IN THE LABOUR COURT OF LESOTHO

CASE NO LC 41/98

HELD AT MASERU

IN THE MATTER OF:

KUENA MAHLAKENG APPLICANT

AND

LESOTHO BANK RESPONDENT

JUDGMENT

Applicant was dismissed by the respondent bank on the 23rd December 1997 following a disciplinary enquiry into his alleged misconduct. Applicant alleges that when he was dismissed, he was owed an after tax amount of M11,444-76 for accrued leave and M2,959-34 in respect of staff savings. He avers further that on the 31st December 1992 the respondent retained the said money and has to date refused to pay it. Applicant further claims that during his employment by the respondent he worked overtime which was never paid.

On the 19th July 1998, the applicant approached this court seeking relief that the respondent be directed to pay him an amount of M27,304-20 being overtime worked whilst in the respondent's employ. He further sought that the respondent be directed to release to him the sums of M11,444-76 and M2,959-34. However, at the close of the applicant's case Mr. Mahlakeng wisely in our view decided to abandon the claim for overtime because the applicant could not prove it. In deed even the paper on which the applicant said he had kept the record of the overtime he worked, which he could not produce in court, it turned out under cross-examination that it was not a daily record of each day's overtime. It was instead a compilation of applicant's own recollection which he made after his dismissal. This concession the applicant made under cross-examination. That paper could not therefore, constitute a satisfactory proof of the overtime worked let alone to sustain the substantial claim of M27,304-20 which the applicant had made.

The applicant adduced evidence of himself in which he testified that the money in respect of leave and staff savings was never paid to him and was instead paid into what was said to be his loan account. Applicant handed in a copy of the deposit slip dated 31/12/97 which was sent to him by the respondent as evidence that the sum of M17,607-33 was deposited with the respondent bank on his behalf into his loan account. Applicant testified further that at the time of his termination he never had any loan account with the bank. The only loan account he had, he testified, was a furniture loan of M7,256-00 which he had paid in full at the time of his termination.

In their Answer the respondents admit that the applicant had the amounts he claims due to him at the time of his dismissal. They further admit that the respondent has refused to pay the said amount despite demand. In paragraph 3.2 of the Answer the respondents aver that "....applicant was granted a loan facility in the amount of M27,523-05 as at 01/12/97 plus shortage of M21,666-45 and a simple interest loan which he is currently servicing and stands at M1,934-48 as at 22.07.98." The respondent aver further in paragraph 4.2 of the Answer that the money being claimed by the applicant was credited by the respondent into applicant's loan account to reduce his indebtedness to the respondent.

In Answer to these allegations, the applicant in his testimony under oath denied obtaining a loan of M27,523-05 from the respondent. He went further to say that infact on the day he allegedly got the loan namely 01/12/97 he was never at work. As regards the shortage, the applicant, while conceding that he had a shortage, testified that he was never shown a shortage of M21,666-45. He averred further that in telling shortages often occur. As regards the simple interest loan he stated that his furniture loan like the loans of other members of staff of a similar nature was transferred to a simple interest loan account. As he testified, at the time of his dismissal he had finished paying that loan.

Applicant admitted that the policy of the respondent is to make tellers pay for their shortages and that is done by way of opening a loan account for the teller which he would then service. While conceding having a shortage he categorically denied having a shortage in the amount alleged by the respondent. The respondent did not lead any evidence. However, under cross-examination Mr. Matooane sought to show the applicant that he was dismissed after the bank found him guilty of:

(a) failing to report the disappearance of a deposit amounting to M7,733-39;
(b) failing to recover funds for unprocessed debits amounting to M6,711-00;
(c) failing to explain shortage of M7,222-06.

The applicant agreed this was correct and Mr. Matooane asked the applicant what was wrong with the bank recovering what it found him guilty of? The applicant answered that the bank did not consult him.

In submissions before the court it became clear that the entire case centered around compensatio or set-off as it is commonly known. We are indebted for both counsels who had prepared brief but concise heads of argument which we found very helpful. It was Mr. Matooane's contention that applicant's benefits have been set off against the shortage he incurred which formed the basis of his dismissal. He contended that set off can be exercised without the permission of the other party as it operates ipso jure as a partial or total discharge of the debt. He relied on the Appellate Division decision in Schierhout .v. Union Government 1926 AD 289.

The operation of the principle of set-off is captured at the bottom of page 289 to the top of page 290 of the judgment of Innes C.J. as he then was in the Schierhout case supra. The learned Chief Justice captures the principle like this:

> ***"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 protanto as effectually as if payment had been made."*** **(emphasis added).**

We have highlighted the phrase "mutually indebted to each other both debts being liquidated and fully due" because this is the fundamental requirement that must exist if the principle of set-off is to be invoked. In Great North Farms (EDMS) BPK .v. RAS 1972(4) SA7 to which we were referred by Mr. Mahlakeng on behalf of the applicant, the learned Justice Margo quotes a number of authorities which shed significant light on the operation of the principle of compensatio. At page 8 of the judgment the learned Judge quotes Rosenow J in Harris .v. Tancred N.O. 1960(1) SA839 where the learned Judge had stated:

> ***"There appears to be some confusion amongst the authorities as to whether set-off operates entirely automatically, or whether it has to be specifically invoked as a defence to a claim."***

At page 9 he quotes Innes C.J. again in Postmaster-General .v. Tante, 1905 T.S 582 at p.590 where the learned Chief Justice stated:

> ***"set-off, like payment, should be pleaded and proved, so that the court may give effect to it, but its operation dates back to the moment when the two persons concerned were reciprocally liable to one another. At that moment in intendment of the law they are regarded as having paid cash to the other's claim with his own, so far as it would go."*** **(emphasis added).**

Mr. Mahlakeng referred us also to the case of Adjust Investments (Pty) Ltd .v. Wild 1968(3) SA 29. In that case a Mr. Brink had sold certain farm properties and movables to the respondent for a sum of R21,000-00. The respondent had to pay M7,000-00 of that price on or before 28th February 1967, but he only paid R4,000-00. The result was that Brink instituted action against the respondent for the balance.

The respondent successfully excepted to the claim on the ground that the declaration did not disclose the cause of action. However, the decision was upset on appeal and the respondent was ordered to pay costs of the appeal as well as the exception in the court a quo. The taxed costs of both proceedings amounted to R462-23. Respondent failed to pay this amount. A writ of execution was issued but he informed the sheriff that he was not possessed of any attachable assets. Brink ceded his claim for the R462-23 to the applicant company which immediately instituted insolvency proceedings against the respondent. The latter's estate was accordingly provisionally sequestrated. At the time applicant applied for provisional order of sequestration the respondent had already instituted a counterclaim against Brink for the cancellation of the sale and return of the R4,000-00 already paid in respect of the purchase price on the ground of alleged fraudulent misrepresentations made by Brink which had induced him to enter into the contract.

In argument before court the respondent sought to have the applicant's claim of R462-39 set off against the R4,000-00 purchase price he was seeking to be returned. The applicant on the other hand contended that the alleged debt of R4,000-00 was not, pending the outcome of the case, a debt capable of set off. Judge Erasmus made informative comments and references to authorities before coming to his decision on the case. At page 31 the learned Judge observes that in Roman times the Judge could in his discretion allow set-off and that illiquidity was no bar to compensation. He remarks further that; "the development of our law of set-off operating ipso jure seems to have gone hand in hand with the development of the law of set-off from illiquid to liquid claims and to have received its impetus not from the Romans but the Dutch and the French." (see pp. 31-33H). At p.32C-E the learned Judge refers to the old writers and these are the relevant excerpts:

> ***"Van Leeuwen R.H. Reft, 4.40.2 insists on relative liquidity 'mits dat sonder moeite slyke' and in Censura Forensis, 4.3.1 he demands absolute liquidity. He states: '....liquidi enim ad illiquidum nulla compensatio est." Vissius, Select Jur Quaest, IC50, is of the opinion that causa debendi must be justa et vera, admitted by the other side or capable of quick proof, whereas Zoesius, Commentarius ad Digesta, (1718) 16.2.11, speaks of liquidity as made manifest by judgment or admission or exigible without delay. Gerhardt Noodt accepts the theory of payment absolutely and so does Voet in certain respects. (16.2.2)."***

The learned Judge concludes by submitting that what is clear is that "absolute mutual liquidity was not always insisted upon in the practice of Holland and set-off was a matter of judicial discretion. This still appears to be the position to-day in South Africa in so far as it does not take place automatically and ipso jure when two liquidated debts balance each other."

The learned Judge again quotes De Villiers C.J. in Kruger .v. Van Vuuren's executrix 55.C 162 at 168 where the learned Chief Justice stated;

> ***"where the defendant does not rely upon a liquid document the liquidity of his claim must be decided by the court which according to Vinnius Sel. Jur. Qu. 1,50, has some degree of discretion vested in it. But until every element of uncertainty has been removed as to the amount opposed in compensation set-off is not allowed."***

The learned Judge further quotes Innes C.J. in Treasurer General .v. Van Vuren, 1905 T.S. 588 at p.589 where the learned Chief Justice stated;

> ***"the law requires that a debt which it is desired to oppose by way of set-off must be of a liquidated nature. It need not be liquid in the sense in which that word is now used in practice. According to Vinnius, Select, Juris Quaest, 1.C.50, if not admitted by the other side it must be capable of easy and speedy proof. Pothier, Obligations 3.C.4 sec.2 says a debt is liquidated when it is evident that it is due and to what amount...."***

Coming now to the Adjust Investments case the learned Judge concluded after reviewing various decisions and the commentaries of old writers that;

> ***"Applying these principles I do not think that it can be said that the respondent's counterclaim, relying on fraud, is capable of prompt ascertainment, or that it will not involve a long and intricate investigation or that it can be established summarily or without difficulty or that it is a debt which is so certain that it can be at 'once proved'."***

Coming now to the facts of the present case, we are satisfied that Mr. Matooane for the respondent duly pleaded the set-off to make the court aware of it. The next issues to determine are whether the applicant is indebted to the respondent and if so whether the debt is sufficiently liquidated or if not, whether it is capable of prompt ascertainment, or whether it will not involve a long and intricate investigation.

It is common cause that the applicant denied obtaining any loan facility from the respondent on the 1st December 1997. The applicant also denied having simple interest loan as he said he had paid it in full. The respondent has not proved these allegations in any way whatsoever. As for the shortage the applicant concedes having a shortage but not in the amount claimed by the respondent. Accordingly the alleged shortage of M21,666-45 is disputed. Even though applicant admits having a shortage the amount is unknown. That being the case there is no mutual indebtedness by the parties of debts which are liquidated and fully due. (see Schierhout's case supra and Pothier Obligations 3.C.4 sec.2)

Mr. Matooane got the applicant to concede under cross-examination that he was found guilty of the charges involving amounts which totalled the figure the respondent claims to have set-off from applicant's benefits. Despite the concession, the applicant does not seem to us to be indebted to the respondent for we have been

shown no basis for such a conclusion. Applicant's negligence or lack of diligence in his work does not automatically make him personally indebted to his employers for the amounts he mishandled. Such indebtedness if any will have to be proved to the court. No attempt was made by the respondent to adduce evidence to support the claim that applicant owes them as alleged.

Now that it has not been proved, is the alleged debt one capable of prompt ascertainment or one that will not require long and intricate investigation or one that is capable of summary determination? Our answer to this question must be in the negative. The question whether one has duly obtained a loan facility is not one that can be summarily determined. Similarly, the fact alone that one has been found guilty of a disciplinary misconduct does not automatically make him liable to the employer in the sum that may have disappeared negligently while in his custody. All these will require thorough investigations and evidence to prove the allegations.

Furthermore, there is involved in this so called set-off, staff savings which, subject to further investigation may constitute alimenta due in the future. As Innes C.J. puts it in Schierhout supra at p.291 compensatio may not "...be invoked against a claim for aliment." The view that we hold therefore is that the applicant has proven his claim against the respondent adequately and the respondent has improperly and unlawfully withheld applicant's monies which were due to him as accrued benefits at the time of his dismissal in December 1997. In the premises applicant's prayers (a), (b) and (d) which read that applicant prays for an order:

> **"(a), Setting aside the purported deductions as unlawful**
> **"(b), Directing the respondent to release to the applicant the said sums, of M11,444-76 and M2,959-34**
> **"(c), ...**
> **"(d), Directing the respondent to pay costs of these proceedings;"**

are granted as prayed. Order (b) must be complied with within 30 days of the handing down of this judgment.

THUS DONE AT MASERU THIS 20TH DAY OF AUGUST, 2001.

L.A LETHOBANE
PRESIDENT

C.T. POOPA
MEMBER I AGREE

P.K. LEROTHOLI
MEMBER I AGREE

FOR APPLICANT : MR. MAHLAKENG
FOR RESPONDENT: MR. MATOOANE