

**IN THE LABOUR COURT OF LESOTHO**

**HELD AT MASERU**

**LC/REV/29/2013  
A0904/2012**

**IN THE MATTER BETWEEN**

**SEVILLE FOODS (PTY) LTD**

**APPLICANT**

**AND**

**SENATE MAKHAOLA  
DDPR**

**1<sup>st</sup> RESPONDENT  
2<sup>nd</sup> RESPONDENT**

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**JUDGMENT**

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*Application for review of the arbitration award. Applicant having raised two grounds of review and later withdrawing one. In the remaining ground, Applicant claiming that Arbitrator heard a matter in respect of which He had no jurisdiction, given its defence of a set off. Court finding the defence was not raised and that Arbitrator was right to proceed to hear the matter. Review application being dismissed and no order as to costs being made.*

**BACKGROUND TO THE DISPUTE**

1. This is an application for the review of the arbitration award in referral A0904/12. 1<sup>st</sup> Respondent had initially referred claims for severance payment and unpaid overtime with the DDPR. The unpaid monies claim was resolved by settlement and parties went into arbitration with the severance payment claim. In the end, an award was issued in favour of the 1<sup>st</sup> Respondent. In terms of the award Applicant was to pay 1<sup>st</sup> Respondent severance payment in the sum of M18,858-00. It is this award that Applicant wishes to have reviewed, corrected and/or set aside.

2. Initially two grounds of review had been raised in the following:  
*“I aver that the learnt arbitrator failed to take into consideration some of the evidence I placed before him thereby committing an irregularity that warrants review of this award in that he failed to consider our evidence to the effect that 1<sup>st</sup> respondent never resigned but only stormed out of the meeting she was called to account for the money she had failed to deposit.”*  
  
*“I aver that the arbitrator committed an irregularity by ignoring the applicant’s defence of set-off which was clear from the opening statement and throughout the proceedings.”*
3. At the commencement of the proceedings, Applicant withdrew the first ground of review and only proceeded with the second one relating to a set off. Having heard and considered both parties submissions, Our judgment follows.

#### **SUBMISSION AND ANALYSIS**

4. Applicant’s case was that 1<sup>st</sup> respondent had committed fraud which led to Applicant losing an amount to the tune of M32,000.00. As a result, in the proceedings before the 2<sup>nd</sup> Respondent they had raised the defence that they were not paying severance payment because of the fraud and the amount that they lost. The Court was referred to pages 2 and 3 of the arbitration award at paragraphs 5 and 6 respectively.
5. At paragraph 5, the court was referred to the following recording:  
*“The respondent adduced quite substantial evidence through its two witnesses, Mr. Leonn De Kock, its Management Consultant and ‘Me Guida Tayob, its Store Manager, with an object of proving and establishing that the applicant was responsible for the disappearance of M32,000.00 of the respondent, hence, the respondent’s refusal to give applicant her severance pay.”*
6. At paragraph 6, the Court was referred to the following recording:  
*“Now, the main issue that has to be looked into, be it is true or not that applicant did cause the disappearance of the M32,000.00 in question, is whether the applicant ended up*

*being dismissed or not by the respondent for the misconduct of theft that the respondent alleges in evidence and argument.”*

7. It was argued that it is clear from these extracts that Applicant had raised the defence of a set off, though not in the strict legal terms, for the reason that the people who appeared before the DDPR were lay in law. It was added that this defence having been raised, the learned Arbitrator ought to have declined jurisdiction over the matter, as it is one that falls within the jurisdiction of the Labour Court in terms of section 24(b). Having ignored the Applicant's defence, the learned Arbitrator heard a matter in respect of which he had no jurisdiction, thereby committing an irregularity. It was prayed that the matter be reviewed.
8. In answer, 1<sup>st</sup> Respondent submitted that set off was never raised at the DDPR. Rather, Applicant's defence before the DDPR, was that 1<sup>st</sup> Respondent had been dismissed for the misconduct of causing the disappearance of M32,000.00 and thus forfeited his severance pay. It was argued that even assuming without conceding, that Applicant had the defence of a set off, it would have clearly made a concession that it owed 1<sup>st</sup> Respondent severance pay, but that it be set off against the claimed fraud money. It was submitted that *in casu*, no such concessions were made as Applicant was adamant that 1<sup>st</sup> Respondent forfeited her entitlement to severance pay due to the act of misconduct that she committed.
9. We have considered both the submissions of parties and the arbitration award. We have noted that indeed it was never the Applicant's case that the claim of severance payment, be set off against the amount alleged to have been lost through 1<sup>st</sup> respondent alleged fraud. Rather, Applicant's case was that it refused to pay because 1<sup>st</sup> Respondent had committed misconduct. This is clear from paragraph 6 of the arbitration award which is recorded as follows:  
*“The respondent's case on the other hand, is that the applicant ought to forfeit her severance pay for the reason that she resigned from the employ of respondent having committed an act*

*of misconduct of causing the disappearance of a sum of M32,000-00 by fraudulent means.”*

In our view this is nowhere near the defence of a set off.

10. Further, the reference portion at pages 2 and 3 of the arbitration award and in particular at paragraphs 5 and 6, only go on to confirm Our attitude. At paragraph 5, the recording merely demonstrates that Applicant brought evidence to demonstrate misconduct on the part of 1<sup>st</sup> Respondent, while the extract on paragraph 6 shows the issues for determination and these are reflected as whether fraud was committed and if 1<sup>st</sup> Respondent was dismissed for same.
11. We therefore agree with the 1<sup>st</sup> Respondent that a set off was never the issue before the 2<sup>nd</sup> Respondent and that the learned Arbitrator was right to proceed to arbitrate over the matter. We further wish to confirm the principle as suggested by 1<sup>st</sup> Respondent that it is a requirement of a defence of a set off that at least one of the claims should not be disputed, which was not the position *in casu*. We further wish to comment that even if Applicant had raised the defence of a set off, the learned Arbitration would still have had incidental proceedings to determine the matter. The claim of set off, would have been incidental to the proceedings in respect of which the learned Arbitrator was originally seized with jurisdiction to hear and determine.

**AWARD**

We therefore make an award in the following:

- 1) That the review application is refused;
- 2) The award in referral A0904/2012 remains in force;
- 3) The said award must be complied with within 30 days of issuance herewith;
- 4) There is no order as to cost.

**THUS DONE AND DATED AT MASERU ON THIS 15<sup>th</sup> DAY OF SEPTEMBER, 2014.**

**T C RAMOSEME  
DEPUTY PRESIDENT (a.i.)  
LABOUR COURT OF LESOTHO**

**MR. KAO  
MRS. RAMASHAMOLE**

**I CONCUR  
I CONCUR**

**FOR APPLICANT:  
FOR RESPONDENT:**

**ADV. 'NONO  
MR. LETSIE**