respondent in his answering affidavit refers to and annex letters of demand, which in turn attach invoices which accord with these amounts.

69. The applicant's response in its replying affidavit to these averments, other than a denial, is to assert that it is impossible to reconcile the amounts purportedly owing with reference to the supporting documents attached.

70. In my view, the second respondent has done enough in relation to these three specified amounts, supported as they are by invoices attached to the answering affidavit and without the applicant having advanced a positive factual countervailing version in reply or with any details in denial. These amounts are liquidated, referenced as they are to specific months supported by specific invoices.

71. I therefore find that each of these three amounts were capable of set-off.

72. The same though cannot be said for the balance of the amounts asserted by the second respondent under this category of claims. The second respondent in paragraph 8.6 of his answering affidavit states that three further amounts need to be taken into account as amounts owing by the applicant to the first respondent for the electricity usage by KFC, namely the amounts of R82 875.71, R76 190.82 and R126 210.67. Unlike the three preceding amounts, it does not appear from the averments in the answering affidavit to which months these relate or how they are calculated or ascertained Further, there is no reference in the answering affidavit when dealing with these amounts to any supporting annexes that may assist.

73. During argument, the second respondent's counsel submitted that if regard is had to the annexes attached to the answering affidavit, these is support for these amounts. Apart from such support not being readily apparent from the annexes I was referred to, more importantly the point made by the applicant's counsel is well taken, which it is not for parties or the court to trawl through annexes to see what support can be made for a particular factual assertion or proposition where that is not referenced in the affidavit itself.[13]

74. I find that these amounts asserted were not capable of set-off.

75. The same fate befalls the amount of R150 000.00 asserted by the second respondent in paragraph 8.7 of his founding affidavit. I invited the second respondent's counsel during argument to explain what this paragraph was intended to convey as it did not appear to me what the claim was. The second respondent's counsel attempted to do so but the basis of this alleged claim by the first respondent against the applicant remained elusive. I have already set out above that care should be taken in the drafting of an answering affidavit.

76. The next claim asserted by the second respondent that was capable of and had been set off was that the applicant is alleged to have appropriated assets without compensation valued at R2 256 312.00. This appears in paragraph 9 of his answering affidavit.

77. The second respondent explains that when the first respondent vacated the premises on 31 July 2022, the applicant took occupation thereof and at the

---

[13] *Minister of Land Affairs* above at 200E.

time various assets remained situated on the premises. The explanation then continues in the answering affidavit that the applicant then sold those assets to the new dealer who took possession of the premises on 1 August 2022[14] and that the applicant has not paid the first respondent for those assets and so has been 'unduly enriched'.

78. The second respondent attaches to its affidavit in support of this claim what he describes is an asset schedule.

79. The applicant denies these averments in reply but also makes the important point that the asset schedule does not contain any values to support the amount of the claim. I agree. The asset schedule lists various assets but there are no values which are attributed to those assets in the schedule.

80. Although this is not apparent from the answering affidavit, an annexe is attached to the answering affidavit where demand is made of the first respondent by what appears to be a third party financer for payment of R2 256 312.18 for certain assets. This amount corresponds to the amount claimed by the second respondent by way of set-off. It may be that this document, which is not referenced in the answering affidavit itself, was attached as support for the amount. But this is speculative because again there is a disconnect between what is alleged in the answering affidavit and the annexes. But even if the letter is intended to serve as some or other

[14] The second respondent submits in paragraph 9.2 of the answering affidavit that this averment is 'common cause' but without laying a factual basis for the submission, it is meaningless. The applicant denies the averment in reply.

support for the quantification of the claim, what a third party financier may be claiming from the first respondent in relation to the outstanding loan balance upon having financed those assets will not constitute the value of such assets for purposes of a unjustified enrichment claim by the first respondent against the applicant based. The measure of a claim in unjustified enrichment, or in delict, is different.

81. Proceeding on an assumption in favour of the second respondent that the claim is otherwise sufficiently pleaded as it is not clear whether the claim is one in unjustified enrichment or in delict or on some other basis, it is not a liquidated claim and therefore was not capable of being set-off.

82. The next amount that the second respondent contends was set off is an amount of R500 000.00 arising from the applicant having presented a guarantee established by the first respondent in the applicant's favour in that amount. This appears in paragraph 10 of the answering affidavit.

83. The applicant in its replying affidavit points out that this amount has already been taken into account in calculating the indebtedness of the first respondent. The applicant in reply attaches statements of account, which reflect a differential of R500 000.00 in support of its averments. Further, as set out earlier in this judgment when summarising the averments in the founding affidavit, the applicant had already said in paragraph 22 of its founding affidavit that the guarantee amount has been taken into account in reduction of the indebtedness. The second respondent in his answering affidavit does not deal

with this averment, and appears to overlook the averment when asserting this claim for R500 000.00.

84. This amount of R500 000.00 too was not capable of set off in that it is based upon averments made by the second respondent that does not disclose a legally cognisable claim.

85. The second respondent in paragraph 21 of his answering affidavit for purposes of set off advance two further amounts, being R7 629.43 as a credit for rental and R162 321.23 as owing by the applicant to the first respondent for 'fuel stock'.

86. The applicant has throughout its affidavits recognised that it is to credit the first respondent in respect of a rental in an amount of R7 629.43 but that credit has already been taken into account, as appears from the founding affidavit. This is another instance where the second respondent overlooks what is alleged in the founding affidavit as having already been taken into account in quantifying the indebtedness, and without adducing any countervailing evidence to create a *bona fide* factual dispute in relation thereto.

87. In relation to the amount of R162 321.23 alleged to have been owing by the applicant to the first respondent for 'fuel stock', I am unable to find any explanation for this amount in the answering affidavit. During argument second respondent's counsel explained that how this claim arose was that the first respondent had previously purchased fuel stock from the applicant and which fuel remained in the fuel storage tanks at the service station when the first respondent vacated the premises at the end of July 2022. And so, the

explanation continues, this was fuel was taken over by the applicant and so must be paid for by the applicant. Again, the second respondent's counsel sought to rely on documents annexed to the answering affidavit.

88. Of course, absent an explanation under oath by the second respondent is his answering affidavit, this claim founders. The deficiency cannot be made up by the second respondent's counsel offering what is factual version during argument. And, again, recourse cannot be had in argument, to found a factual version, to documents annexed to the affidavits where not referenced appropriately in the affidavits themselves. In any event, there is no calculation or explanation of this amount apparent from the answering affidavit, and so the claim for that amount is not liquidated,

89. The last amount asserted by the second respondent in his answering affidavit was by way of a "*counterclaim for R17 701 000.00 in respect of entrenched value for its business*". Apart from this being a damages claim, as far as can be gleaned, and therefore should be counterclaimed and is incapable of set-ff, it appeared from what was said by the second respondent's counsel during argument that this claim by the first respondent had since fallen away and was no longer being pursued. No more need be said then of this claim as a defence in these proceedings.

90. Of the amounts asserted by the second respondent that were set off against the indebtedness owing by the first respondent to the applicant, I have found that the amounts of R67 186.15, R73 595.19 and R76 190.82 satisfied the

requirements of set-off and therefore were capable of and so were *ipso facto* set off against the first respondent's indebtedness to the applicant.

91. During the course of argument I raised whether it is permissible for the court to grant judgment partially in the event that I found that certain amounts were set off, as the applicant had claimed a singular amount. Counsel offered no contrary views, but rather argued whether certain amounts should or should not be set-off. I see no reason why this cannot be done where the amount of the judgment debt can be easily calculated.

92. In the circumstances, I find that the sum of the three amounts set off, which is R216 972.16, is to be deducted from the applicant's capital amount claimed of R3 900 893.10, leaving an amount of R3 683 920.94. Judgment is therefore to be granted in favour of the applicant for this capital amount, together with interest at the agreed contractual rate.

93. The applicant in its notice of motion claims interest *a tempore morae*. The applicant in its draft order provides the date for this purpose as 3 November 2022. As the application was served upon the respondents on 3 November 2022, it appears that this is the reason for that date. As the set off of the amounts totalling of R216 972.16 would have happened *ipso facto* before this, probably at some point in July 2022, the calculation of interest from 3 November 2022, which is a later date, would not prejudicial to the second respondent.

94. The applicant has had substantial success and is therefore entitled to its costs.

95. The operating lease provides for costs on an attorney-and-own client scale. The draft order provides for costs to be taxed on the lesser scale of an attorney-and-client.

96. An order is made that:

96.1. the second respondent is to pay the applicant the amount of R3 683 920.94;

96.2. the second respondent is to pay the applicant interest on R3 683 920.94 at 13.75% per annum as from 3 November 2022 to date of final payment.

96.3. the second respondent is to pay the applicant's costs on an attorney-and-client scale, including the costs of counsel.

B M GILBERT

Acting Judge of the High Court

Gauteng Division, Johannesburg

Date of hearing: 16 October 2024

Date of judgment: 25 October 2024

Counsel for the applicant:	S Aucamp
Instructed by:	DM5 Incorporated
	Sandton
Counsel for the second respondent:	J A Venter
Instructed by:	Des Naidoo & Associates
	Sandton