LAC/CIV/A/5/2007

IN THE LABOUR APPEAL COURT OF LESOTHO
HELD AT MASERU

In the matter between

TS'ELISO PITSO APPELLANT

AND

ELLERINES FURNISHERS (PTY)LTD RESPONDENT

CORUM: HONOURABLE MR. K.E.MOSITO AJ
ASSESSORS: MR. J. TAU
MR. D.TWALA
Heard: 15 October 2008
Delivered: 28 October 2008

SUMMARY

Appeal against the decision of the Labour Court – Appellant having claimed underpayment of monies due under the Act in the Labour Court. How section 8(2)(h) of the Labour Code(Amendment) Act No.3 of 2000 to be used – set off to be pleaded.

Jurisdiction of the Labour Court - Labour Court having declined jurisdiction on the basis that underpayment of monies due under the Act should be claimed in the DDPR. Appeal dismissed with costs.

JUDGEMENT

MOSITO AJ.

1. This is an appeal against the decision of the Labour Court (per Khabo DP) handed down on the 12th day of May 2008. The facts giving rise to this appeal are not really in dispute. They are that, at all times material to the proceedings before the Court *a quo* and this Court, the Appellant was an employee of the Respondent posted at the Respondent's Maputsoe Branch as a Shop Attendant.
2. It is common cause that, while driving Respondents vehicles, and within a period of twelve months, Appellant was involved in three different motor vehicle accidents on three different occasions. The repair quotation for the last vehicle was M14 449.58 (Fourteen thousand Four Hundred and Forty Nine Maloti and Fifty Eight Lisente).
3. In his Originating Application the Appellant alleges that, Respondent caused him to sign a stop order to the effect that an amount of M802.75 (Eight Hundred and Two Maloti and Seventy-Five Lisente) be deducted from Appellant's monthly salary for a period of eighteen (18) months with effect from March 2006.This was duly done. Appellant alleges that he later learnt that this arrangement was not in accordance with the rules and regulations of the Company as appears in para 7 below. He also alleges that, as of August 2007, the sum of M13 663.06 (Thirteen Thousand, Six Hundred and Sixty Three Maloti and Six Lisente) had been deducted from his salary together with interest to the tune of M2,746.87 (Two Thousand Seven Hundred and Forty Six Maloti and Eighty Seven Lisente).
4. He says that he has since learned that Respondent had misinformed him as to what the rules and regulations of the Respondent provide for

regarding the situation where an employee has been involved in an accident for the third time as was and is the case with him *in casu*. He alleges that according to the Respondent's regulations, he (Appellant) is obliged to pay only R1500.00 (One Thousand and Five Hundred) and nothing more. He therefore requires Respondent to pay back to him the difference of what he has already paid to Respondent.

5. Respondent agrees that Appellant had been involved in a motor vehicle on three occasions as aforesaid. It alleges that Appellant was informed that he was prohibited from driving Respondent's vehicles after the third collision and that he would have to face disciplinary charges and possible dismissal unless the respondent was indemnified for the damage to the vehicle. The parties then agreed that, Appellant's authorisation to drive Respondent's vehicles be revoked, and that Appellant sign an acknowledgement of debt offering to repay the amount of M14 449.58 (Fourteen thousand Four Hundred and Forty Nine Maloti and Fifty Eight Lisente) by means of monthly instalments of M802.75 (Eight Hundred and Two Maloti and Seventy-Five Lisente) from end of February 2006. The Respondent also annexed a copy of the aforementioned acknowledgement of debt.
6. Respondent contends that the indebtedness of Appellant does not arise from the Respondent's own regulations, but from the acknowledgement of debt. It was on the strength of the said acknowledgement of debt that Appellant was not dismissed from the employ of Respondent. It therefore contends that Appellant should not be allowed to renege on the agreement as contained in the acknowledgement of debt. Fortunately the pleadings do not call upon us to decide this issue.

7. For the sake of completeness, we should mention that the Respondent's regulations styled "Manager's Manual" on which Appellant sought to rely in the Labour Court provided for the incidence of liability as appears in the table below.

MOTOR VEHICLE EXCESSES APPLICABLE 01/03/2002		
	Debit Store	Recover from driver
1st Accident for specific vehicle	R2,000.00	R500.00
2nd Accident for specific vehicle	R2,500.00	R1,000.00
3rd Accident or subsequent Accident for specific vehicle	R3000.00	R1500.00
Theft of vehicle	R5000.00	-
Hi-jack of vehicle	R5000.00	-

8. The issue before the Labour Court was whether it had jurisdiction to order Respondent to pay the monies that it had withheld in excess of the R1500.00 (that is M13 663.06 (Thirteen Thousand, Six Hundred and Sixty Three Maloti and Six Lisente) plus the interest to the tune of M2,746.87 (Two Thousand Seven Hundred and Forty Six Maloti and Eighty Seven Lisente).
9. The Labour Court, quite correctly in my view, had to first characterise the Appellant's claim for it to determine whether it had jurisdiction to entertain it. It consequently held that this was a claim for either underpayment or non-payment of monies due to Appellant from Respondent. It once again, quite correctly in my view, considered whether it had original jurisdiction to entertain a claim for

underpayment or non-payment of monies due to Appellant from respondent. This approach was, with respect correct.

10. It appears from the judgement of the Labour Court that the Court was urged on behalf of Appellant to hold that this was a case of set-off, and that, in terms of section 8(2)(h) of the **Labour Code(Amendment) Act No.3 of 2000**, it was competent for the Labour Court to so hold. The same argument was pursued before us in this Court.

11. In the Grounds of Appeal before us, the Appellant advanced two complaints. The first was that, the Court *a quo* erred and/or misdirected itself in finding that Appellant's claim was one for underpayment or non-payment. The second complained was that, the Court *a quo* erred and/or misdirected itself in ruling that Appellant's papers filed of record do not clearly reflect the claim of set-off. In argument before us, the Appellant contended that, the foregoing complaints found their support in section 8(2)(h) of the **Labour Code(Amendment) Act No.3 of 2000.**

12. The aforementioned section provides as follows as far as necessary for the determination of this appeal:

> (1) The Court shall have the power –
>
> (a) …….
> (b) ….
> (c) …..
> (d) ….
> (e) …..
> (f) …..
> (g) ….

> (h) to adjust and set off one against the other all claims on the part either of the employer or of the employee arising out of or incidental to such relation between them as the Court may find, whether such claims are liquidated or unliquidated or are for wages, damage to person or property or for any other cause, and to direct payment of the balance found due by one party to the other;

10 It is apparent from the above section that litigants before the Labour Court are entitled to set up a set-off in their defences so that the claim and set-off or counterclaim are tried together. In such a case, the counterclaim or set-off would then be regarded for all intents and purposes as a defence to the claim.

11 There can be no doubt that the Court is given the power to adjust one or several claims against the other(s). However, as the Labour Court correctly held, the Court can only exercise such power if properly moved so to do by means of the originating application. The issue must be specifically pleaded so as to enable the Court to exercise such a power. In the present case, Appellant did not plead the defence of set-off. In the words of our Court of Appeal, "nowhere did he deal with set-off as his counsel purported to do at the hearing of the matter before us"(**Thato Lekula Motebejane v Boliba Multi-purpose Cooperative Society C of A (CIV) NO. 15/07 at para 5).** In the Originating application, there was not even an attempt to rely on section 8(2)(h) of the **Labour Code(Amendment) Act No.3 of 2000.**

12 .We therefore agree with the learned Deputy President of the Labour Court that, set-off having not been pleaded, it was not open to Appellant to avail himself of it. Another contention by

Appellant was that, the Court *a quo* erred and/or misdirected itself in finding that Appellant's claim was one for underpayment or non-payment. At the hearing of this appeal, this Court asked Counsel for Appellant whether the claim by Appellant should be characterised as one for underpayment or non-payment. He quite correctly in my view replied that it was one for underpayment. Respondent's Counsel also agreed that this was a matter of underpayment. In the light of this admission, the complaint that the Labour Court had erred in holding that this was a matter of underpayment of monies falls off.

13 The next question is whether the Labour Court was wrong in ruling as it did that, it had no original jurisdiction to entertain matters of underpayment or non-payment.

14 As indicated above, Appellant was claiming underpayment of monies withheld under the provisions of the **Labour Code (Amendment) Act No.3 of 2000.** In the first place, section 9 of the **Labour Code (Amendment) Act No.3 of 2000** provides that, the jurisdiction of the Labour Court is exclusive and no court shall exercise its civil jurisdiction in respect of any matter provided for under the Code. In the second place section 15 of the **Labour Code (Amendment) Act No.3 of 2000** provides in **46B** for the establishment of the Directorate of Dispute Prevention and Resolution (DDPR). Subsection (2) of that section provides that, the function of the directorate shall be to resolve trade disputes through arbitration. Section 226(2) (C) of the **Labour Code (Amendment) Act No.3 of 2000** provides that a dispute

concerning the underpayment of any monies due under the provisions of the Act, shall be resolved by arbitration. There can be no doubt in my view that, the underpayment of monies in dispute before both the Labour Court and this Court *in casu*, is that of monies due under the provisions of this Act in as much as they are wages payable under the Code. It is these monies that the Act provides that they shall be resolved by arbitration.

15 In my view, the Learned Deputy President was correct in holding as she did that, this was a matter that falls within the jurisdiction of the DDPR. There is therefore no merit in this appeal, and it should be dismissed. It is accordingly dismissed with costs.

16. My Assessors agree.

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K.E.MOSITO AJ.

Judge of the Labour Appeal Court

For Appellant Mr. Molefi

For Respondent: Mr. De Beer