IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Case No: 44/2011

In the matter between:

SWAZILAND POLYPACK (PTY) LTD **APPELLANT**

AND

THE SWAZILAND GOVERNMENT **1st RESPONDENT**

SWAZILAND INVESTMENT PROMOTION AUTHORITY (SIPA) **2nd RESPONDENT**

Neutral citation: S*waziland Polypack (PTY)Ltd v. the Swaziland Government Another (44/11) [2012] SZSC 30 (31 May 2012)*

CORAM: **A.M. EBRAHIM JA**
M.C.B. MAPHALALA JA
A.E. AGIM JA

Heard : 14th May 2012
Delivered : 31st May 2012

Summary

Civil Appeal – application to perfect landlord's hypothec – appellant raising defence of non-beneficial occupation – the basis of the liability of tenant to pay rent discussed – appeal dismissed with costs.

MAPHALALA JA

[1] This is an appeal against the judgment of the court a quo which granted an order perfecting the Landlord's hypothec; the court further ordered the appellant to pay arrear rental to the second respondent as well as an eviction order.

[2] The first respondent and the appellant concluded and signed a Memorandum of Understanding on the 6th December 2002 in respect of a lease of two Factory Shells to be used by the appellant. In terms of the Memorandum the appellant was exempt from paying rental during the first twelve months of beneficial occupation; thereafter, the appellant would pay a monthly rental of E195 000.00 (one hundred and ninety five thousand emalangeni). The appellant would be responsible for the daily upkeep of the factory whilst structural maintenance due to normal wear would be responsibility of the first respondent.

[3] The Memorandum further provided that a detailed Leased Agreement would be drawn up. The lease was for an initial period of ten years with an option of renewal for another three years or more.

[4] When the non-rental period lapsed on the 31st May 2009, the appellant continued to use and enjoy the premises; however, it did not pay the rental.

The second respondent who is the Agent for the first respondent and manages all factory shells prepared the Lease Agreement in accordance with the Memorandum of Understanding; however, the appellant refused to sign the Lease Agreement despite demand. The refusal to sign the Lease meant that the appellant was on a month to month Lease.

[5] From the 1st June 2009 to the 11th November 2010 when the proceedings were instituted to perfect the Landlord's hypothec, recover arrear rental and sue for eviction, the arrear rental had accumulated to E3 120 000.00 (three million one hundred and twenty thousand emalangeni). On the 18th June 2010 the second respondent demanded payment of the arrear rental in writing from the appellant; this effectively placed the appellant in *mora*.

[6] Clause 11 of the Memorandum provided that any disputes, controversies and claims arising from the Lease Agreement shall be settled by the Courts of Swaziland in accordance with the Laws of the country. This is in sharp contrast to the written lease which the appellant refused to sign; it provided that a dispute arising between the parties would be referred to arbitration.

[7] The appellant raised certain Points *in limine* in its Answering Affidavit: firstly, that the Court *a quo* lacks jurisdiction to hear and determine the dispute on the grounds that the parties had agreed that any dispute arising

out of their written agreement would be resolved by way of arbitration. This Point is misconceived and the Court *a quo* was correct in holding that the appellant could not invoke and rely on the draft agreement because it was not signed by the appellant and was consequently invalid and not binding between the parties.

[8] In the case of *Scriven Brothers v. Rhodesian Hides and Produce Co. Ltd and Others* 1943 AD 393 at 400 *Tindall* stated the following:

> **"An arbitration clause is a written submission agreed to by the parties to the contract, and, like other written submissions to arbitration, must be construed according to its language and in the light of the circumstances in which it was made. If the dispute is as to whether the contract which contains the clause has ever been entered at all, that issue cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he ever joined in the submission. Similarly, if one party to the alleged contract is contending that it is *void ab initio* (because for example, the making of such a contract is illegal), the arbitration clause cannot operate, for on this view, the clause itself is also void."**

[9] The above case summarises the correct position of law in this country with regard to Arbitration Clauses. It is not in dispute that the appellant did not sign the written lease which provided for an arbitration clause for disputes arising between the parties. The appellant cannot rely on that clause in the

circumstances; and if it wishes to enforce the clause when such was not concluded, the proper forum to determine this issue are the courts and not arbitration.

[10] The second point *in limine* was that the second respondent sought and was granted an order for payment of arrear rental in an application for perfecting the landlord's hypothec irregularly without having proved its claim; to that extent, the appellant queried the attachment of its movable property pursuant to the interim order on the basis that the attachment was not the proper remedy in law for a hypothec.

[11] The Landlord's hypothec is a security right created by operation of the law over movable property belonging to the Lessee who is in arrears with rent payments. The hypothec is intended to secure the Landlord's claim for arrear rental. The lessee's property becomes subject to the hypothec as soon as the rent is in arrears; however, the law requires that the Landlord has to perfect the hypothec by attaching the Lessee's movable property in terms of a Court Order whilst the property is still on the premises. The legal basis for perfecting the hypothec by obtaining a Court Order for attachment or an interdict restraining the Lessee from removing the movable property from the leased premises is to prevent the lessee from disposing of and removing the movable property from the leased premises

pending payment of the rent or the determination of proceedings for the recovery of the rent.

- **See *A.J. Van Der Walt and G.J. Pienaar*, Introduction to the Law of Property, third edition at page 302; *Webster v. Ellison* 1911 AD 73 at 79-80; *Barclays Western Bank, Dekker* 1984 (3) SA 220 (D) at 224 (A)**

[12] *Lord De Villiers CJ* in the case of *Webster v Ellison* (supra) at page 79 stated the law as follows:

> **"The landlord's lien is in the nature of a special tacit hypothec which is confined to *invecta et illata* upon the land leased…. To render this hypothec effectual it is necessary to attach the property, and the general rule is that the attachment must take place while the things are on the leased premises."**

[13] At page 82 of the judgment, His Lordship continued and stated the following

> **"…The Court will always assist vigilant landlords seeking to attach goods on the leased premises upon prima facie proof that there are reasonable grounds for apprehending that the goods will be removed. The landlord will always mainly rely upon the facility with which he can prevent the removal of the goods rather than upon the bare**

possibility of his being able to get hold of them after they have been removed."

[14] The court a *quo* correctly granted the interim order for the hypothec because the rent was in arrears; this procedure, as the learned judge of the court a quo held, was not irregular. Perfecting the landlord's hypothec involves either the attachment of the movables belonging to the Lessee as or an interdicting restraining the Lessee from removing the movable goods; this is intended to prevent the Lessee from removing or disposing of the goods pending payment of the rent or the determination of proceedings for recovery of the rent.

[15] In addition the court *a quo* correctly held that there is now a practice in this jurisdiction for granting an interim order for attachment or interim interdict against removal of the goods in terms of an *ex parte* application. Ancillary orders call upon the Lessee to show cause why it cannot be ordered to pay the arrear rentals, and, why it cannot be ejected from the premises. However, the applicant should present *prima facie* proof that there are reasonable grounds for apprehending that the goods will be removed or disposed of.

[16] The third point *in limine* was that the second respondent does not have *locus standi* to sue the appellant on the grounds that it is not a party to the

Memorandum of Understanding; and that there is no contractual relationship between the second respondent and the appellant. To that extent it was argued that the second respondent has no right of recourse to apply for the joinder of the first respondent because it does not have a cause of action against the appellant; in addition, it was argued that the second respondent does not have a direct and substantial interest in the matter to be a party to the proceedings.

[17] The second respondent is the Agent of the first respondent and was duly appointed in March 2007 in terms of a Management Agreement to manage Government Factory Shells. On the 14th March 2007 the Minister for Enterprise and Employment appointed the second respondent to collect rentals on behalf of the first respondent on Government-owned Factory Shells; in addition, the second respondent was further tasked with the preparing and signing of lease agreements. The appointment was to commenced on the 14th March 2007 and continues for an initial period of ten years and thereafter continue for an indefinite period until terminated by either party on six months written notice.

[18] The Management Agreement coupled with the Letter of Appointment did confer *Locus Standi* upon the second respondent to institute the application to perfect the landlord's hypothec as well as to institute the joinder

application in respect of the first respondent. It is therefore misconceived for the appellant to argue that the second respondent has no direct and substantial interest in the proceedings to perfect the landlord's hypothec as well as the application for joinder of the first respondent.

[19] The Management Agreement authorises the second respondent, *inter alia*, to seek appropriate tenants for the premises situated on the properties, settle the terms of leases and execute them in the name of and on behalf of the first respondent, represent the first respondent in all dealings with tenants, and take all steps it may deem appropriate to enforce the terms of the leases, to conclude contracts with third parties for the provision of services to the property and for the repairs and maintenance of the property, and to receive rentals and other monies payable to the owners, and be custodian of deposits for the duration of the lease.

[19.1] More importantly clause 4.1.9 provides the following with regard to the Manager's authority:

> **"To take, in the manager's own name, any steps in court of Law for the recovery of any monies payable to the owners, the ejectment of any tenant and/or for the enforcement of any other legal rights, to institute and/or defend any action or other proceedings and to withdraw, settle and/or to compromise the same, to defer any matter**

to arbitration and to carry out and perform any award made thereunder, and to sign any documents as may be required."

[20] The court *a quo* held correctly that it is now settled that where a necessary party was not joined in the proceedings, such did not entitle a dismissal of the matter but instead a postponement of the matter to allow the necessary party to be joined.

[21] In the case of *Amalgamated Engineering Union v. Minister of Labour* 1949 (3) SA 637 (AD) at 649 *Fagan AJA* stated the following:

"The fact, however, that when there are two parties before the court, both of them desire it to deal with an application asking it to make a certain order, cannot relieve the court from inquiring into the question the Order it is asked to make may affect a third party not before the Court, and, if so, whether the court should make the Order without having that third party before it. Indeed, I cannot see that in this respect the position of the two litigants would be any better than that of a single petitioner who applies *ex parte* for an order which may affect another party not before the court. The third party's position cannot be prejudiced by the consensus of the two litigants that they do not wish that party to be joined"

[22] At page 659 *His Lordship Fagan AJA* stated the following:

> **"Indeed it seems clear to me that the Court has consistently refrained from dealing with issues in which a third party may have a direct and substantial interest without either having that party joined in the suit or, if the circumstances of the case admit of such a course, taking other adequate steps to ensure that its judgment will not prejudicially affect that party's interests. There may also, of course, be cases in which the court can be satisfied with the third party's waiver of his right to be joined, e.g. if the court is prepared, under all the circumstances of the case, to accept an intimation from him that he disclaims any interests or that he submits to judgement. It must be borne in mind, however, that even on the allegation that a party has waived his rights, that party is entitled to be heard; for he may, if given the opportunity, dispute either the facts which are said to prove his waiver, or the conclusion of law to be drawn from them or both."**

[23] It is apparent from the evidence that the first respondent is the owner of the factory shells as well as the Lessor; hence, it has a direct and substantial interest in the proceedings. It cannot be in dispute that whatever judgment the court could make would prejudicially affect its interests. The first respondent is a necessary party and should be joined in the proceedings in the absence of a waiver of its right to be joined. Moreover, the court has an inherent power to inquire whether the order it is asked to make will not

prejudicially affect the rights of third parties. The Court has an inherent power to order joinder of necessary parties either at the instance of a party or *mero motu.*

[24] At page 660 *His Lordship Fagan AJA* stated as follows:

> **"Mere non-intervention by an interested party who has knowledge of the proceedings does not make the judgment binding on him as *res judicata*….**
>
> **The principle that *res judicata* can be pleaded only when the parties between whom the plea is raised are the same as in the previous suit or are deemed to be the same because certain persons are identified with one another for this purpose … may sometimes give valuable guidance as to whether a third party should be joined or not. The court will not, for instance, issue a decree which will be *brutum fulmen* because some persons who will have to co-operate in carrying it into effect, will not be bound by it."**

[25] *His Lordship Grosskopf J.A*. in the case of *Klep Valves (PTY) Ltd v. Saunders Valve (PTY) Ltd* 1987 (2) SA 1 (AD) at 39 stated the following:

> **"Of course, the desire of the parties cannot be conclusive in this matter. As was pointed out in *Amalgamated Engineering Union v. Minister of Labour* 1949 (3) SA 637 (A) at 649, the fact that the two parties before the court desire the case to proceed in the absence of a third party cannot relieve the court from inquiring into the question whether the Order it is asked to make may affect the third party."**

[26] *His Lordship Van Reenen AJ* in the case of *Harding v. Basson and Another* 1995 (4) SA 499 (C) at 501 C stated the following:

> **"The non-joinder of a party normally arises when raised by a defendant or a respondent; when a person, other than a party to already instituted proceedings, wishes to be joined as a party thereto or when raised by the court *mero motu*. A party's right to demand than someone be joined as a party arises if such a person has a joint proprietary interest with one or either of the existing parties to the proceedings or has a direct and substantial interest in the Court's Order…. Furthermore, the Supreme Court in terms of its inherent jurisdiction, has a discretion *mero motu* to require the joinder of a party in proceedings that have been instituted.**

[26.1] *Herbstein and Van Winsen*, "The Civil Practice of the Supreme Court of South Africa", fourth edition, at page 170 state the following:

> **"If a third party has, or may have, a direct and substantial interest in any order the court might make in proceedings or if such an order cannot be sustained or carried into effect without prejudicing that party, he is a necessary party and should be joined in the proceedings, unless the court is satisfied that he has waived his right to be joined. Such a person is entitled to demand as of right that he be joined as a party and cannot be required to establish in addition that it is equitable or convenient that he should be joined as a party. In fact when he is a necessary party in this sense the court will not deal with the issues without a joinder being effected, and no question of discretion or convenience arises."**

[27] The Court *a quo* correctly dismissed the point *in limine* that the Lease Agreement between the parties was for a period of ten years renewable for a three year period, and, that the said Lease was invalid because it had not been notarially executed in terms of the law. It is common cause between the parties and it has not been denied by the appellant that the draft written Agreement was not signed by the appellant; hence, it is not binding between the parties and consequently invalid and unenforceable at law. In the circumstances, it is evident that the contract between the parties is one of Lease on a month to month basis.

[27.1] Section 30 of the Transfer Duty Act no. 8 of 1902 deals with the Lease of land for ten years or more to be notarial, and provides the following:

> **"30. (1) No lease of any mynpatch, claim or right to minerals and no lease of any land or any stand for a period not less than ten years or for the natural life of any person mentioned therein, or which is renewable from time to time at the will of the lessee indefinitely, or for periods which together with the first period thereof amount in all to not less than ten years, shall be of any force or effect if executed after the taking effect of this Act unless executed before a Notary Public, nor shall it be of any force or effect against creditors or any subsequent bona fide purchaser or lessee of the property leased or any portion thereof unless it be registered against the title deeds of such property."**

[28] The Court a *quo* was also correct in dismissing the Point *in Limine* raised by the appellant that the Lease Agreement between the parties was illegal

and therefore unenforceable for its failure to comply with the provisions of sections 8 and 9 of the Land Speculation Control Act no. 8 of 1972 which required that consent of the Land Control Board be sought before the Lease could be concluded as the directors and shareholders of the appellant were not Swazis.

[29] Section 8 of the Land Speculation Control Act provides the followings:

"8. (1) A controlled transaction shall be void unless the Land Control Board has granted its consent in respect of that transaction in accordance with the Act.

(2) An agreement relating to a controlled transaction shall be void:

(a) at the expiry of three months after the conclusion of the agreement, if an application for the Land Control Board's consent has not been made within that time; and

(b) if an application for the Land Control Board's consent has been refused:

(i) at the end of thirty days from the date of such refusal; or

(ii) where a party has appealed under section 13 against such refusal, on the dismissal of his appeal.

[30] Section 9 provides the following:

"If any money or other valuable consideration has been paid in respect of or in relation to an agreement that is void by virtue of section 8, that money or consideration shall be recoverable as a debt

by the person who paid it from the person to whom it was paid, but without prejudice to section 17."

[31] Section 2 of the Interpretation Section of the Land Speculation Control Act defines a Controlled transaction as follows:

"2…. "Controlled transaction" means:

(a) the sale, transfer, lease, mortgage, exchange or other disposal of land to a person who is not :

(i) a citizen of Swaziland;

(ii) a private company or co-operative society all of whose members are citizens of Swaziland;

(iii) a person listed in the Schedule to this Act;

(b) the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns land in Swaziland, to or with a person who is not a Swaziland citizen;

but does include:

(a) the transmission of land or shares by virtue of the will or intestacy of a deceased person;

(b) a donation by parent to his descendant;

(c) a sale in execution of a judgment of any court;

(d) a sale by a trustee of an insolvent estate or the liquidator of a company or co-operative society in liquidation.

[32] The court a quo was correct in holding that the appellant did not deal with the Point *in limine* relating to sections 8 and 9 of the Land Speculation Control Act in order to enable the respondents to deal with it in their Replying Affidavits. In any event the contract between the parties does not fall within the definition of a controlled transaction in so far as it is not a lease of land but of Factory Shells. It is implicit in the definition of a controlled transaction that the subject-matter of the transaction must be land. The legislature's intention was to restrict the sale, transfer, lease, mortgage or other disposal of land.

[33] The court *a quo* was also correct in dismissing the allegation by the appellant that there was a dispute of fact in the proceedings relating to the amount due and payable to the respondents on the basis of a counter-claim for monies owed to it by the first respondent arising from damages it suffered as a result of electricity outages. I agree with the learned judge of the court *a quo* that the appellant has not proved that the first respondent was the cause of the electricity outages and that they were not caused by an Act of God or *vis* major. More importantly the appellant did not file any counter-claim to the present proceedings.

[34] The court *a quo* held correctly that there was no dispute of fact in the proceedings for the perfection of the Landlord's hypothec, that the appellant had admitted occupation of the premises, the agreed monthly rental of E195 000.00 (one hundred and ninety five thousand emalangeni), and that the appellant had conceded that it had not paid any rental since taking occupation of the premises and that the arrear rental had accumulated to E3 120 000.00 (three million one hundred and twenty thousand emalangeni). In addition it did not dispute the correctness of the arrear rental except the allegation of illiquid damages owed to it arising out

of electricity outages. It is against this background that the court *a quo* confirmed the interim order for the perfection of the landlord's hypothec which included the payment of arrear rental as well as ejectment. Similarly, it is not in dispute that since September 2011, the appellant has been paying E200 000.00 (two hundred thousand emalangeni) per month as rental and by agreement with the second respondent it will continue doing so pending the finalization of this appeal. This clearly shows that the alleged dispute of fact is not *bona fide*, material or real.

[35] The appellant argued during the hearing that it had not been given uninterrupted use and enjoyment of the factory premises because no reliable electricity supply to the factory had been provided as had been guaranteed by the first respondent; and that it had suffered regular interruptions to the power supply to the factory. The appellant argued that the first respondent agreed to pay a penalty of E400 000.00 (four hundred thousand emalangeni) per day for each day that power cuts occurred or if there was insufficient electricity available for production; and that the amount owing to the appellant in terms of the undertaking given by the second respondent was no less than E39 600 000.00 (thirty-nine million six hundred thousand emalangeni). According to the appellant, it did not owe the amount claimed by the respondents as rental for the factory premises; that second respondent is not entitled to exercise the landlord's hypothec and that the respondents are not entitled to judgement of the amount claimed.

[36] The appellant argued that the first respondent was liable for all electricity outages on the basis that it guaranteed a reliable electricity supply. It also argued that both claims are liquid and that a set-off should operate, and that the appellant was entitled to remain in occupation of the premises.

[37] It is the duty of the court in every case where a dispute of fact is alleged to examine the alleged dispute in order to determine if it cannot be resolved on the papers without resort to oral evidence. This is to guard against the tendency of respondents raising fictitious issues of fact with a view to delay the hearing of the matter to the prejudice of the applicant. In order for the alleged dispute of fact to require oral evidence, it must be real, genuine and bona fide and not merely a bare denial of the applicant's allegations. Where no real disputes of fact exists, Motion proceedings are permissible to enforce liquidated money claims and consequently grant a final order. See the following cases: *Plascon-Evans Paints (PTY) Ltd* 1984 (3) SA 623 (A) at 635 B; *Arnold v. Viljoen* 1954 (3) SA 322 (C) at 329; *Wightman t/a JW Construction v. Headfour (PTY) Ltd* 2008 (3) SA 371 (SCA) at 375F-376B.

[38] The appellant's defence is based on clause 6 of a letter written by the Chief Executive Officer of the second respondent and addressed to the appellant dated 15th June 2005. Clause 6 provides the following:

> **"Warranty on power supply after November 2005. We once again affirm that sturdy power supply will be in place at the specified times and firm power will be in place in November 2005. We accept that as a result of outages arising from non-availability of firm power after November, the penalty of E400 000.00 (four hundred thousand emalangeni) per each day when the power is not available (total power-cuts and/or insufficient power for production) shall apply, provided that Acts of God are excluded. These shall refer to widespread infrastructure destruction across the region which is capable of destroying even a firm power source."**

[39] The appellant has attempted to explain how it arrived at the E39 600 000.00 (thirty-nine million six hundred thousand emalangeni) damages for electricity outages at pages 81-85 of the Book of Pleadings during the period 2006 – 2010. It is apparent therefrom that the interruptions on the days specified range from one (1) minute to five (5) minutes; in other instances the duration of the interruption is not disclosed. The appellant does not mention whether the power dip/ failure constituted total power cuts and/or insufficient power for production. In addition, the appellant does not mention whether the power dip/failure excluded Act of God and/or whether they excluded "widespread infrastructure destruction across the region". The glaring omissions referred to above render the appellant's defence vague and embarrassing and not constituting a *bona fide* defence in law.

[40] It is trite law that where a party acts in breach of contract , the innocent party is entitled to cancel the contract and claim damages in lieu thereof; he may also elect to maintain the contract and demand specific performance. It was held in the case of *Arnold v. Viljoen* 1954 (3) 322 C that the test of a tenant's liability when sued for arrear rental was whether he was in occupation or in possession of the premises and not whether or not such occupation or possession was beneficial. Accordingly, when the tenant is sued for rent he cannot plead as a defence that he had been deprived of the beneficial occupation of the premises by reason of structural defects which the landlord fails to repair; the tenant cannot remain in occupation but refuse to pay the rent.

[41] *Justice Franklin J* in the case of *Greenberg v. Meets Veterinary Labarotories (PTY) Ltd* 1977 (2) SA 277 (T) at 285E stated as follows:

"I am not persuaded that the case of *Arnold v. Viljoen* was wrongly decided; and in my view the principles stated in it and in the cases in which it had been cited with approval or applied, apply to the facts of the present case. The applicant, despite the respondent's breach of contract, has elected to remain in occupation of the premises and to purport to keep the contract alive and yet it refuses to pay the rent. In my view it is not competent in law for the applicant to do so. When it become clear that the respondent was not prepared to effect the necessary structural alterations, the applicant, was in my judgment, obliged to elect whether to cancel the contract, or to maintain it. If it elected to cancel the contract, as … it was entitled to do, it was entitled to sue the respondent for damages for breach of contract or to claim a set-off. But what it cannot do is to elect to maintain the contract and contend that it is excused from continuing to pay the rent on account of the condition of the premises….

Since the applicant has unequivocally elected to enforce the lease and to hold the respondent to its terms, on the basis of the authorities to which I have referred above I consider that the applicant is not entitled to withhold the payment of the rent whilst it remains in occupation of the premises. As the defence raised by the applicant on this issue is in my view unsound in law, it follows that it does not fulfil the requirements for a bona fide defence laid down in Grant's case, (supra), and the other cases in which it was followed."

[42] The appellant did not institute a counter-claim in the proceedings, and, the reliance on clause 6 of the letter from the second respondent dated 15th June 2005 was raised as a defence. A counter-claim is a separate action and is brought together with the claim for purpose of convenience. See *Herbstein & Van Winsen*, the Civil Practice of the Supreme Court of South Africa, 4th edition, at page 341.

[43] Lastly, the appellant will not be prejudiced by a dismissal of the appeal with costs because this would not preclude it from subsequently instituting action proceedings for damages that it alleges to have suffered by virtue of the breach of contract by the first respondent.

[44] The first and second respondents have made out a clear case for ejectment of the appellant from the premises for failure to pay the monthly rental despite demand; this constituted a breach of contract.

[45] The appellant has submitted that its claim is a liquidated claim capable of automatic set-off. The debt arising from clause 6 of the 2005 letter is neither liquid and/or due since no demand was made by the appellant to place the respondents in *mora*. In the case of *Standard Bank v. S.A. Fire Equipment* 1984 (2) SA 693 (C) at 696F-H *Justice Rose-Innes J* stated as follows:

> **"It seems reasonably clear that the defence of compensation or set-off is a defence "*in rem*", since set-off is similar to payment and results in the discharge, in whole or in part, of a debt. Set-off occurs, or may be invoked, only when two persons have incurred indebtedness each to the other, from whatever cause or causes, and both debts are for liquidated amount in money due and payable at one and the same time. When this situation arises each debt, or claim compensates the other, each is written off against the other and a balance is struck whereby both debts, if equal in amount, are discharged just as if both have been paid. If the one debt is greater than the other, of course, the lesser debt is discharged and the greater is reduced by the amount of the lesser. Such being the nature of set-off, it is not a defence in personam, but a defence *in rem,* since it extinguishes the debt whoever may be the debtor."**

[46] Accordingly, the appeal is dismissed with costs to include the costs of Senior Counsel appearing for the second respondent as well as costs of suit for the first respondent.

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M.C.B. MAPHALALA

JUSTICE OF APPEAL

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I agree: A.M. EBRAHIM

JUSTICE OF APPEAL

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I agree: A.E. AGIM

JUSTICE OF APPEAL

For Appellant	Adv. Van Niekerk instructed by Attorney L. Howe
For First Respondent	Attorney S. Khumalo
For Second Respondent	Adv. D. Smith instructed by Attorney S.V. Mdladla

DELIVERED IN OPEN COURT ON 31st MAY 2012.