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DISPUTE RESOLUTION
ALERT

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Set it off: Postponement of a final winding up order pending the determination of a counterclaim

Rule 22(4) of the Uniform Rules of Court affords a defendant who has filed a counterclaim against a plaintiff the right to request the postponement of judgment on such part of the claim as admitted by him until the counterclaim has been finally determined. The defendant must show that the counterclaim, if successful, will wholly or partially extinguish the plaintiff's claim. As such, both the claim and counterclaim must generally be sound in money. The court also has a discretion whether to postpone the claim in convention so that both the claim and the counterclaim are heard simultaneously.

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Set it off: Postponement of a final winding up order pending the determination of a counterclaim

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Rule 22(4) of the Uniform Rules of Court affords a defendant who has filed a counterclaim against a plaintiff the right to request the postponement of judgment on such part of the claim as admitted by him until the counterclaim has been finally determined. The defendant must show that the counterclaim, if successful, will wholly or partially extinguish the plaintiff's claim. As such, both the claim and counterclaim must generally be sound in money. The court also has a discretion whether to postpone the claim in convention so that both the claim and the counterclaim are heard simultaneously.

Rule 22(4) was recently discussed in *Aerontec (Pty) Limited v South Harbour Tankfarm CC* 2021 JDR 0203 (WCC) (Aerontec) in the Western Cape High Court.

In casu

Aerontec applied for the final winding up of South Harbour Tankfarm on grounds that it was unable to pay its debts as and when they fell due for payment in the ordinary course of its business. South Harbour Tankfarm opposed the granting of a final winding up order on the basis that it had an unliquidated counterclaim against Aerontec, which it contended would extinguish Aerontec's claim. Aerontec had supplied goods to South Harbour Tankfarm, which South Harbour Tankfarm alleged were not fit for purpose, and as a result, it suffered damages in the form of pure economic loss.

Argument

Aerontec argued that South Harbour Tankfarm had agreed contractually that it would be precluded from relying on a counterclaim as a defense to its liability to pay amounts owing in terms of the credit facility agreement, which provided *inter alia* that –

> *"Clause 4.4* *payments of all amounts due shall be made at such place or into such account free of deduction or set off, free of exchange or other such address as we may nominate*
>
> ....
>
> *Clause 8.1* *All goods and materials as supplied to and shall be accepted by the Buyer voetstoots without warrantee express or implied against patent or latent defects and on the particular understanding that we do not expressly or impliedly warrant or represent that such goods or material are suitable for any particular purpose"*

Notwithstanding clauses 4.4 and 8.1 of the credit agreement, South Harbour Tankfarm pointed out that the critical question was whether Rule 22(4) found application to the dispute between the parties given the nature of the contractual provisions which governed their relationship.

Set it off: Postponement of a final winding up order pending the determination of a counterclaim

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The court held that the impugned provisions of the credit agreement, as argued by Aerontec, were not dispositive of the issues at hand and, accordingly, the court exercised its discretion in making a determination of the counterclaim.

In support of its argument, South Harbour Tankfarm relied on the case of *Consol Ltd t/a Consol Glass v Twee Jongegezellen (Pty) Ltd* 2002 (2) SA 580 (C) (Consol Glass), which dealt with the question of whether a clause in an agreement relating to set off justified a conclusion that the first respondent in that matter had either waived or agreed to the exclusion of the procedural benefits of Rule 22(4). In this case it was concluded that no express reference was made to the provisions of Rule 22(4) in the set off clause or anywhere else in the agreement, and there could be no basis to suggest that tacit or implied reference had been made. As such, the court concluded that the parties clearly did not, at the time of conclusion of the agreement, give consideration to such Rule or to any matter pertaining thereto, nor could this be inferred from any relevant facts or surrounding circumstances.

Analysis

The court in Aerontec applied the same reasoning applied in the Consol Glass case and held that given the wording of the credit agreement, it would be difficult to conclude that Rule 22(4) was contemplated when the contract was entered into, and there was consequently no basis to suggest that the parties intended to exclude the implication of Rule 22(4) or deny one of the parties any of its procedural benefits.

The learned judge stated further that it was clear that South Harbour Tankfarm's unliquidated counterclaim could not be set off against Aerontec's liquidated claim and that any such set off would come into operation only if and when judgment on the counterclaim was given in favour of South Harbour Tankfarm. The court held that the impugned provisions of the credit agreement, as argued by Aerontec, were not dispositive of the issues at hand and, accordingly, the court exercised its discretion in making a determination of the counterclaim.

Judgment

The court held that there was insufficient evidence showing that Aerontec was liable for damages suffered by South Harbour Tankfarm, stating that the counterclaim against Aerontec had no merit to succeed, even on a *prima facie* basis. Ultimately, South Harbour Tankfarm was placed under final liquidation.

Contracting parties who seek to either waive or agree to the exclusion of certain procedural benefits afforded by the Rules of Court in terms of a contract should do so in writing and with specific reference to the Rule sought to be waived or excluded.

Mongezi Mpahlwa, Camille Kafula and Jessica van den Berg

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