



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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Habib Overseas Bank Limited (in liquidation) v Crestar Printers and Publishers (Pty) Ltd (in liquidation) and Others (058/2025) [2026] ZASCA 136 (05 October 2026)

Today, the Supreme Court of Appeal (SCA) upheld, in part, an appeal by Habib Overseas Bank Limited (in liquidation) (the bank) against a judgment of the Gauteng Division of the High Court, Johannesburg (the high court). The case turned on whether two sureties, who had funds in their own accounts with the bank, could rely on set-off to reduce the amounts they owed the bank as sureties. The SCA found that one could, but the other could not.

In November 2019, the bank provided loan and overdraft facilities to Crestar Printers and Publishers (Pty) Ltd (Crestar). Several persons signed as sureties and co-principal debtors for Crestar's debt. Two of them, the late Mr Sheikh Hassan Omar and Ghousbibi Arifullah CC (Ghousbibi), limited their liability to R6 million each. Both held deposit accounts with the bank, and from mid-2021 the funds in those accounts exceeded the R6 million each had signed for. Ghousbibi also registered a mortgage bond over a commercial property to secure its obligations as surety.

Crestar fell into arrears. On 15 June 2021, the bank called on Mr Omar and Ghousbibi to pay R6 million each by 17 June 2021. Neither paid, and the bank went to court on 26 July 2021. Mr Omar died in January 2022, and the executrix of his estate took his place in the proceedings. Crestar was placed in liquidation in May 2022. The bank itself was placed under curatorship in March 2023 and was finally liquidated in February 2024. From the time of the curatorship, the two depositors could not withdraw their funds, and in the bank's liquidation each stands to recover only R100 000.00.

For nearly three years, the two sureties challenged the validity of their suretyships. On 10 May 2024, six days before the hearing, they filed a further affidavit abandoning those challenges, admitting their liability, and, for the first time, arguing that their debts to the bank had been set off against the money the bank owed them on their accounts. The high court admitted the affidavit and ordered the bank to pay its costs. It held that set-off took effect on 26 July 2021, the day the bank launched its application, and directed the bank's liquidators to restate Crestar's account.

The SCA explained that set-off is a common-law rule. Where two parties owe each other money, and both debts are fixed in amount and due for payment, one debt cancels the other to the extent of their overlap, as if payment had been made. This occurs by operation of law, but a party seeking its benefit must raise it. Once raised, it takes effect from the date on which both debts first existed together. Parties may agree that set-off will not apply between them, but because such an agreement displaces the ordinary rule, it must be expressed clearly.

The bank pointed to five sources from which, it said, an agreement excluding set-off could be found. The SCA rejected four of them. The clause in the facility letter permitting the bank to use credit balances applied to Crestar's accounts, not to the sureties' accounts. The clause in the deeds of suretyship dealt with money the bank received when enforcing the suretyship, not with ordinary deposits. The set-off clause in the bank's account opening terms gave the bank a right of set-off. It did not prevent set-off under the law. The court found it unnecessary to decide whether a customer can pledge their own

deposit to their bank, because, on its view, the clause did not help the bank. There was also no evidence to support the argument that keeping separate accounts meant the parties had agreed to keep those debts apart, and the SCA rejected the argument that the debts were never due at the same time.

Ghousbibi's mortgage bond was different. It expressly provided that the amounts payable by the mortgagor, Ghousbibi, were to be paid without set-off. The SCA held that this was a clear agreement excluding set-off and that it was also the most recent and most specific document the parties had signed on the subject. The court did not accept Ghousbibi's argument that the set-off clause in the account terms was a 'contrary express agreement' that overrode the bond. Mr Omar had given no bond. As a result, the two sureties, whose deeds of suretyship were identical, ended up in different positions. The court said that this was the consequence of the security Ghousbibi chose to give.

The SCA also held that the high court had fixed the wrong date. Mr Omar's debt as surety became due on 17 June 2021, the deadline set out in the bank's letter of demand. Set-off took effect on that date, extinguishing his R6 million liability and reducing Crestar's debt to the bank by the same amount. Launching the court application on 26 July 2021 did not alter the terms of the agreements or change the date.

The bank argued that the sureties had, by their long delay, waived the right to rely on set-off. The SCA disagreed. A debtor is entitled to rely on set-off but is not obliged to raise it at the first opportunity, and waiver is not lightly inferred. All the bank had shown was delay. However, the delay had consequences. The sureties had come to court days before the hearing with a new case, and the SCA held that they, not the bank, should pay the costs of the late affidavit.

Ghousbibi also asked the court to develop the common law so that set-off would apply automatically immediately before a bank's liquidation, arguing that otherwise the loss of its deposit would constitute an arbitrary deprivation of property under section 25 of the Constitution. The SCA rejected this. Ghousbibi's position stemmed from the bond it had given, not from anything the bank had done. The court added that public policy is as concerned with holding parties to agreements they freely make as with relieving them of the consequences.

The SCA set aside parts of the High Court's order. It held that Mr Omar's estate's liability as surety was extinguished by a set-off of R6 million on 17 June 2021, thereby reducing Crestar's debt from that date, and that the set-off did not operate between the bank and Ghousbibi. The bank's liquidators must restate Crestar's account on that basis. The two sureties must pay the costs of their late affidavit. The bank's claims against the remaining respondents, including Ghousbibi, were postponed, and the bank may return to court on supplemented papers once it has calculated what remains owing. Its request for the mortgaged properties to be declared specially executable must wait until then. Because each side succeeded in part, the court ordered each party to pay its own appeal costs.