

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: ~!NO.
- (2) OF INTEREST TO OTHER JUDGES:~/NO.
- (3) REVISED.

IN THE HIGH COURT OF THE NORTHERN CAPE

DATE

(TRANSVAAL PROVINCIAL DIVISION)

  
SIGNATURE

8 May 2006, 7 June 2006 In the matter between:

Case Number: 15338/05

SLAKES - MAPHANGA INCORPORATED

Slakes Maphanga

and

OUTSURANCE LIMITED

INSURANCE

COMPANY

Outsurance

### Judgment

*Set-off - additional point argued at application for leave to appeal- Court dealing with it although not dealt with in main judgment.*

Van Rooyen AJ

[1] In February I granted an application of the short term insurer, Outsurance,

and ordered its erstwhile attorneys, Slakes Maphanga, to pay R233 676,56

plus interest to Outsurance. An application for leave to appeal was filed by

Slakes Maphanga.

[2] I based my judgment on the fact that Slakes Maphanga had, on its own version, applied set-off before it was permitted to do so. The agreement, according to Slakes Maphanga was that accounts had to be settled by



2 Outsurance within thirty days from the rendering of an account and if this did not happen, then it would apply set-off.

[3] Ms *Fisher*, for Slakes Maphanga, submitted that set-off had, in any case, taken place automatically and that, especially for that reason, there were reasonable prospects of success on appeal.

[4] Mr *Vorster*, for Outsurance, firstly referred me to authority that he could go wider than the grounds on which my judgment were based since an appeal court would be entitled to consider the matter also from a different or wider angle ( see *Sentrale Kunsmis Korp. v NKP Kunsmisverspreiders 19VO(3) SA 367(A)* ). I agree with his approach.

[5] Considered from this wider perspective, Mr *Vorster* argued that the debt was, in any case, not liquidated so that it could be set off. From the papers it appears that when Outsurance notified

Slakes Maphanga that it was

cancelling its mandate to it in regard to litigation, Slakes Maphanga, on its part, informed Outsurance that it would raise a fee of R150 per file. Since

there were more than 380 files the total amount would be significant.

Outsurance responded by (adamantly) stating that this was not necessary and that the R150 per file did not, in any case, fall within its negotiated fee structure. To my mind this dispute created substantial uncertainty as to the debts of Outsurance to Slakes Maphanga. This must have been clear to



3Slakes

Maphanga. As held in my judgment, Slakes Maphanga notified

Outsurance that it had set off its debts on the 28th April 2005. This happened

10 days after the accounts were rendered. I held that since the set-off had

taken place prematurely, it amounted to a nullity.

[6] Ms *Fisher* now, however, argues that set-off had, in any case, taken place

automatically. The letter of 18 April, counsel argued, had no effect on set-off.

Since the accounts had not been paid previously, set-off had, by 18 April,

taken place *ipso iure* and *ex tunc*.

[7] There is reference in Slakes Maphanga's answering affidavit (para 11.1) to

the fact that as early as January 2005 it noticed that its accounts were not

being paid timeously and that by February 2005, the accounts were in arrears

to the extent of 180 days. Slakes Maphanga then decided not to pay over

monies collected and met the debts of Outsurance from the monies collected.

Slakes Maphanga therefore, in January 2005, ceased paying over collected

monies and settled the debts of Outsurance to it by setting them off against

the monies collected.

[8] The dispute as to what is owed by Outsurance, however, also relates to debts which

were said to be owed after the mandate was cancelled on the 4th

March 2005. Thus, in its letter of 18 April, Slakes Maphanga states that it

encloses its "final statements of account for urgent settlement." It also states





4that if there are any disputes as to the accounts they would be "happy" to proceed to have the accounts taxed and to refund any differences which may accrue in favour of Outsurance. The converse would also apply.

[9] To my mind, the post-cancellation attempt at set-off was affected by the uncertainty as to what the amounts should be. Slakes Maphanga contended that the closing of files of necessity required a fee whilst Outsurance contended that such formal closure was not required. The dispute was sufficient to affect the requirement that a debt may only be set-off when it is liquidated. The dispute also affects the reasonable ascertainability of the debt. Although a part of the debt (pre-cancellation) may have been certain, it is impossible to decide on the papers which part of the debt is comprised by the post-cancellation debts. Since set-off was raised by the Respondent, the applicant cannot be held responsible for bringing the matter to court by way of motion.

Having considered the papers, my judgment and the additional point, I do not believe that there are reasonable prospects of success on appeal.

The application for leave to appeal to appeal is dismissed with costs.

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5For the Applicant: Ms O Fisher instructed by Slakes Maphanga Attorneys clo

Le Roux Jansen, Pretoria

For the Respondent: J Vorster ( with him

Geyser) instructed by Weavind

and Weavind, Pretoria

