

IN THE LABOUR COURT OF LESOTHO

HELD AT MASERU

LC/ENF/63/2013

IN THE MATTER BETWEEN

**MEDITTEREAN SHIPPING
COMPANY (PTY) LTD**

APPLICANT

AND

THAPELO KHITŠANE

RESPONDENT

JUDGMENT

Application for stay of enforcing pending finalisation of the a claim before another court. Applicant claiming fear of inability to recover its loss from Respondent as he has no money. Court finding that it would be improper to stay enforcement pending a matter in respect of which it has not control. Court further finding that source of fear is not original as it arises from the Respondent answer and therefore an afterthought. Court not finding merit in Applicant's claim and dismissing same. No order as to costs being made.

BACKGROUND OF THE DISPUTE

1. This is an application for stay of enforcement of the DDPR award in referral A0698/2012. In terms of the arbitral award, Applicant had been ordered to pay Respondent the sum of M78,692.31, as severance payment.
2. The brief background of the matter is that Respondent was an employee of Applicant until his contract of employment terminated by resignation. When Applicant defaulted on payment of same, Respondent referred a claim with the Directorate of Dispute Prevention and Resolution (DDPR) for payment. An award was issued on the 23rd January 2013 in favour of Respondent, as earlier indicated. When Applicant defaulted against the said award, Respondent initiated enforcement proceedings with this Court.
3. Incidentally, Applicant had also initiated civil proceedings before the Bloemfontein High Court, in the Republic of South Africa, allegedly through its parent company MSC Logistics (Pty) Ltd, against Respondent herein. In this claim, Applicant had claimed an amount of M679,447.56 against Respondent, wherein it obtained judgment by default. Unhappy with the default award, Respondent lodged a rescission application to have same set aside. By order of Mrs. Khabo, the President of this Court, the enforcement proceedings were stayed pending finalisation of the said rescission application, before the Bloemfontein High Court.

4. Eventually the rescission before the Bloemfontein High Court was heard and finalised in favour of Respondent herein. Armed with the said judgment, Respondent caused summons to be issued against Applicant herein, for enforcement of the DDPR awarded amount. It was in reaction to the said summons that the current applicant was made. Having heard the arguments of parties, Our judgment follows.

SUBMISSIONS AND ANALYSIS

5. Applicant's case was that whereas they have initiated proceedings against Respondent in the Bloemfontein High Court, the said proceedings have since been stayed *sine die*. They are therefore asking this Court to stay the enforcement proceedings as security in the event that they win the case in the Bloemfontein High Court.

6. They submitted that they are in fear that Respondent may not be able to pay them the amount that they claim before the Bloemfontein High Court. They added that should they win, with these proceedings stayed, they will at least be able to recover an amount in the sum awarded to Respondent by the DDPR, rather than not being able to recover anything at all.

7. They further submitted that their fear is borne by the averments of Respondent in answer to this application, specifically at paragraph 3.8 of the Respondent's answer, where he has averred that he has no money. They added in

the event that they lose in the Bloemfontein matter, they will immediately comply with the DDPR award, as the awarded money is readily available.

8. It was further submitted that in the event that Applicant obtains an order in the Bloemfontein High Court in its favour, it will be able to invoke a set off without recourse to the procedures of this Court or any other court, as a set off is automatic. They will simply withhold of the awarded amount and set it off against their victory amount before the Bloemfontein High Court. The Court was referred to the case of the *Great North Falls v RAS 1972 (4) SA 7*, for the principle of a set off.

9. When asked about the principle in the case of *Astoria Bakery Lesotho (Pty) Ltd v Thabiso Mokhesuoe LC/59/2004*, Applicant submitted that the circumstances of the two cases were different. It was argued that in *casu*, Respondent has no money and that Applicant is merely asking for security to avoid prejudice on its part, which condition would not bring prejudice to Respondent. It was argued that there would be no prejudice as Applicant has the awarded amount, unlike Respondent who has no money.

10. Respondent answered that the claimed fear is an afterthought as it arises from the answer to the Originating Application, and in particular from paragraph 3.8, as Applicant has argued. It added in any event at paragraph

3.8, Respondent does not say he does not have money, but rather that he was unable to go on appeal as he had no money then.

11. Respondent further answered that he agreed with the principle in the case of *Astoria Bakery Lesotho (Pty) Ltd v Thabiso Mokhesuoe (supra)*, that this Court cannot grant a stay on the basis of proceedings before another court, in respect of which this Court has no control, as that would render the award held by Respondent meaningless.

12. Regarding the claim that a set off is automatic and that no recourse to the procedures of any court is necessary, Respondent argued on the contrary. In fact, Respondent submitted that a set off is only done through the procedures of Court as it would otherwise be self help, which practice is highly shunned by courts of law. It was prayed that this application be refused and that Applicant be ordered to comply with the DDPR award immediately, particularly given their submission that the awarded amount is readily available. It was added that severance pay is a right of Respondent and it cannot be withheld without due course. The Court was referred to the case of *Selloane Mahamo v Nedbank Lesotho Limited LAC/CIV/04/2011*.

13. About MSC Logistics (Pty) Ltd being the parent company to Applicant, it was denied as being untruthful. It was submitted that Applicant company is a company registered in

Lesotho and in terms of the laws of Lesotho, as Applicant has shown in the Originating Application, while MSC Logistics is a South African Company which is headed in Kwazulu Natal, Republic of South Africa. It was added that Applicant has not even alleged in its Originating Application this claimed relationship of a holding and subsidiary company.

14. In reply, Applicant submitted that MSC Logistics is the holding company to Applicant company. Further that this was accepted by both parties before the DDPR in the proceedings in referral A0698/12, which is the award subject of these proceedings. The Court was referred to paragraph 8 of the arbitration award.

15. The posting of a security before this Court is governed by section 37 of the *Labour Code Order 24 of 1992*. The provisions of this section are as follows,

“When it appears to the President of the Court that an employer against whom proceedings have been instituted under the provisions of the Code is likely to abscond to avoid payment of wages or other sums owed to any of his or her employees, the President may order such employer to post a bond until the hearing of the proceedings or until earlier payment of such wages or sums has been made in full.”

16. Clearly from the provisions of section 37 above, the circumstances under which security may be made are very limited. To be specific, they are limited to an employer who

is likely to abscond and are dependent on there being pending proceedings instituted in terms of the Code. *In casu*, Applicant has not instituted proceedings in terms of the Code. Secondly, the posting is not in respect of the employer but the employee. Consequently, the circumstances of the case *in casu* do not meet the requirements for posting of a security or holding of sums of money as security, at least as contemplated by the *Labour Code Order (supra)*.

17. Further, We are in agreement with Respondent that there is no real basis of the fear alleged. We say this because it arises from the Respondent's answer and it was not pleaded in the Originating Application. By this We mean the now claimed source of fear. It is therefore an afterthought. It is trite law that an afterthought is unreliable and cannot therefore be relied upon to decide on the right of parties.

18. We also wish to confirm, as Respondent has shown, that at paragraph 3.8 of his Answer, there is no conclusive proof that Respondent does not have money. Rather in that paragraph, Respondent merely states that he could not file an appeal as he had no funds then. This therefore does not lead to the conclusion that Respondent has no money or that he will not be able to honour the judgment of the Bloemfontein High Court should it be in favour of Applicant.

19. About the set off being automatic, We hold a contrary view. A set off is not automatic and if approached in that

fashion, specifically the mode proposed by Applicant, it becomes an illegality as it would be resorting to self help. It is trite law that self help is prohibited. In the case of *Letsosa Hanyane v Total Lesotho (Pty) Ltd CIV/APN/412/1997*, the learned Justice Ramodibeli J, in addressing the issue of resorting to self-help held as follows,

“... I consider that the Respondent's wrongful act of self help as fully set out above is so repugnant to the rule of law that it must be nipped in the bud.”

20. Self help should be distinguished from the exercise of powers of the employer conferred by section 85 of the *Labour Code Order (supra)*, that he/she may make deductions from an employee's wages without use of the procedures of this Court or any court of law. The provisions of this section are inapplicable *in casu*, for the simple reason that there is no more an employment relationship between Applicant and Respondent. In essence, a set off can only be made through the Court procedures. We however, note the principles as shown in the case of *Great North Falls v RAS (supra)* on the principle.

21. Regarding the principle in *Astoria Bakery Lesotho (Pty) Ltd . Thabiso Mokhesuoe (supra)*, We see no reason to deviate from this authority. While Applicant has attempted to suggest that the circumstances of the two cases are different and that they should be dealt with differently, We see no merit in the argument. In fact what Applicant

identifies as differences, We find to be similarities between the two.

22. We hold the above view for a simple reason that both matters that is, the *Astoria Bakery Lesotho (Pty) Ltd v Thabiso Mokhesuoe (supra)* and these proceedings, involve an application for stay pending proceedings before another court. The only difference, if at it is a difference at all, the proceedings before another court, are also outside this Court's jurisdiction. This is Our view, whether considered as a difference or similarity, makes Applicants position worse off.

23. At page 4 of the judgment in *Astoria Bakery Lesotho (Pty) Ltd v Thabiso Mokhesuoe (supra)*, the learned Judge held that,

“There is no certain time by which the proceedings in the Magistrate Court will come to an end. Accordingly, the effect of this request if granted is to render meaningless the judgment which the respondent has in his favour. The court before which the applicant's claim is pending has the mechanism for the enforcement of its own decisions. It follows therefore that there is no merit in this request and it is accordingly dismissed.....”

24. We hold the same view as above and Applicant has not given Us a good reason to deviate. We see no need to consider other arguments.

AWARD

We therefore make the following award:

- 1) That the application is dismissed;
- 2) Applicant is ordered to give effect to the award of the DDPR within 30 days of issuance herewith failing which it shall be acting in contempt.
- 3) No order as to costs.

**THUS DONE AND DATED AT MASERU ON THIS 11th AY OF
MAY, 2015**

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

MR. KAO

I CONCUR

MRS. MOSEHLE

I CONCUR

FOR APPLICANT:

ADV. LOUBSER

FOR RESPONDENT:

ADV.

MOLAPO