



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 058/2025

In the matter between:

HABIB OVERSEAS BANK LIMITED
(IN LIQUIDATION)

APPELLANT

and

CRESTAR PRINTERS & PUBLISHERS
(PTY) LTD (IN LIQUIDATION)

FIRST RESPONDENT

IKRAAM JAFFER

SECOND RESPONDENT

SALAHHUDDEN JAFFER

THIRD RESPONDENT

HAWA JAFFER

FOURTH RESPONDENT

DR TANWIR JAFFER

FIFTH RESPONDENT

IKRAAM JAFFER NO

SIXTH RESPONDENT

RASHIDA OMAR NO

SEVENTH RESPONDENT

GHOUSBIBI ARIFULLAH CC

EIGHTH RESPONDENT

THE EXECUTOR IN THE ESTATE OF
THE LATE AHMED HASSAN JAFFER

NINTH RESPONDENT

HAWA JAFFER NO

TENTH RESPONDENT

SALAHHUDDEN JAFFER NO

ELEVENTH RESPONDENT

DR TANWIR JAFFER NO

TWELFTH RESPONDENT

Neutral citation: *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)

Coram: NICHOLLS, MEYER, KOEN JJA and MPHAHLELE and
KOOVERJIE AJJA

Heard: 28 August 2026

Delivered: 05 October 2026

Summary: Insolvency – suretyship – set-off raised as defence by sureties (banking customers) against an insolvent bank – delay in raising defence of set-off – whether automatic set-off excluded by agreement between the parties.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Van Nieuwenhuizen, AJ, sitting as a court of first instance):

The following order is made:

- 1 The appeal is upheld to the extent set out in paragraph 3 below but is otherwise dismissed.
- 2 Each party to pay its own costs of the appeal.
- 3 Paragraphs 177.1, 177.2, 177.3, 177.4, 177.7 and the determination of costs for the period post 10 May 2024 in the high court order are set aside and replaced as follows:

‘177.1 The seventh and eighth respondents are granted leave to file the supplementary affidavit dated 10 May 2024 and are directed to pay the costs of the application for admission of the affidavit, on an unopposed basis, jointly and severally, the one paying the other to be absolved, on scale C.

177.2.1 It is declared that the indebtedness of the seventh respondent to the applicant under the deed of suretyship dated 15 November 2019 was extinguished by set-off on 17 June 2021 to the extent of R6 million, and that this sum reduced the indebtedness of the first respondent to the applicant with effect from that date.

177.2.2 It is declared that set-off did not operate between the applicant and the eighth respondent.

177.3 The costs of the application post 10 May 2024 are reserved for subsequent determination.

177.4 The joint liquidators of the applicant are directed to restate the account of the first respondent taking into account the set-off in paragraph 177.2.1 above.

177.7 The applicant's claims against the first to sixth, eighth, and tenth to twelfth respondents are postponed sine die. The applicant is granted leave to approach the court on duly supplemented papers setting out the computation of its claim, after credit has been given for the sum referred to in paragraph 177.2.1 and for any payments received.'

JUDGMENT

Mphahlele AJA (Nicholls, Meyer, Koen JJA and Kooverjie AJA concurring)

Introduction

[1] The appellant, Habib Overseas Bank (the bank), made loan and overdraft facilities available to the first respondent, Crestar Printers and Publishers (Pty) Ltd (Crestar). Several persons bound themselves with the bank as sureties and co-principal debtors for Crestar's indebtedness. Two of them, the late Mr Sheikh Hassan Omar (Mr Omar), whose wife, the executor of his estate, is cited as the seventh respondent, and the eighth respondent, Ghousbibi Arifullah CC (Ghousbibi), limited their liability to R6 million each. Both Mr Omar and Ghousbibi held deposit accounts with the bank. From mid-2021, the credit balances in those accounts exceeded the limits of their suretyships. Crestar defaulted, and the bank instituted proceedings against it. While those proceedings were pending, both Crestar and the bank were wound up.

[2] The question on appeal is whether, before the bank's liquidation, the indebtedness of these two sureties was extinguished by set-off against the credit balances on their accounts. The parties agreed, in correspondence between their attorneys dated 24 March 2025 and 2 April 2025, that the issue for determination be formulated as follows:

‘[I]n light of the common cause facts and the documentary evidence governing the terms of the operation of the accounts of the seventh and eighth respondents, whether or not the principal debtor’s indebtedness was extinguished by reason of set-off occurring automatically as between the appellant and either or both of the seventh and eighth respondents, and if so, to what extent.’

[3] The Gauteng Division of the High Court, Johannesburg, per Van Nieuwenhuizen, AJ (the high court), held that set-off took effect automatically from 26 July 2021, the date on which the application was launched, and directed the bank’s liquidators to restate Crestar’s account accordingly. The judgment was delivered on 31 October 2024. The appeal against that part of the order is with the leave of the high court.

[4] Crestar and its liquidators abide by the decision of the Court. The second to fifth respondents are cited in their personal capacities, and the sixth, tenth, eleventh and twelfth respondents are cited in their capacities as trustees of the Ahmed Jaffer Family Trust. The only parties participating in the appeal are the bank, as the appellant; Rashida Omar NO, the executrix of the estate of the late Mr Omar, as the seventh respondent; and Ghousbibi as the eighth respondent. The latter two will be referred to as the depositor respondents.

Factual Background

[5] The facilities were made available by the bank to Crestar under a facility letter dated 11 November 2019, together with the annexure attached thereto. The letter

was addressed to Crestar and signed on 12 November 2019 by Crestar, the second to fifth respondents, the trustees of the Ahmed Jaffer Family Trust, Mr Omar, and Ghousbibi.

[6] Separate deeds of suretyship followed. The late Mr Omar signed his on 15 November 2019, and Ghousbibi signed theirs on 20 November 2019. Each of these two deeds limits the surety's liability to R6 million. The suretyships of the second to fifth respondents and the Ahmed Jaffer Family Trust are unlimited. The deeds are identical in their terms, save for the liability limit applicable to Mr Omar and Ghousbibi.

[7] The obligations of Ghousbibi, the late Mr Ahmed Hassan Jaffer and Mrs Hawa Jaffer under their suretyships were secured by covering mortgage bonds of R6 million and R4 million, respectively, registered on 21 February 2020. The Ghousbibi bond was registered over a commercial property, Erf 211 (No.122) Rietspruit Street, Sunderland Ridge Extension 1 Township. The Jaffer bond was registered over a residential property, Erf 4083 (No.11) Tala Street, Eldoglen Township, Eldograin Extension 40.

[8] Mr Omar held four accounts and signed the bank's account-opening terms and conditions on 18 January 2019. Ghousbibi has held a current account with the bank since 2006; the account-opening mandate is dated 25 June 2006 in one part of the record and 25 May 2006 in another. The difference is immaterial. It is common cause that those terms and conditions signed by Mr Omar also governed the operation of Ghousbibi, although they did not form part of the account-opening documents completed for Ghousbibi in 2006.

[9] Crestar persistently breached the terms of the facility letter. On 11 May 2021, the bank demanded payment of R9 239 557.07 from Crestar, or alternatively the provision of further security, within 30 days. On 10 June 2021, the bank's attorneys demanded payment of R9 355 587.08 from Crestar and the second to fifth respondents within 48 hours. On 15 June 2021, they wrote separately to Mr Omar and to Ghousbibi, calling upon each to pay R6 million under their suretyships by 17 June 2021. No payment was made.

[10] The bank launched the application on 26 July 2021. On that date, the credit balance on the Ghousbibi account stood at R3 751 436.87. Mr Omar died in January 2022, and his executrix, the seventh respondent, was substituted in his place. As at 3 January 2022, the combined credit balance on Mr Omar's four accounts was R9 565 910.02.

[11] Events then overtook both the principal debtor and the creditor. Crestar was placed in liquidation by a special resolution registered on 5 May 2022. The bank was placed under curatorship on 26 March 2023, then in provisional liquidation, and on 26 February 2024 in final liquidation. The depositor respondents could not withdraw funds from their accounts after the curatorship took effect. Each of them stands to recover R100 000.00 from the insolvent estate in respect of the deposits described above.

[12] The respondents attacked the validity of the suretyship signed by Mr Omar and Ghousbibi. On 10 May 2024, six days before the hearing, the seventh and eighth respondents delivered a supplementary affidavit in which they abandoned the grounds of attack, admitted Crestar's indebtedness and their own liability as sureties, and, for the first time, raised the defence that their liability had been extinguished by

set-off. The high court granted them leave to file the affidavit and ordered the bank to pay the costs of that application. The bank had no opportunity to answer the new allegations before judgment, but nothing now turns on that: the facts on which the defence rests are common cause, and the question is one of law. The parties argued the appeal on that basis.

Issues for determination

[13] The bank does not dispute that the four requirements for set-off were satisfied. It argued that set-off could not operate automatically because the parties had agreed otherwise. It contends that these agreements were to be found in five places: clause 3 of the annexure to the facility letter; clause 3.5 of the deeds of suretyship; clause 12 of the account-opening terms and conditions; clause 3 of the Ghousbibi mortgage bond; and, more generally, in the fact that the bank and its customers kept separate accounts on separate terms. In the alternative, the bank submitted that the credit balances were not due and payable to the depositors until they demanded payment, so the maturity requirement was not met, and that Mr Omar and Ghousbibi had elected not to rely on set-off when it would otherwise have operated.

[14] The depositor respondents support the high court's judgment. They contend that none of the five instruments excludes set-off, that clause 12, prima facie, is an agreement in favour of set-off rather than against it, and that a pledge of a claim against the pledgee is conceptually impossible. Alternatively, they asked that the common law be developed to give effect to set-off immediately before a bank's liquidation, failing which, they submitted, depositors would be arbitrarily deprived of property in contravention of section 25 of the Constitution.

[15] Four questions for determination therefore arise. The first concerns the requirements of the common law. The second concerns whether any of the instruments relied on by the bank exclude set-off and, if so, in relation to which of the two depositors. The third concerns when the reciprocal debts became due. The fourth concerns the consequences of the high court's order.

Legal Framework

[16] The classic statement of the doctrine of set-off remains that of Innes CJ in *Schierhout v Union Government (Minister of Justice)*:¹

‘The doctrine of set-off with us is not derived from statute and regulated by rule of court, as in England. It is a recognised principle of our common law. When two parties are mutually indebted to each other, both debts being liquidated and fully due, then the doctrine of compensation comes into operation. The one debt extinguishes the other *pro tanto* as effectually as if payment had been made. Should one of the creditors seek thereafter to enforce his claim, the defendant would have to set up the defence of *compensatio* by bringing the facts to the notice of the Court as indeed the defence of payment would also have to be pleaded and proved. But, compensation once established, the claim would be regarded as extinguished from the moment the mutual debts were in existence together.’

[17] Three features of the passage are relevant here. First, the debts must be mutual, meaning that each party must be bound to the other in the same capacity. Second, both debts must be liquidated and fully due. Third, the extinction is retrospective. Set-off takes effect by operation of law when the requirements are met, but the party seeking to rely on it must raise it; when raised, it relates back to the moment when the reciprocal debts were in existence together. That was put as follows in *Herrigel NO v Bon Roads Construction Co (Pty) Ltd and Another*,² a passage on which both parties relied: ‘it is trite law that set-off operates automatically and that, once set-off

¹ *Schierhout v Union Government (Minister of Justice)* 1926 AD 286 at 289-290.

² *Herrigel NO v Bon Roads Construction Co (Pty) Ltd and Another* 1980 (4) SA 669 (SWA) at 676F-G.

is claimed or relied on, it relates to the time when the two respective debts were mutually in existence’.

[18] The relationship between a bank and its customer is that of debtor and creditor. Money paid into an account becomes the bank’s property. The customer acquires a personal right to payment of the credit balance.³ The relationship is contractual, and its incidents are determined by the terms on which the particular account is operated rather than by any general theory of banking.⁴ A credit balance in a current account is therefore a debt owed by the bank to its customer and, in principle, may be extinguished by set-off against a debt owed by the customer to the bank.

[19] Parties may agree that set-off shall not operate between them. The agreement may be express, or it may arise by necessary implication from what they have agreed.⁵ Whether they have done so is a question of interpretation, to be answered by reading the language used in the light of the document as a whole and the circumstances attendant upon its coming into existence.⁶ Because such an agreement displaces a rule of the common law that would otherwise operate of its own force, the intention to displace it must appear from the instrument with clarity. It is not enough that the instrument may be read as having that effect. The interpretation is restrictive.

³ *First National Bank of Southern Africa Ltd v Perry NO and Others* 2001 (3) SA 960 (SCA) para 16; *Standard Bank of South Africa Ltd v Echo Petroleum CC* [2012] ZASCA 18; 2012 (5) SA 283 (SCA).

⁴ *Standard Bank of SA Ltd v Absa Bank Ltd and Another* 1995 (2) SA 740 (T) at 747C; *Harding and Others NNO v Standard Bank of South Africa Ltd* 2004 (6) SA 464 (C) at 467J-468A.

⁵ *Southern Cape Liquors (Pty) Ltd v Delipcus Beleggings Bpk* 1998 (4) SA 494 (C) at 501A-B; *Standard Bank of South Africa Ltd v Echo Petroleum CC* [2012] ZASCA 18; 2012 (5) SA 283 (SCA) para 33.

⁶ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18; *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] ZASCA 99; [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA) para 25.

Analysis

Clause 3 of the annexure to the facility letter

[20] Clause 3 of the annexure constitutes a sweeping clause. It entitles the bank to apply any credit balance on any account ‘to which you are entitled’ to reduce the outstanding amount under the facilities. Clause 4 requires repayment on demand, free and clear of any deduction or withholding.

[21] The facility letter was addressed to Crestar and set out the terms on which facilities were afforded to Crestar. The sureties signed it to signify their acceptance of those terms. The accounts to which clause 3 refers are the addressee’s accounts. Counsel for the bank sought to extend the clause to the sureties by reference to a provision stating that, where the letter is addressed to more than one person, those persons are jointly and severally liable. That provision cannot convert a facility agreement between the bank and its borrower into a term governing a surety’s deposit accounts. Clause 3 therefore does not assist the bank.

Clause 3.5 of the deeds of suretyship

[22] Clause 3.5 permits the bank, in its sole and absolute discretion, ‘to treat any monies received, recovered or realised hereunder by the Bank from the Surety as cash security, free of interest, for so long as the Bank shall deem fit without any intermediate obligation on the Bank’s part to apply such monies or any part thereof in or towards the discharge of the indebtedness of the Debtor to the Bank ...’.

[23] The clause says nothing about set-off. It addresses the treatment of money the bank has received, recovered or realised under the suretyship, that is, money that has come to the bank through the enforcement of the surety’s obligation. The bank holds money in that category in a different capacity from that in which it holds a

customer's deposit: it is held for a purpose, as security, not as a debt repayable on demand. Nothing in the clause governs a credit balance that a surety happened to hold in a transactional account opened years before the suretyship was signed. The bank's argument requires the clause to be read as meaning that money in an ordinary account, which the bank has neither received nor recovered nor realised under the suretyship, is nevertheless immune from set-off. The language will not bear that meaning.

Clause 12 of the account opening terms and conditions

[24] Clause 12 is headed 'SET-OFF'. It provides, in clause 12.1, that the assets or funds in any of the customer's accounts and all rights the customer may have against the bank 'will be subject to a first, perfected, and prior lien, security interest, and right of set-off and will be held as security by the Bank for the discharge of any indebtedness or other obligation that you may have to the Bank, howsoever such obligation may have arisen'. Clause 12.2 records that the assets in the account will be held as security for payment of any liability of the customer, and that the customer agrees to pay any debit balance on demand. Clause 12.3 excludes the bank's liability for losses arising from such transactions and reserves to it the right to restrict or close the account where it applies a set-off.

[25] The bank advanced two arguments under the clause. The first is that the credit balances were pledged, so the right to claim payment vested in the bank as pledgee, and the requirement of mutuality fell away. The second is that, on the terms of the clause, set-off was a right reserved to the bank, not an obligation, and that it therefore follows by necessary implication that the parties agreed that set-off would not operate of its own accord.

[26] The first argument encounters a difficulty of principle at the outset. What is said to have been pledged is the bank's own indebtedness to its customer. A pledge requires the pledgee to hold the thing pledged as security for a debt owed to it by another. Where the thing is a claim against the pledgee itself, the security and the obligation meet in one person. In our law, this leads to confusion that extinguishes the obligation rather than securing it.⁷ In *Oertel NO v Brink (Oertel)*,⁸ it was held that the insolvency of the pledgee does not destroy the mutuality of the obligations of pledgor and pledgee and that the pledgor cannot be in a worse position than he or she would have been had there been no insolvency. In England, the House of Lords held in *Re Bank of Credit and Commerce International SA (No. 8)*,⁹ that a charge by a depositor over their own deposit is conceptually possible. However, Lord Hoffmann accepted that it is a special kind of security and that the depositor's liability is discharged automatically to the extent of the deposit. In *MS Fashions Ltd and Others v Bank of Credit and Commerce International SA (in liq) and Others (No 2) (MS Fashions)*,¹⁰ where the depositor was, as in this matter, bound as a surety and co-principal debtor, the Court of Appeal held that set-off operated from the date of the winding up, notwithstanding the charge.

[27] For the purposes of this appeal, it is unnecessary to decide whether a pledge of the kind the bank contends for is recognised in our law. On either view, clause 12 does not assist the bank. If the pledge is a conceptual impossibility, the clause can amount to no more than a contractual right of set-off, which leaves the common law untouched. If it is recognised, then on the reasoning in both *MS Fashions* and *Oertel*, the mutuality of the reciprocal obligations survives. The clause cannot be both the

⁷ G Muller et al *Silberberg and Schoeman's The Law of Property* 6 ed (2019) at 455 and 462; 29 *Lawsa* 3 ed para 432.

⁸ *Oertel NO v Brink* 1972 (3) SA 669 (W) at 677C.

⁹ *Re Bank of Credit and Commerce International SA (No. 8)* [1997] 4 All ER 568 (HL).

¹⁰ *MS Fashions Ltd and Others v Bank of Credit and Commerce International SA (in liq) and Others (No 2)* [1993] 3 All ER 769 (CA).

source of the bank's security and the destruction of the mutuality on which that security depends.

[28] The second argument fares no better. Clause 12, on its face and by its heading, is an agreement that set-off may take place. A clause that confers a right on one party to do something is not, without more, an agreement that the law may not do the same thing of its own accord. The bank's construction requires the addition of words the parties did not use. Had the drafter intended to exclude the operation of the common law, it would have been a simple matter to do so, as the drafter of the mortgage bond, discussed below, did.

[29] The same answer disposes of the bank's maturity argument. The submission made was that a credit balance is not due to the customer until the customer instructs the bank to pay it, and that a debt owing on an overdraft repayable on demand is not due until demand is made, so the two debts are never due at the same time. If that were so, set-off could never operate between a bank and its customer, and the bank's reliance on clause 12 and the sweeping clause in the facility letter would be inexplicable. A credit balance in a current account is owing and payable to the customer, and the requirement of an instruction concerns the mechanics of payment, not the existence of the debt.¹¹

Clause 3 of the Ghousbibi mortgage bond

[30] Ghousbibi's position differs from that of the estate of the late Mr Omar in one respect, which is decisive. Ghousbibi secured its obligations as surety by a covering

¹¹ See *Standard Bank of South Africa Ltd v Echo Petroleum CC* [2012] ZASCA 18; 2012 (5) SA 283 (SCA), referred to in fn 3 above; and *Trinity Asset Management (Pty) Ltd v Grindstone Investments 123 (Pty) Ltd* [2017] ZACC 32; 2017 (12) BCLR 1562 (CC); 2018 (1) SA 94 (CC) para 102, discussing *Standard Bank of South Africa Ltd v Oneate Investments (Pty) Ltd (in liquidation)* 1998 (1) SA 811 (SCA).

mortgage bond. Clause 3 of that bond provides: ‘in the absence of any contrary express agreement all amounts from time to time payable by the principal debtor and/or the mortgagor to the mortgagee shall be paid punctually without demand and/or deduction and/or set-off in the currency of the Republic of South Africa to the mortgagee at its offices or such place as the mortgagee may designate for the time being by written notice to the principal debtor and/or the mortgagor’.

[31] The clause is express. It is not confined to the principal debtor: it applies to amounts payable by the mortgagor as well, and the mortgagor is Ghousbibi. The amounts payable by Ghousbibi to the bank are those for which it bound itself as surety, and the bond is the instrument by which it secured them. An agreement that those amounts are to be paid without set-off is an agreement that set-off shall not operate in respect of them. The bond was registered on 21 February 2020, after the account conditions had been signed and the suretyship had been given, and it is the last and most specific expression of the parties’ intention on the subject.

[32] Counsel for the depositor respondents relied on the opening words: ‘in the absence of any contrary express agreement’. Clause 12 of the account conditions, so counsel argued, is such an agreement because it expressly provides for set-off. I do not think the words can carry that weight. The clause creates an obligation to pay punctually, without demand and without deduction or set-off. A contrary express agreement would therefore permit the mortgagor to withhold, deduct, or set off. Clause 12 does none of that. It gives the bank a right to appropriate the customer’s credit balances towards the customer’s indebtedness. It does not entitle the customer to decline to pay, or to pay less than the full amount, because of what stands to the customer’s credit elsewhere. The two clauses operate at different ends of the transaction and are not in conflict.

[33] This construction leaves the two depositor respondents in materially different positions. However, their suretyships are identical, and the credit balances in their accounts arose in the same way. That is the consequence of the security Ghousbibi chose to give, but which Mr Omar did not. Parties who add an instrument to a transaction are bound by the terms of the instrument they have added.

[34] It follows that set-off did not apply between the bank and Ghousbibi. Ghousbibi's liability as surety, limited to R6 million, remains.

The keeping of separate accounts

[35] The bank's final contention was that, where a bank and its customer maintain separate accounts governed by different terms, there is a tacit agreement that the rights and obligations recorded for each account are to be kept separate. It was submitted that the customer commonly holds a savings account in credit alongside a current account in overdraft, or an access bond alongside a credit balance, and that if set-off operated automatically in such cases, the banking system would be thrown into disorder, because a bank could not charge interest on a debit balance that had been notionally extinguished.

[36] The record does not support the argument. The evidence shows no agreement that the accounts were to be kept separate. The practices relied upon were not established by evidence, and a court cannot take judicial notice of a banking custom that has never been pleaded or proved.¹² Nor does the apprehended disorder follow. Set-off extinguishes reciprocal debts only where its requirements are met, and it

¹² *Golden Cape Fruits (Pty) Ltd v Fotoplate (Pty) Ltd* 1973 (2) SA 642 (C) at 646A-C; *Emadyl Industries CC t/a Raydon Industries v Formex Industries (Pty) Ltd t/a Formex Engineering* [2011] ZAECPHC 58; 2012 (4) SA 29 (ECP) para 50.

applies only when a party raises it. A bank that wishes to place the matter beyond doubt may do so in its terms of business, as the drafter of the mortgage bond did.

When the debts fell due, and the reliance on set-off

[37] On 15 June 2021, the bank called upon both the late Mr Omar and Ghousibi to pay R6 million by 17 June 2021. Any opposition before that date was irrelevant, and their respective liabilities under the suretyships became due and payable from 17 June 2021. It is common cause that, on that date, Mr Omar held credit balances with the bank exceeding R6 million. The reciprocal debts were mutual, liquidated and fully due, and nothing in the instruments to which he was a party excluded set-off. Accordingly, his liability under the suretyship was extinguished on 17 June 2021, and Crestar's indebtedness to the bank was reduced by R6 million with effect from that date.

[38] The high court fixed the date of set-off at 26 July 2021, the date the application was launched, reasoning that mutuality prevailed from that date because the arrangements governing the operation of the accounts must then have fallen away. That reasoning cannot stand. The instruments either excluded set-off, or they did not; the institution of proceedings did not alter their terms. The relevant date is the date on which the last requirement was satisfied, being 17 June 2021.

[39] The bank submitted that a debtor who does not rely on set-off when it would otherwise operate may not invoke it afterwards, and that the depositor respondents, having continued to operate their accounts as before and having raised other defences for nearly three years, elected not to do so. The premise, insofar as it is that the party relying on set-off must raise it, is not in dispute. The conclusion contended for by the bank otherwise does not follow. A debtor is entitled, but not obliged, to

rely on set-off, and the failure to raise it at the earliest opportunity does not, without more, amount to abandonment of the right. Waiver is not lightly inferred and must be proved by the party alleging it. The bank proved only delay. Once the defence was raised, it related to 17 June 2021.

[40] The delay is not without consequence. The seventh and eighth respondents came to court six days before the hearing with a new case and abandoned the case they had advanced on affidavit over the preceding three years. The high court was right to admit the affidavit, because the issue it raised was one of law on common-cause facts and the interests of justice required that it be decided. But the costs occasioned by such an indulgence are ordinarily borne by the party seeking it, and there was no reason to depart from that course in this matter. To that extent, the appeal against para 177.1 of the high court's order must succeed.

The constitutional and public policy contentions

[41] The depositor respondents, in the alternative, sought the development of the common law to provide that, where a bank is insolvent, set-off takes effect immediately before its liquidation. They submitted that failing to do so amounts to an arbitrary deprivation of property contrary to section 25 of the Constitution. They also invoked the principle that no one may take advantage of their own wrong and the doctrine of fictional fulfilment, contending that a bank which brought about its own demise cannot refrain from applying set-off to the prejudice of its depositors.

[42] These contentions do not arise in respect of the seventh respondent in whose favour set-off operated on ordinary principles. In respect of Ghousibi, they are, in my view, misdirected. No act of the bank produced the result of which it complains, let alone the mismanagement that led to the bank's failure. That result arises from

the terms of the bond that Ghousbibi itself gave. A party that has agreed to pay without set-off cannot invoke public policy to escape its bargain. Public policy is, in any event, as concerned with the enforcement of agreements freely entered into as with relief against their consequences.¹³ The doctrine of fictional fulfilment has no application: the bank did not prevent the fulfilment of a condition, and nothing in its conduct was directed at Ghousbibi's position.¹⁴ As for section 25, the deprivation of which Ghousbibi complains is the consequence of its own contract and the operation of the law of insolvency. No case for developing the common law was made out.

The order of the high court

[43] Paragraph 177.1 granted the seventh and eighth respondents leave to file the supplementary affidavit and ordered the bank to pay the costs of that application on scale C from 10 May 2024. For the reasons set out in paragraph 40 above, leave was correctly granted, but the costs order must be reversed.

[44] Paragraphs 177.2, 177.3 and 177.4 directed the liquidators to restate Crestar's account, to recalculate interest, and declared the maximum credit balance that might be set off to be R6 million in respect of each depositor. The order refers in those paragraphs to a declaration made in 'paragraph 173.2', by which paragraph 177.2 is plainly meant. Those paragraphs must be set aside. Set-off operated on 17 June 2021, and only in respect of the estate of the late Mr Omar, in the sum of R6 million.

[45] Paragraph 177.7 postponed the bank's claim *sine die*, with leave to approach the court on supplemented papers. That course remains appropriate in respect of the

¹³ *Botha (now Griessel) and Another v Finanscredit (Pty) Ltd* 1989 (3) SA 773 (A) at 783A; *Lotter N O and Others v Minister of Water and Sanitation and Others* [2021] ZASCA 159; [2022] 1 All SA 98 (SCA); 2022 (1) SA 392 (SCA) para 55.

¹⁴ *Du Plessis NO and Another v Goldco Motor & Cycle Supplies (Pty) Ltd* [2009] ZASCA 62; 2009 (6) SA 617 (SCA) para 22; *Lekup Prop Co No 4 (Pty) Ltd v Wright* [2012] ZASCA 67; 2012 (5) SA 246 (SCA); [2012] 4 All SA 136 (SCA) para 11; *First National Bank Ltd v Avtjoglou* 2000 (1) SA 989 (C) at 996D-G.

first to sixth, eighth and tenth to twelfth respondents, whose liability is now to be computed after credit is given for the sum extinguished on 17 June 2021, but limited in the case of the eighth respondent to R6 million.

[46] The bank sought to have both mortgaged properties declared specially executable. This relief will have to stand over until the remaining indebtedness, if any, of the eighth respondent has been determined.

Costs

[47] The appeal has succeeded in respect of the eighth respondent and failed in respect of the seventh. The two respondents were represented by the same counsel and made common cause on every issue, except the mortgage bond which occupied only a small part of the argument. In those circumstances, it would be appropriate for each party to pay its own costs of appeal.

[48] The following order is made:

- 1 The appeal is upheld to the extent set out in paragraph 3 below but is otherwise dismissed.
- 2 Each party to pay its own costs of the appeal.
- 3 Paragraphs 177.1, 177.2, 177.3, 177.4, 177.7 and the determination of costs for the period post 10 May 2024 in the high court order are set aside and replaced as follows:

‘177.1 The seventh and eighth respondents are granted leave to file the supplementary affidavit dated 10 May 2024 and are directed to pay the costs of the application for admission of the affidavit, on an unopposed basis, jointly and severally, the one paying the other to be absolved, on scale C.

177.2.1 It is declared that the indebtedness of the seventh respondent to the applicant under the deed of suretyship dated 15 November 2019 was extinguished by set-off on 17 June 2021 to the extent of R6 million, and that this sum reduced the indebtedness of the first respondent to the applicant with effect from that date.

177.2.2 It is declared that set-off did not operate between the applicant and the eighth respondent.

177.3 The costs of the application post 10 May 2024 are reserved for subsequent determination.

177.4 The joint liquidators of the applicant are directed to restate the account of the first respondent taking into account the set-off in paragraph 177.2.1 above.

177.7 The applicant's claims against the first to sixth, eighth, and tenth to twelfth respondents are postponed sine die. The applicant is granted leave to approach the court on duly supplemented papers setting out the computation of its claim, after credit has been given for the sum referred to in paragraph 177.2.1 and for any payments received.'

S S MPHAHLELE
ACTING JUDGE OF APPEAL

Appearances

For the Appellant:	J Peter SC with E Venter
Instructed by:	Dasoo Attorneys, Johannesburg Lovius Block Inc, Bloemfontein
For the 7 th & 8 th Respondents:	A C Botha SC with M Karolia
Instructed by:	Shaheed Dollie Inc, Johannesburg Hattingh Attorneys, Bloemfontein.