IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

DATE: 13/05/2005

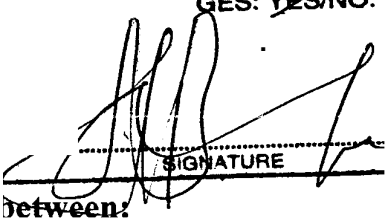
CASE NO: 30977\04

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: /NO.

(2) OF INTEREST TO OTHER JUD. GES: YES/NO.

(3) REVISED. .



between:

In the matter between

BURP AK DA GAMA AVOCADO OILS (EDMS) BPK **APPLICANT**

VS

COPPER SUNSET TRADING 29(EDMS) BPK **1ST RESPONDENT**

FOUR ARROWS INVESTMENT 62 (EDMS) BPK **2ND RESPONDENT**

JUDGMENT

SHONGWE, J

[1] The essence of this application is the determination of whether a defence of set -off raised by the 1st Respondent is valid in law in the circumstances of this case.

[2] The Applicant initiated motion proceedings by claiming a sum of R130-382.00 being firstly arrear rentals in respect of the months from July 2004 to November 2004 both months inclusive. The arrears arise from a written agreement of lease. Secondly the Applicant claims the

ejectment of the 1st Respondent from the property known as **Remaining extent of Portion 1 of the Farm Witwater Forest Reserve 188 Registration Division J.T Mpumalanga** ("the property") Thirdly payment of the sum of R 26 767.00 per month as rental, as from the 1st December 2004 up to the date of ejectment of the 1st Respondent from the said property.

[3] To the Applicant's claim the 1st Respondent raises a defence of set off. It is alleged that the Applicant owes the 1st Respondent a sum of R1 131 532.16 and in terms of the doctrine of set off the 1st respondent is not indebted to the Applicant. The Applicant answers by denying the existence of such indebtedness, a denial that the sum of R1 131 352.16 is a liquidated amount and also relies on clause 3 of the lease agreement, *inter alia* that the monthly rental 'shall be payable monthly in advance free of bank exchange and without deductions.'

I pause to mention that during argument counsel for the Applicant did not specifically rely on the provisions of Clause 3 of the lease agreement. Nor did he deal with this point in his heads of argument.

[4] The Applicant moved an amendment, on the day of hearing, which amendment was not opposed and was granted. The amendment is to the effect that prayer 2 of the notice of motion is no longer being proceeded with, for reasons to be dealt with later in the judgment, and that prayer 3 instead of 'up to the date of ejectment' same be substituted with 'up to the 2nd February 2005' being the date of registration of the transfer.

[5] The backdrop of this application can be incapsulated as follows: On the 19th May 2004 the Applicant and the 1st Respondent entered into a written sale agreement of the applicant's business. ("the business sale agreement"). On the same date the Applicant and the 1st Respondent concluded a written lease agreement whereby the Applicant leased the property on which the business is operated to the 1st Respondent. This agreement of lease was subject to the fulfilment of all suspensive conditions of an agreement of sale of the property between the Applicant and the Second Respondent as purchaser. In other words the subject of the lease agreement is the same subject of the sale between the Applicant and the second Respondent.

[6] The Applicant and the Second Respondent also entered into a cession agreement in terms whereof the Applicant ceded to the Second Respondent all its rights in terms of the said agreement of lease, which cession would be effective on the date of registration of transfer of the property to the Second Respondent

[7] It is now common cause that the date of registration of the transfer is the 2nd February 2005 hence the amendment to prayer 3 of the notice of motion.

[8] In terms of clause 7, under the heading Stock, of the business sale agreement the parties agreed to do a stock-taking with regard to the avocado crude oil which formed part of the subject of the sale. The price of the crude oil was to be determined by multiplying the amount (in kilograms) of the crude oil by R8.80 per kilogram. It was specifically

agreed that any crude oil which is materially damaged or unsaleable or unusable as being incomplete, redundant and below commercially acceptable standards would be excluded for purposes of valuing the stocks unless the parties agree in writing on the value thereof.

[9] In compliance with the provisions of Clause 7 of the lease agreement a stock-taking did indeed take place on the effective date which was the 5th July 2004. As a consequence of the stock-taking an amount was paid to the Applicant by the 1st Respondent which was calculated as per the provisions of Clause 7.

[10] The 1st Respondent alleges that it discovered later that 128 583 kilograms of the crude oil forming part of the stock was totally unusable and defective as described in sub-clause 7.1.4 of the business sale agreement. The 1st Respondent goes further to allege that a representative of the Applicant during a meeting of the 9th August 2004 confirmed in the presence of the 1st Respondent's deponent Mr De LaRey that about 68 000 kg of the delivered crude oil was indeed sediment and commercially unusable. This allegation is denied by the Applicant as well as Mr Weirich, the representative who is alleged to have confirmed this oil sedimentation.

[11] The first Respondent further alleges that during the stock taking representatives of the Applicant committed fraud by representing to the 1st Respondent that R 128 583 kg of crude oil were indeed useable. whereas the said representatives knew that these amounts of oil were unusable and defective. The Applicant denies all these

allegations of fraud and misrepresentation and also denies that the oil became commercially unusable.

[12] It is common cause that the 1st Respondent owes a certain amount of money to the Applicant representing arrear rentals .The exact amount owing is also not in dispute. What is in dispute is whether the debt alleged by the 1st Respondent against the Applicant is a liquidated debt capable of being raised as a defence of set-off

[13] It is not disputed that the 1st Respondent paid to the Applicant a sum of R1 131 532.16 as a purchase price of the stock purchased by the 1st Respondent. My understanding of the issues is that the parties are *ad idem* that for a valid defence of set -off to be successfully raised, the debt must be a liquidated one. The dispute is about what is meant by 'a liquidated debt or claim'.

[14] There is a plethora of authority confirming that set-off comes into being when two parties are mutually indebted to each other and both debts are liquidated and fully due. The one debt extinguishes the other *pro tanto* as effectually as if payment had been effected. **(See Shierhout vs Union Government 1926 AD 286 at 289-290).** Innes CJ (as he then was) went further to say that the doctrine of set-off is a recognised principle of our common law .. **(See Trinity Engineering vs Anglo-African Shipping 1986 (1) SA 700- at 702).**

[15] In **Fatti's Engineering Co ltd vs Vendick Spares ltd 1962 (1) SA 736 at 738E-739A** Boshoff J expressed his view thus:

> *"A debt must be liquid in the sense that it is based on a liquid document or is admitted or its money 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 the individual Judge in each particular case"*

(Reference is made to **Lester Investments (Pty) ltd vs Narshi 1951 (2) SA 464(C) at 470 E-H** and other authorities referred to therein) (See also **Janowsky & Others vs Payne 1989 (2) SA 562 (CPD)**

[16] The discretion referred to must be exercised judicially of course. In the present case the parties specifically agreed on a formular clearly derived to ascertain the amount of the stock to be purchased. The denial of the existence of the debt by the Applicant and the denial of the fraudulent misrepresentation does not itself destroy the right to raise the defence of set-off. It is conceded that the 1st Respondent may have to call expert witnesses to show that the crude oil was defective. The 1st Respondent may also have to lead evidence to prove fraudulent misrepresentation. In my view the calling of witnesses does not impact on the ascertainment of the amount of the debt but may impact on the proof and level of the proof of the allegations of

defectiveness and fraudulent misrepresentation but not on the promptness and speedy ascertainment of the amount of the debt. In that sense I am persuaded that the 1st Respondent's claim is a liquidated one.

[17] I am of the opinion that I cannot conceive on the information and evidence presently before me that an enquiry to establish the amount of the debt would be protracted or difficult. Clause 7 & of the business sale agreement categorically and clearly states the method of calculation of the purchase price of the stock in trade. No greater difficulty need be expected with the proof of the amount to be claimed. If that is so I cannot grant the order prayed for by the Applicant at this stage. If during the hearing of evidence it should, contrary to what I would expect judging by the papers, be made to appear to the presiding Judge that the 1st Respondent's claim for the purchase price is not capable of speedy and prompt ascertainment then it would always be open to the court to decide in the light of such evidence that no claim exists capable of set-off.

[18] Even if I am wrong in thinking, on the evidence before me, that the 1st Respondent's claim is one which is readily ascertainable, nevertheless it is clear that on the papers before me it cannot positively be stated that it is not readily ascertainable.

[19] Counsel for the 1st Respondent raised a point *in limine* to the effect that the Applicant lacks *locus standi* to pursue this claim. His argument is based on the fact that the applicant ceded all his rights to the 2nd

Respondent and that such cession should take effect on the 2nd February 2005 which is the date on which the registration of the transfer of the property to the 2nd Respondent took place. He further argued that the Applicant's rights were therefore ceded to the 2nd Respondent and the Applicant cannot split its rights before the registration and after the registration. With due respect to Counsel this argument is bad in law and cannot fly. The Applicant had rights based on the lease agreement which rights he ceded to the 2nd Respondent as at 2nd February 2005 therefore the rights he possessed before 2nd February 2005 can be exercised up to the 2nd February 2004 upon which date the 2nd Respondent will be entitled to assume those rights as it's own. The Applicant cannot be barred from exercising its rights prior to the date of registration despite the cession agreement.

I do not consider it necessary to deal in details with the reasons why the point *in limine* should be regarded as doomed *ab initio*. More especially considering my view on the merits.

[20] It is clear that the 1st Respondent raised the question of a claim based on the defectiveness of the crude oil as early as in August 2004. Therefore the Applicant knew or should have known that a dispute of facts would of necessity arise. **(See Room Hire Co (Pty) Ltd vs Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 at 1162).**

[21] I therefore find that the 1st Respondent's debt is a liquidated one, that is readily and promptly ascertainable. I further find that the 1st Respondent's claim will if established be an answer to the Applicant's

claim for the arrear rentals. I further find that in view of the dispute of facts in regard to the defectiveness and the fraudulent misrepresentation, evidence will be required to be heard in support of the 1st Respondent's claim as well as in opposition by the Applicant.

[22] **I make the following order:**

(a) That this matter be referred to trial.

(b) That the founding Affidavit shall stand as a summons, the answering Affidavit shall stand as a plea.

(c) The further conduct of the proceedings shall follow the normal and usual course in terms of the Rules of court.

(d) The costs of this application shall be costs in the course.

J.B. SHONGWE

JUDGE OF THE HIGH COURT