

**IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG
(REPUBLIC OF SOUTH AFRICA)**

CASE NO: 2010/42058

In the matter between:

EXECUJET AVIATION (PTY) LTD Applicant

and

MZILIKAZI GODFREY KHUMALO Respondent

SUMMARY OF REPORTABLE JUDGMENT

The Applicant brought an application for judgment against the Respondent in an amount of R1 million. The Applicant's claim arose out of flight charter services rendered by the Applicant's predecessor in title to a company, Metallon. The Respondent was the chairman of Metallon.

The Applicant had brought an application to wind up Metallon. The Respondent had filed an answering affidavit in that application contending that it was inappropriate to bring a winding up application against Metallon because the Applicant's true debtor was the Respondent himself and not Metallon. The Respondent alleged that he was indebted to the Applicant and indicated that he had undertaken to pay the amount due by him to the Applicant in an unspecified number of instalments.

The Applicant filed two further affidavits in the winding up application. In both of those affidavits, the Applicant disputed that the funds were owed by the Respondent personally and continued to insist that the funds were owed by the company, Metallon. As a consequence of filing these affidavits, the Applicant obtained a compulsory winding up order against Metallon.

After the final winding up order had been granted, the Applicant brought this application against the Respondent. In its founding affidavit, the Applicant continued to maintain that its true debtor was Metallon and not the Respondent. However, the Applicant alleged that Metallon's answering affidavit which was deposed to by the Respondent, constituted an acknowledgement of liability by the Respondent that remained open for acceptance by the Applicant. The Applicant purported to accept this offer to pay in its founding affidavit in this application. In the result, the Applicant's cause of action was based entirely upon the alleged acknowledgement of liability and its acceptance.

The Court analysed the nature of an acknowledgment of liability. It concluded that, in this case, the undertaking of the Respondent was not an acknowledgment of liability because, on the Applicant's own version, the debt was owed by Metallon and not the Respondent. There was no underlying *causa* for the alleged acknowledgment of liability.

A creditor to whom liability has been acknowledged does not have a "*free election*" to enforce both the original obligation and the acknowledgement of liability. The creditor must enforce one or the other. The Applicant had elected to enforce the primary obligation – i.e. the claim against Metallon. It was now too late for the Applicant to turn back the clock.

By proceeding with the winding up and insisting in its replying affidavit that the indebtedness was Metallon's and not the Respondent's, the Applicant had rejected any offer that the Respondent might allegedly have made. It was now no longer open for the Applicant to accept that offer.

The Court dismissed the Applicant's application. However, the Court concluded that this was an appropriate case to depart from the ordinary rule which requires that costs be awarded to the winner. The Respondent had abused the process of the Court. Accordingly, the Applicant was not required to pay the Respondent's costs.

P.N. LEVENBERG, AJ