

HELD AT MASERU

In the matter between:

T & T SECURITY SERVICES (PTY) LTD

APPLICANT

And

SAMUEL PEAPEA

RESPONDENT

JUDGMENT

Date: 31st July 2013

A claim for a set off against an amount awarded by the DDPR. Court on own motion raising two points of law premised on its jurisdiction over Applicant's claim. Firstly, jurisdiction of the Court over a claim for set off as an independent claim – secondly, jurisdiction of the Court over Applicant claim in the light of non-compliance with section 227 (5) of the Labour Code (Amendment) Act 3 of 2000. Applicant failing to prove that the Court has jurisdiction over its claim and matter being dismissed for want of jurisdiction. No order as to costs being made.

BACKGROUND OF THE ISSUE

1. This is a claim for the set off in respect of an alleged debt owing to Applicant by Respondent, against an amount awarded to the Respondent by the DDPR. The matter was heard on this day and judgment was reserved for a later date. The background of this matter is essentially that Respondent was employed by Applicant as a security guard. After termination of Respondent's employment contract, he referred a claim for unfair dismissal claim with the DDPR. An award was issued in his favour, in terms of which Applicant was to pay him an amount to the tune of M12, 535.30.
2. *In casu*, it is applicant's argument that during the employ of Respondent, he caused Applicant to incur certain pecuniary loss. It is said that the loss was occasion by Respondent's

failure to discharge his obligations to protect the property to the clients of Applicant effectively. At the commencement of the proceedings, We raised two preliminary points, both of which were premised on the jurisdiction of this Court in respect of the Applicant's claim.

3. In raising the above points of law, We were guided by the authority in *Thabo Mohlobo & others v Lesotho Highlands Development Authority* LAC/CIV/A/02/2010, where the Court relied on a quotation from *Casa v Tao Ying Metal Industries & 3 others* 2009 (2) SA CC, in the following,
“where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what that law is, a court is not only entitled, but is in fact also obliged, *mero muto* to raise that point of law and require parties to *therewith*.”
4. The firstly point relates to the jurisdiction of this Court to hear and determine Applicant's claims as a court of first instance without a report in terms of section 227 (5) of the *Labour Code Order 24 of 1992 as amended*. Secondly, the jurisdiction of this Court to hear and determine a claim for set off as an independent claim pursuant to the provisions of section 24 (2) (h) of the *Labour Code Order (supra)*. Both parties were given the opportunity to make addresses on both points and Our judgment is thus in the following.

SUBMISSIONS AND ANALYSIS

5. Advocate Mohanoe for Applicant submitted that section 24 (2) (h) of the *Labour Code Order (supra)*, vests this Court with jurisdiction to entertain a claim for set off as an independent claim. He added that this Court has heard claims of this nature before and reference was made to the case of *Monahali Construction (Pty) Ltd v Thabang Ngaka* LC16/2009. Further, that it is acceded that in order to have jurisdiction to sit as a court of first instance, a claim must have gone through the process of conciliation. Advocate Mohanoe prayed that this matter be removed from the roll to enable Applicant to comply with the provision of section 227 (5), by referring this claim for conciliation with the DDPR.

6. Mr. Letsie submitted in reply that a claim for set off is normally pleaded as a defence to a claim that is before court for determination. He argued that on this basis, that this Court has no jurisdiction over Applicant claim for a set off, as a set off cannot be brought as an independent claim. On the issue of non compliance with the provisions of section 227 (5), he submitted that if the Court finds that it has jurisdiction in terms of section 24 (2) (h), he had no objection to the matter being removed from the roll for purposes of compliance with the said section 227 (5).
7. As rightly pointed out by Applicant, the jurisdiction of this Court over a set off is established by section 24 (2) (h) of the *Labour Code Order (supra)*. The provisions of section 24 (2) (h) are as follows,
“to adjust and set off against all other claims on the part either of the employer 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.”
8. Our interpretation of the section 24 (2) (h) is that in as much as it vests this Court with the jurisdiction to entertain a claim of set off, such depends on there being a claim against which a set off is sought. By this, We mean that a set off cannot be referred as an independent claim, for without a claim there is nothing to set off from. This is clear from the opening lines of section 24 2) (h) which read as follows,
“to adjust and set off against all other claims”
9. Our interpretation finds support in the Transvaal Provincial Division decision in *Great North Farms (EDMS) BPK v RAS 1972 (4) SA 7*, at page 8E where the learned Justice Margo quoted the learned Judge Rosenow J in *Harris v Tancred N.O. 1960 (1) SA 839*, where the learned Judge had stated as thus,
“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.”
10. At page 9E-F of the same judgment, the learned Judge continues to quote Innes C J again in *Postmaster-General v*

Taute, 1905 TS 582 at p.590, where the learned Chief Justice stated as thus,:

“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.”

11. The above quotations are clear that a set off should be pleaded as a defence. This essentially means that a set off is a secondary claim, which depends on the existence of a primary claim. Even so, the said primary claim must be before a court in which a set off is being pleaded. *In casu*, there is no claim before this Court against which a plea of set off is being raised. This means that in order for a claim of a set off to have been rightly raised, Applicant ought to have pleaded it as a defence to Respondent claim for unfair dismissal before the DDPR.
12. About the authority in *‘Monahali Construction (Pty) Ltd v Thabang Ngaka LC16/2009*, the circumstances of that case differ from the circumstances *in casu*. In that case, Applicant had sought the review of the DDPR arbitral award before this Court, under LC/REV/48/08. The review application was dismissed. In dismissing the said application, the Court had further gone to reduce the amount which had initially been awarded to the Respondent. Applicant had then applied for a set off of the amount determined by this Court against the debt it claimed was owing by Respondent. Clearly the circumstances of both cases are not of sufficient similarity and cannot be compared.
13. Even assuming that the circumstances of the two cases were comparable, this Court is not bound by its own decisions. The principle of judicial precedent operates in respect of the decisions of superior courts in relation to those of the lower courts. Even if the principle was to be applied *in casu*, the fact that the circumstances between the two cases differ, disqualifies its application. While it is true that Courts must strive towards the maintenance of consistency and predictability in their decisions on similar matters, such cannot be at the expense of legality. Consequently, We find

that this Court has no jurisdiction to entertain a set off as an independent claim.

14. On the issue of non-compliance with section 227 (5), parties have both acceded that it has not been complied with. This clearly means that this Court has no jurisdiction over Applicant's claim as it stands. In view of the fact that this is a Court of equity and fairness, had Applicant succeeded to show that this Court has jurisdiction over a set off as an independent claim, We would have been inclined to remove the matter from the roll, to allow Applicant to comply with the provisions of section 227 (5). However, given Our attitude in respect of the first aspect of the points of law, We see no need to grant the indulgence sought.

AWARD

We therefore make an award in the following terms:

- a) That this application is dismissed for want of jurisdiction;
and
- b) That there is no order as to costs.

THUS DONE AND DATED AT MASERU ON THIS 12th DAY OF AUGUST 2013.

**T. C. RAMOSEME
DEPUTY PRESIDENT (AI)
THE LABOUR COURT OF LESOTHO**

**Miss M. THAKALEKOALA
MEMBER**

I CONCUR

**Mrs. L. RAMASHAMOLE
MEMBER**

I CONCUR

**FOR APPLICANTS:
FOR RESPONDENT:**

**ADV. MOHANOE
MR. LETSIE**