THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1140/2023

In the matter between:

SUMEIL (PTY) LTD	**APPELLANT**
and	
COOGAL FINANCE (PTY) LTD (IN LIQUIDATION)	**FIRST RESPONDENT**
KAREN FORTEIN N O	**SECOND RESPONDENT**
THE MASTER OF THE FREE STATE HIGH COURT, BLOEMFONTEIN	**THIRD RESPONDENT**

Neutral citation: *Sumeil (Pty) Ltd v Coogal Finance (Pty) Ltd (In Liquidation) and Others* (1140/2023) [2025] ZASCA 27 (28 March 2025)

Coram: ZONDI AP and KOEN and COPPIN JJA and PHATSHOANE and BLOEM AJJA

Heard: 25 February 2025

Delivered: 28 March 2025

Summary: Claim for money payment on application – application of *Plascon-Evans* rule – Set-off – executory contract – reciprocal obligations – duty of applicant to make out a case for relief sought.

ORDER

On appeal from: Free State Division of the High Court, Bloemfontein (Mbhele DJP, Reinders and Loubser JJ, sitting as a full court):

1 The appeal is upheld with costs.

2 The order of the full court, dismissing the appellant's appeal, is set aside and is substituted with the following order:

'1 The appeal is upheld with costs.

2 Paragraphs 31.4 and 31.5 of the order of the court a quo are set aside and are replaced with the following order:

"The application against the first respondent for payment to the applicant of the amount of R944 000 (nine-hundred and forty-four thousand rands) and interest on that amount, is dismissed".'

JUDGMENT

Coppin JA (Zondi AP and Koen JA and Phatshoane and Bloem AJJA, concurring):

[1] This is an appeal, with the special leave of this Court in terms of s 17(3) of the Superior Courts Act.[1] It is against the order of the full court of the Free State High Court (the full court) which dismissed, with costs, the appellant's appeal from the court of first instance (the high court). At the behest of the first and second respondents, the high court, inter alia, had granted an order in an application (the application) directing the appellant, Sumeil (Pty) Ltd (Sumeil), to pay to the first respondent, Coogal Finance (Pty) Ltd (in liquidation) (Coogal), an amount of R944 000 and interest (the payment order) and 30% of the cost of that application.

[1] The Superior Courts Act 10 of 2013.

[2] The costs order and other orders made by the high court were not appealed and were not before the full court, or this Court. The second respondent, Ms Karen Fortein (Ms Fortein), is cited in her capacity as the liquidator of Coogal. The third respondent, the Master of the Free State High Court, Bloemfontein, did not participate in the proceedings at all.

[3] The crisp issue for determination is whether the payment order had been correctly made, ie was it proved on the papers that Sumeil was indebted to Coogal in the aforesaid amount, as found by the high court and confirmed by the full court, and should that order have been granted?

Background

[4] Mr Willem Andries Maritz Nel (Mr Nel) became and remained the sole director of Coogal from 6 March 2015 until its liquidation. Mr Nel and his wife are the co-directors of Sumeil. Coogal's shareholder is the Maritz Nel Family Trust (the trust). Mr Nel, his wife and their auditor are the trustees of the trust. And Mr Nel and his wife were Sumeil's shareholders, but following Coogal's liquidation, they sold their shares in Sumeil to Minel (Pty) Ltd. Coogal's main business activity, according to its registration documents, was 'broker and provider of financial services and all related services and activities'. But in a subsequent directors' report for the year ended 28 February 2013 it is stated that Coogal's primary activity in the preceding twelve months was to create new market opportunities for entrepreneurship through commercial transportation and the leasing of heavy-duty vehicles. Sumeil's main business, according to its registration documents, is transport.

[5] Over the years Coogal purchased vehicles which were financed by ABSA Bank (ABSA) in terms of instalment sales agreements which it would then lease in terms of 'master rental agreements' to transport contractors for short or longer periods. The contractors would usually use those vehicles as replacement vehicles in their fleet while their own vehicles were being repaired. Coogal mainly derived its income from this kind of master rental agreement.

[6] In 2012 Coogal concluded a lease-to-buy agreement with a transport contractor (DP Botes Vervoer) in respect of all its vehicles. Consequently, it had no vehicles

available for leasing to its other customers. This shortage prompted Coogal to acquire four Volvo trucks (the trucks) in terms of four separate instalment sale agreements it concluded with ABSA. Coogal was to pay to ABSA an instalment of approximately R30 000 per month per truck as from 2 December 2012 in terms of the respective sale agreements. Ownership of the trucks was reserved and vested in ABSA pending full payment of the purchase price of each truck, whereupon ownership of the fully paid truck would pass to Coogal.

[7] During March 2016 Coogal leased the four trucks to Sumeil in terms of four separate master rental agreements. In terms of each agreement Sumeil had to pay 35 instalments of R10 000 (excluding VAT) per month and a final balloon payment upon maturation of R165 000 (excluding VAT). The agreements were to mature and terminate on 28 February 2019. Ownership of the trucks was reserved pending full payment to Coogal.

[8] Upon maturity of the agreements Sumeil had the option to acquire ownership of the trucks at no cost. This was also confirmed in four 'End of Contract/ Rental' notices dated 1 December 2018 sent to Sumeil by Coogal in respect of each of the master rental agreements. According to each of those notices, if Sumeil did not notify Coogal of its election within three months of the termination of the agreement, Sumeil would be deemed to have elected to acquire ownership of the trucks. In terms of each of the master rental agreements Coogal was to carry the maintenance and running costs of the trucks, but (according to Mr Nel) this duty was ultimately assumed by Sumeil which invoiced Coogal in that regard.

[9] Coogal was provisionally liquidated on 7 March 2019 and finally on 11 April 2019. The application for its liquidation was brought by another creditor and was duly lodged with the Registrar of the high court on 4 February 2019. Section 348 of the Companies Act [2] (the Companies Act) provides that a winding-up of a company by the court shall be deemed to commence at the time of the presentation to the court of the

[2] The Companies Act 61 of 1973 (the Companies Act). Section 348 of the Companies Act applies to the liquidation of companies after the Companies Act 71 of 2008 came into operation by virtue of the provisions of paragraph 2 of Item 9 to Schedule 5 to the 2008 Act.

application for the winding-up. Thus, in terms of our law, Coogal's liquidation is deemed to have commenced on 4 February 2019 (the deemed date of liquidation) and the *concursus creditorum* is deemed to have been established on that date.[3]

[10] During about September 2020 Coogal, at the behest of Ms Fortein, as its appointed liquidator, brought the application in the high court. In terms of the notice of motion, as subsequently amended on 8 February 2021, Coogal and Ms Fortein, cited as the first and second applicant, respectively, sought an order for the liquidation of Sumeil, and for orders, effectively, that the corporate veils of Coogal and Sumeil be pierced, that their separate corporate statuses be ignored and that they be treated as if they were one entity. In the alternative, they sought an order that Sumeil pay to Coogal the amount of R944 000, plus interest and costs.

[11] In the founding affidavit Ms Fortein avers that '[o]n 4 February 2019, Sumeil owed Coogal an amount of R185 000 in respect of the master rental agreement'. According to her, '[t]his was the balance due on the ledger of Sumeil in the financial records of Coogal'. In support of this averment Ms Fortein refers to a copy of ledger '006: Sumeil (Edms) Bpk', a copy of which is attached to the founding affidavit. She states that this ledger 'clearly recorded the R40 000.00 plus VAT monthly invoices. . . which shows a debit balance of R185 000.00 on 4 February 2019' owing to Coogal. She also states that the four balloon payments of R165 000 plus VAT (R189 750) in respect of each of the trucks (giving a total of R759 000) was 'also due and payable'. Accordingly, she alleges, that, in total, Sumeil was indebted to Coogal in the amount of R944 000 (R185 000 plus R759 000).

[12] In trying to make out a case for the liquidation of Sumeil, Ms Fortein refers to the financial records and the ledgers of Coogal; to the ledger accounts of Sumeil and to the financial records of these entities. She describes the records as 'unsanitised'. They, inter alia, showed that immediately before the deemed date of liquidation Sumeil owed Coogal R185 000 and that Sumeil had a credit balance of R1 412 906.83 with Coogal.

---

[3] *Nel NO and Others v The Master* of the High Court and Others 2002 (3) SA 354 (SCA) para 6.

[13] Sumeil opposed the application. Mr Nel deposed to the answering affidavit. In addition to raising technical points, Mr Nel on behalf of Sumeil, denies that Sumeil was insolvent or that it was just and equitable for it to be wound-up. He explains how the agreements between Sumeil and Coogal in respect of the trucks came about and how they worked. Mr Nel also deals with the financial records of those entities and explains that both used a Pastel bookkeeping system: in Coogal's records the 'Supplier' transactions were recorded in the creditor ledger under account '008: Sumeil (Edms) Bpk'; the 'Customer transactions' were recorded in the debtor ledger under account '006: Sumeil (Edms) Bpk'; loans to and from Sumeil 'were accounted in the general ledger under account "5500/004: Sumeil (Edms) Bpk"'; and that '[a]t the end of a financial year those accounts were reconciled to reflect the financial position between' Sumeil and Coogal.

[14] Mr Nel goes on to explain how, even though it was Coogal's obligation, Sumeil came to carry the running costs of the trucks and invoiced Coogal for them. And how it was necessary to adapt the books of account because of that agreement. According to Mr Nel, Sumeil was 'both, a "Supplier" (creditor) as well as a "customer"' or debtor in Coogal's books of account and the transactions between them were mirrored in Sumeil's books of account.

[15] Mr Nel admits that in terms of ledger '006: Sumeil (Edms) Bpk' Sumeil owed Coogal R185 000 on the deemed date of Coogal's liquidation (ie 4 February 2019) but denies that Sumeil was indebted to Coogal on that date. On 4 February 2019 general ledger '5500/004: Sumeil (Edms) Bpk' reflected 'a credit balance of R1 412 906.83 in the books of Coogal and the customer ledger "006: Sumeil (Edms) Bpk" reflected a debit balance of R185 000.00'. Thus, on the deemed date of liquidation, according to Mr Nel, Coogal owed Sumeil an amount of R1 227 906.83.

[16] Mr Nel further indicates that before the order for the liquidation of Coogal was granted, but after the deemed date of its liquidation, the trust, as shareholder of Sumeil, 'settled [Coogal's] indebtedness in terms of the instalment sale agreements in respect of the four (4) Volvo trucks directly with ABSA bank'. According to Mr Nel, the payments to ABSA were accounted for in the books of Coogal as is evident from the

journal entries made after 18 February 2019 in the customer ledger '006: Sumeil (Edms) Bpk'.

[17] The high court held that the ledgers and financial records which Coogal relied on, and referred to as 'unsanitised', were the same as the ledgers Sumeil relied upon to dispute its alleged indebtedness to Coogal. The high court further held that Sumeil was not factually or commercially insolvent and that Sumeil was indeed able to pay its debts as and when they fell due. Even though the high court held that it was not convinced that Sumeil was disputing its indebtedness to Coogal on bona fide and reasonable grounds, because there was no objective evidence in the form of source documents supporting the entries in the ledger, it nevertheless found that no case had been made out for the liquidation of Sumeil. Consequently, the high court dismissed Coogal's application (a) for the provisional liquidation of Sumeil; (b) for an order to ignore the separate corporate personalities of Sumeil and Coogal and to treat them as one entity; and (c) for the relief ancillary thereto.

[18] But the high court upheld Coogal's claim for payment of the amount of R944 000 and the interest on that amount and ordered Sumeil to pay 30% of the costs of the application. The high court found that Sumeil admitted that it owed Coogal the amount of R185 000, and that it did not dispute that 'as at the date of [Coogal's liquidation] it owed Coogal R189 750.00 (including VAT)' in respect of each truck as balloon payments. It held that even though the balloon payments had been made directly to ABSA, it was made by the trust and there was 'no supporting evidence' that the payment was made on behalf of Sumeil. It also found that since these payments were made 'some two weeks after the date of the liquidation . . . it does not fall to be taken into account'. The high court found that the payment by the trust to ABSA did not extinguish Sumeil's indebtedness to Coogal. Although the high court did not find that the payment was void or voidable, it mentioned that it was for Ms Fortein to investigate and pursue that issue further.

[19] Only the alternative claim for payment was the subject of the appeal before the full court, and that court confirmed the order of the high court in respect of that claim. It held that there was no merit in the appeal of Sumeil and that it should therefore fail. It essentially, inter alia, accepted the following: When an order of liquidation is granted

a *concursus creditorum* is established and no other transactions, apart from those that are legally sustainable, may thereafter be effected;[4] any disposition which is not sanctioned by the court is void[5] and that 'unless a mutuality of respective claims existed at the time of the liquidation, no set-off can take place';[6] a mutuality is required if there are reciprocal debts and they are payable and to be liquidated before the *concursus creditorum*.[7]

[20] The full court essentially held the following. The high court considered Sumeil's version and applied the principle established in *Plascon-Evans Paints v Van Riebeck Paints*[8] for the resolution of real disputes of fact in motion proceedings (the *Plascon-Evans* rule).[9] In terms of the *Plascon-Evans* rule where a final relief is sought the facts in dispute are decided on the respondent's version unless that version is 'so far-fetched or so clearly untenable, or so palpably implausible' that it can be rejected on the papers. The full court held that the high court did not err in finding that Sumeil had placed insufficient evidence before it and the full court was satisfied with the high court's conclusions. It held that Coogal succeeded in showing that Sumeil owed it the judgment amount at the date of Coogal's deemed liquidation. The full court concluded that the fact that the payments were made by the trust to ABSA after the deemed date, constituted an 'insurmountable obstacle' to Sumeil's defence. According to the full court, '[t]here can be no dispute that such payments were void *ab initio* (and were most certainly not declared to be valid in the exercise of a court's discretion) as was held in *Pride Milling*'.[10]

---

[4] *Fairleigh NO v Whitehead and Another* 2001 (2) SA 1197 (SCA).
[5] *Pride Milling Company (Ltd) v Bekker NO and Another* [2021] ZASCA 127; 2022 (2) SA 410 (SCA); [2021] 4 All SA 696 (SCA) (*Pride Milling*).
[6] *Thorne and Another NNO v The Government* 1973 (4) SA 42 (T) (*Thorne*).
[7] *Richter NO v Riverside Estates (Pty) Ltd* 1946 OPD 209 at 223-224.
[8] *Plascon-Evans Paints (TVL) Ltd v Van Riebeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) 634H-635C (*Plascon-Evans*); see also *Wightman t/a JW Construction v Headfour (Pty) Ltd* [2008] ZASCA 6; 2008 (3) SA 371 (SCA); [2008] 2 All SA 512 (SCA) paras 11-12.
[9] In terms of the *Plascon-Evans* rule the fact in dispute is decided on the respondent's version unless that version is 'so far-fetched or implausible, or so clearly untenable, or so palpably unreasonable' that its rejection merely on the papers is justified. The order sought will only be granted if the facts stated by the respondent together with the facts averred by the applicant, that are admitted by the respondent, justify its grant.
[10] *Pride Milling* fn 5 above.

[21] The arguments made by the parties in this Court are, in essence, the same arguments they advanced before the full court. It was submitted on behalf of Sumeil that the high court (and by extension the full court) did not consistently or correctly apply the *Plascon-Evans* rule to the monetary claim. Had they applied the rule correctly they were bound to conclude the following: that Coogal owed Sumeil R1 227 906.83 on the deemed date of liquidation (ie 4 February 2019); the four balloon payments were not due and owing at the deemed dated of liquidation, because they were only due at maturity, which was on 28 February 2019; and that it was never Sumeil's case that the payments made by the trust to ABSA were made in order to discharge Sumeil's debt to Coogal, but rather, that such payments were made to discharge Coogal's obligations to ABSA in order to facilitate the transfer of the trucks to Sumeil. Lastly, it was submitted on behalf of Sumeil that the payment by the trust to ABSA did not constitute a 'disposition' in terms of section 341(2) of the Companies Act, because the money paid was not Coogal's, but that of the trust.

[22] The submissions made on behalf of Coogal and Ms Fortein were essentially in support of the approaches and decisions of both the high court and full court. Briefly, it was submitted that: Sumeil sought to 'deconstruct' the *Plascon-Evans* rule, which had exceptions, such as when allegations or denials are far-fetched or clearly untenable; on the deemed date of liquidation Sumeil was indebted to Coogal in the amount of R944 000 in respect of the master rental agreements; the debt arose from the payments that had to be made by Sumeil to Coogal in respect of the trucks; 'no lawful cession, set-off or repayment occurred or could occur after the deemed date'; and '[a]ny payments and/or resultant adjustments to the general ledgers of either party through journal entries would have the effect of preferring certain creditors, while causing prejudice to other creditors'.

[23] It was further submitted on behalf of Coogal and Ms Fortein that: there was insufficient evidence upon which to conclude that the payments made by the trust to ABSA were made on Sumeil's behalf and for the purpose of releasing Sumeil from the balloon payments it owed Coogal; and that Sumeil cannot rely on accounts containing journal entries 'which were drawn up at its own behest after the deemed date, to prove repayment of amounts to Coogal'; the accounts also could not serve to prove that

Coogal owed Sumeil; in the absence of source documents 'there is no real evidence' that Coogal was indebted to Sumeil; there was no material dispute of fact on the papers regarding Sumeil's indebtedness to Coogal; and Sumeil's denial of being indebted to Coogal was 'not based on bona fide and reasonable grounds' but was 'an unsubstantiated denial for which insufficient supporting evidence is proffered'.

Discussion

[24] Ultimately, Sumeil is relying on set-off. In the books of account of Coogal and Sumeil there are debits and credits, which if 'set-off' against each other, produce a balance at a particular time in favour of one, or the other. 'Set-off' is the extinguishing of debts owed reciprocally between two parties. Generally, it operates automatically provided its requirements are met. They are: (a) the parties must be mutually indebted to each other in their personal capacities; and (b) the mutual debts must be liquidated and be due and payable.[11]

[25] Since the spectre of liquidation looms large in this matter, the following principles are vital. 'Unless mutuality of respective claims existed at the time of liquidation, no set-off can take place'.[12] The reason for this is apparent. If set-off was permissible after liquidation, then it may give a particular creditor an undue preference and undermine the entire rationale of a *concursus*.[13]

[26] The essence of Sumeil's version regarding its indebtedness to Coogal, including its indebtedness in respect of the balloon payments for the four trucks, is the following. In the answering affidavit, in response to an averment that Sumeil is indebted to Coogal in those amounts, Mr Nel states:

'36.11. Before any liquidation order was granted (and thus before any deemed date of liquidation) [Sumeil] honoured its contractual obligations in terms of the master rental agreement to [Coogal] by settling of [Coogal's] indebtedness in respect of the four Volvo trucks directly to ABSA Vehicle Finance (ABSA). I append the proof of payments marked "MN 8.1" to "MN 8.4".

---

[11] See, inter alia, *Siltek Holdings (Pty) Ltd (in Liquidation) t/a Workgroup v Business Connexion Solutions (Pty) Ltd* [2008] ZASCA 136; [2009] 1 All SA 571 (SCA) (*Siltek*) para 9.
[12] Ibid, see also *Thorne*.
[13] Ibid, see also *Administrator, Natal v Magill, Grant and Nell (Pty) Ltd (in liquidation)* 1969 (1) SA 660 (AD) (*Magill*) at 671.

36.12. The said payments represent the final balloon payments due by [Coogal] in respect of its four instalment sale agreements to ABSA.
36.13. I point out that the aforementioned payments were made from the account of [the trust] who made the payment on behalf of [Sumeil]. The payments were accounted in the books of [Coogal], as is evident from the journal entries made on 18 February 2019 in the customer ledger – "KF-18".
36.14. The total balance due by [Sumeil] in terms of the master rental agreement of R30 956.28 [R 7 739.12 in respect of each Volvo truck] was accounted against [Sumeil's] credit balance on the general ledger account.
36.15. I thus respectfully submit that, irrespective of the provisions of section 348, 341 and 340 of the 1973 Act, [Sumeil] discharged its liability to the applicant in terms of the master rental agreement.'

[27] In light of the common cause facts and the law, traversed above, some of the averments of Mr Nel do not withstand scrutiny. In paragraph 36.11 of Sumeil's answering affidavit, Mr Nel states the exact opposite of what was submitted to us on behalf of Sumeil, namely that Sumeil was not claiming that the trust's payment to ABSA served to extinguish its debts under the master rental agreements to Coogal. Here Mr Nel states that Sumeil honoured those obligations to Coogal 'by settling' Coogal's indebtedness directly with ABSA.

[28] Annexures 'MN 8.1 to 8.4' are ABSA online notices of payment. Each of them reflects that payment of an amount of R182 010.88 was made to ABSA. The total paid to ABSA was thus R728 043.52 (R182 010.88 x 4). All four notices are dated 18 February 2019, are addressed to Sumeil and indicate that the payments were made by the trust. These payments were clearly made after Coogal's deemed date of liquidation, that is after 4 February 2019. Mr Nel's averment that the payments occurred before the deemed date of Coogal's liquidation is therefore also wrong. He appears to have confused the date when the order of liquidation was granted with the deemed date of liquidation.

[29] Mr Nel effectively states that Sumeil's debt to Coogal in terms of the master rental agreements was extinguished by 'set-off' without mentioning 'set-off' explicitly. The full court correctly held that '[u]nless mutuality of respective claims existed at the

time of liquidation, no set-off can take place.[14] It is apparent from the customer ledger '006: Sumeil (Edms) Bpk', 'KF-18', that these transactions in the ledgers in terms of which Sumeil is claiming that Coogal now became indebted to it, were only effected on 18 February 2019, when the payment was made to ABSA by the trust. Coogal is deemed to have been in liquidation by then. Set-off could not operate after the deemed liquidation of Coogal, and after the *concursus* was deemed to have been established[15] in respect of the balloon payments.

[30] In *Siltek* this Court quoted with approval what had been stated in *Thorne* concerning that aspect, namely:

'In regard particularly to the question of set-off, the rule is that once a *concursus creditorum* has been established, there can be no compensation unless mutuality between the respective claims existed at the date of the order. . . [t]he mutuality here required is that the reciprocal debts both existed and that both were liquidated and payable, before the *concursus creditorum* was established.'[16]

[31] In respect of the debt of R185 000, Ms Fortein alleges the following:

'On 4 February 2019, Sumeil owed Coogal an amount of R185 000.00 in respect of the master rental agreements. This was the balance due on the ledger of Sumeil in the financial records of Coogal. I respectfully refer the above honourable court to a copy of ledger "006: Sumeil (Edms) Bpk" attached as annexure "KF-18" which clearly recorded the R40 000.00 plus VAT monthly invoices, and which shows a debit balance of R185 000.00 on 4 February 2019.'

[32] In Sumeil's answering affidavit Mr Nel states in response to those averments: 'I admit that in terms of KF-18 [ledger '006: Sumeil (Edms) Bpk'] Sumeil owed [Coogal] R185 000.00 on 4 February 2019'. But Mr Nel then goes on to state, in effect, that is not the complete story, because if you consider the other ledger entries, at that date, Coogal in fact owed Sumeil. There were mutual debts owed between Sumeil and Coogal immediately prior to the liquidation of Coogal. Sumeil's indebtedness to Coogal of the sum of R185 000 was accordingly extinguished. But set-off could not operate in

[14] *Thorne* and *Siltek*.
[15] See *Siltek*.
[16] *Siltek* para 8.

respect of the balloon payments because they were only due after the effective date of liquidation.

[33] Thus, even if the defence of set-off in respect of the balloon payments (R759 000) for the trucks could not be upheld, the same cannot be said for the claim of the R185 000. Set-off clearly operated in respect of that claim. On the deemed liquidation of Coogal it was indebted to Sumeil in the nett amount of R1 227 906.83, ie after setting-off Sumeil's debt to Coogal of R185 000, against Coogal's debt to Sumeil of R1 412 906.83. However, it does not follow that Sumeil should, in those circumstances have been ordered to at least pay the balloon payment debt (ie the R759 000). The question that remained, is whether Coogal (and Ms Fortein) made out a case on the papers for the payment of that amount.

[34] At the time of the liquidation of Coogal, performance in terms of the master rental agreements was still outstanding, ie the master rental agreements were executory contracts: Sumeil would have to pay the sum of R759 000 against which Coogal would have to pass ownership of the trucks to Sumeil. Upon liquidation, in terms of the law, Ms Fortein, as liquidator, was to elect whether to abide by those agreements and complete them, or repudiate them.[17] The election was to be made within a reasonable time.[18] If a liquidator elects to abide by a contract which has reciprocal obligations, and attempts to enforce it, the other party may raise the *exceptio non adempleti contractus* if the insolvent party has not performed or tendered performance in full.[19]

[35] Since the master rental agreements contain reciprocal obligations, and are reciprocal agreements, Coogal (and Ms Fortein), having elected to abide by the agreements, could only claim payment of the amounts outstanding, against a tender by Coogal to perform its reciprocal obligations in terms of those agreements. The latter obligations certainly would have included, tendering transfer of the ownership of the trucks to Sumeil against payment. It is a trite principle that a party claiming the

---

[17] *Ellerines Brothers (Pty) Ltd v McCarthy Limited* [2014] ZASCA 46; 2014 (4) SA 22 (SCA) paras 10-12 (and the case is cited there).
[18] *Glen Anil Finance (Pty) Ltd v Joint Liquidators: Glen Anil Development Corporation Ltd (in Liquidation)* 1981 (1) SA 171 (AD) at 182.
[19] *Frank v Premiere Hangers CC* [2007] ZAWCHC 21; 2008 (3) SA 594 (C) at 603A-H.

performance of obligations in a reciprocal agreement must not only allege, but to succeed, must prove that it has performed its contractual obligations, or at least, tender performance of those obligations.[20]

[36] The only inference to be drawn is that Ms Fortein (on behalf of Coogal) had elected to abide by the master rental agreements and to complete them. But she sought payment from Sumeil without tendering performance of Coogal's reciprocal obligations. In the absence of a reciprocal tender of performance of delivery of the trucks, she (and Coogal) failed to make out a valid case in law for the payment.

[37] Consequently, Coogal (and Ms Fortein) should not have succeeded in their claim for payment under the master rental agreements with Sumeil and that claim ought to have been dismissed.

[38] In the result:

1 The appeal is upheld with costs.
2 The order of the full court, dismissing the appellant's appeal, is set aside and is substituted with the following order:

'1 The appeal is upheld with costs.

2 Paragraphs 31.4 and 31.5 of the order of the court a quo are set aside and are replaced with the following order:

"The application against the first respondent for payment to the applicant of the amount of R944 000 (nine-hundred and forty-four thousand rands) and interest on that amount, is dismissed".'

_____

P COPPIN

JUDGE OF APPEAL

[20] *Thompson v Scholtz* 1999 (1) SA 232 (SCA) at 238D-F.

Appearances

For the appellant:	P J J Zietsman SC
Instructed by:	Muller Gonsior Inc., Bloemfontein
For the first & second respondent:	T P Kruger SC
Instructed by:	Jaco Roos Attorneys, Pretoria
	Noordmans Inc., Bloemfontein.