

SOUTH AFRICA / JUDGMENT

## Seloba v Premier, Limpopo and Another (J445/20) [2022] ZALCJHB 372 (8 December 2022) [2022] ZALCJHB 372

COURT

Labour Court Johannesburg

BEFORE

Baloyi

CASE / FILE NUMBER

J445/20

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### Source record

THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no. J445/20

In

the matter between:

PHUTI

PHILLEMONT SELOBA

Applicant

and

THE

PREMIER, LIMPOPO

First

Respondent

THE

DIRECTOR-GENERAL, LIMPOPO

Second Respondent

Date

heard: 15 November 2022

Date

delivered: 08 December 2022

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**JUDGMENT****BALOYI AJ****Introduction**

1. That the arbitration award dated 10 February 2020 be made an order of the Court is the main prayer in the application initiated by the applicant. Further prayers include an order directing the respondents to implement the arbitration award with immediate effect, payment of the award amount with interest, declaring the decision to transfer the applicant wrongful, unlawful, null and void as well as costs.
2. The application is opposed and is met with a counter-application. The respondents are in reconvention seeking an order declaring a set-off in respect of the amount which the respondents believed is due to them arising out of cost orders made in their favour.

**Background**

3. On 06 November 2018 the second respondent placed the applicant on suspension pending a disciplinary action. The disciplinary hearing first sat in December 2019 and due to various issues that unfolded, amongst others, preliminary points raised by the applicant, it was postponed several times. In May and June 2019, the applicant filed two applications seeking orders that his suspension be lifted and interdicting the disciplinary hearing respectively. The applications were dismissed with costs.
4. In February 2020 the applicant obtained an arbitration award issued by the General Public Service Sectoral Bargaining Council, in terms of which the first respondent was found to have committed unfair labour practice. The first respondent was consequently ordered to uplift the suspension. Furthermore, the first respondent was ordered to pay the applicant R261 669-00 which was an equivalent of four months remuneration.
5. The applicant demanded compliance with the award. From the correspondence attached to the founding affidavit, the first respondent indicated its willingness to lift the suspension and placing the applicant to a different position. In so far as the monetary award is concerned, the first respondent raised an issue of set-off relying on the bills of costs that were yet to be taxed. The total amount of the bills of costs was in the sum of R267 968-30. This effectively meant that the applicant was instead indebted to the first respondent a difference of R6000-03 in light of the first respondent's claim being greater than that of the applicant.
6. The first respondent ultimately dismissed the applicant on 12 May

2020. The applicant filed this application on 19 May 2020. The issue of set-off based on the untaxed bills of costs remained the main point in the respondents' opposition. This went to an extent of respondents posting a counter-application seeking an order that it be declared that the claim in terms of the arbitration award be set-off against the amounts appearing in the untaxed bills of costs.

R267 968-30 appeared in the respondents' notice of counter-application dated 18th June 2020 to which the answering affidavit was attached.

7. The applicant opposed the counter-application contending that the respondents committed an unlawful act by resorting to self-help which is contrary to the provisions of section 34 of Basic Conditions

of Employment Act.

8. A new notice of motion dated 02 November 2021 together with a supplementary affidavit were filed by the respondents. The taxed bills of costs were attached to the supplementary affidavit with the notice of motion reflecting the sum of R214 920-70 as the amount to be set off from the award amount of R261 968-30. It is further alleged in the supplementary affidavit that the respondents have paid the difference of R46 748-30 over to the applicant. As such, any form of indebtedness between the parties is extinguished. Nothing is placed on record through the papers or oral submission to the effect that the respondents were amending their original notice of motion and/or attempting to seek leave of the Court to supplement their papers.

9. On the date of the hearing of this application it was brought to the attention of the Court that the applicant has withdrawn his application. It was submitted that the notice of withdrawal of the application was filed some months prior to the date of hearing. This was confirmed by the respondents' counsel. The withdrawal appeared to be a wise move taken by the applicant. All orders sought, with exception of that sought in the main prayer were mainly aimed at asking the Court to basically enforce the award. Despite this development, the respondents persisted on proceeding with the

counter-application.

Evaluation

10. It is of great importance to first deal with the conduct of proceedings in this application, that is, the respondents' filing of a new notice of motion and supplementary affidavit without considering an amendment or seeking leave of the Court for the admission of the supplementary affidavit to the record.

11. In terms of Rule 7 of the Rules of conduct of proceedings in this Court, similarly with Rule 6 of the Uniform Rules only three sets of affidavits are provided for, that is; founding, answering and replying affidavits. With the existence of well-developed case law on this subject, it goes without any debate that the filing of further affidavits is not prohibited.

However, a party wishing to do so has to seek indulgence from the Court. When doing so, must demonstrate exceptional circumstances or special circumstances. In *Standard Bank of SA Ltd v Sewpersadh and Another*[1], the Court held that:- ‘clearly a litigant who wished to file a further affidavit must make formal application for leave to do so. It cannot simply slip the affidavit into the Court file (as it appears to have been the case in the instant matter). I am of the firm view that this affidavit falls to be regarded as pro non scripto.’ (See also *Bangtoo Bros v National Transport Commission and Others*[2]).

12. In terms of the above authorities, it is incumbent upon a party wishing to file a further affidavit to make necessary application for admission of same accompanied by a satisfactory explanation to the effect. The practice in this Court is also on par with that of the High Court which is primarily aimed at ensuring that rules are consistently complied with. In *Fais Ombud v CCMA & Others*[3], the Court had this to say in paragraphs 40 and 41.

*“[40] In summary: there must be a proper and satisfactory explanation as to why the facts or information contained in the additional affidavit were not placed before the Court earlier and the Court must be satisfied that no prejudice is caused to the other party that cannot be remedied by an appropriate order as to costs.*

- [41] In casu the Applicant has not made any attempt whatsoever to seek leave from this Court to admit a further affidavit and there is no satisfactory explanation as to why the facts the Applicant now seeks to introduce, were not placed before the Court earlier. In fact, the Applicant filed a further affidavit, without seeking leave from this Court to do so and acted as if it is of right entitled to file a further affidavit. That is not the case.”
13. Similarly, this matter is plagued by the same ailment, the respondents, despite being represented elected to quietly file the supplementary affidavit with a second notice of motion without attempting to put up an explanation for such a move. Without such explanation, this Court will not be in a position to exercise the necessary discretion under the circumstances. The Court is therefore compelled to determine the matter based on the papers filed prior to the filing of the second notice of motion and the supplementary affidavit.
14. Turning to the respondents’ case about the set-off principle. Correctly so, as argued on behalf of the respondents, set-off has common law origins. Section 34 of the Basic Conditions of Employment Act clearly gives a legislative regulation of the principle with conditions attached thereto. What is significant and relevant to this matter is a deduction from the employee’s remuneration and whether the employee’s indebtedness arose during the course of employment and due to the fault of the employee.
15. The requirements of set-off to be considered in terms of common law are clearly summarized in *Ranksharp SA (Pty) Ltd v Kleinman*[4] as follows:
  - i. The debt must be owing between the parties in the same capacity,

- ii. The debts must be of the same kind,
  - iii. The reciprocal debts must be due and enforceable
  - iv. Both debts must be liquidated in that they are capable of speedy and easy proof.”
16. The indebtedness arising out of the arbitration award and cost order arose out of litigation of a labour dispute between the parties. This is clearly ascertainable that the origin of mutual indebtedness is of the same capacity. In this regard, there is no doubt that the first requirement is met.
17. It is however imperative to caution at this point that the requirements of set-off are not considered in isolation but cumulatively. Having overcome the first hurdle does not mean that the respondents have established a case to justify the set-off. Can it be said that both the debts are due and enforceable to satisfy the second part of the requirements of set-off? Pure facts of the matter do not suggest so in respect of both debts. The applicant relies on the arbitration award which is a final binding document ordering the first respondent to make payment of R 261968-30 to the applicant by no later than 15 May 2020. The same cannot be said about the untaxed bills of costs.
18. The respondents still bear the onus to establish that their set-off claim is based on the liquidated amount. The untaxed bill of costs has been disputed by the applicant to a point that it was a subject of opposed taxation before the taxing master after the filing of this application. In Penny 600 SA Holdings (Pty) Ltd<sup>[5]</sup> the Court unpacked this principle at paragraph 19 – 20 as follows:
- “19. The above principles apply equally to the set-off of a liquidated debt against a judgment debt or an award of the CCMA. This was demonstrated in the matter of The Government v Regna-Adwel Business Machines Africa (Pty) Ltd 1970*
- (2) SA 428 (T) where a warrant of execution issued against the respondent company for failure to comply with the judgment debt outstanding payments in lieu of leave were set aside due to the fact that the company had set the judgment debt off against a liquidated debt. Similarly an employer is entitled to set-off any claims which it may have against any amount owing by that employee. This notwithstanding, and notwithstanding the dicta in Keulder v Minister of Finance 1953
- (2) SA 101 (N) AT 104H to the effect that an employer may set off money owing to it from an employee’s salary, section 34(1) of the Basic Conditions of Employment Act, 75 of 1997 determines that an employer may not do so unless the employee in writing agrees to the deduction of a debt specified in the agreement, or the deduction is required or permitted in terms of law, collective agreement, court order or arbitration award.
19. The requirements for a liquidated debt were set out in Treasurer-General v Van Vuuren 1905 TS 582 at 589:

*“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 Jurist Quaest, 1 c 50), if not admitted by the other side it must be capable of prompt and speedy proof.”*

20. The respondents’ arguments demonstrate that they carry the same sentiment. Further reliance was placed on *Bardopoulos and Macrides v Militiadons*[6] that the bill of costs submitted to the Taxing Master and taxed accordingly brings about the debt being capable of speedy and easy

proof. This is surely the correct means of satisfying this requirement[7]. As far as this application is concerned, it cannot be said that the respondents satisfied this requirement. The set-off was effected based on the amount of the untaxed bill of costs that was greater than the award amount, thus leaving the applicant still indebted to the respondents for the difference. The claim and the amount were disputed by the applicant. The argument based on the revised amounts in the supplementary affidavit that I have already ruled against its admission to the proceedings came after a horse has bolted. The respondents are bound to stand and fall by their founding papers which entirely rested the application on an unliquidated amount. Even if the supplementary affidavit was to be considered as being properly before the Court, the respondents had already flexed their muscles based on the wrong application of the set-off principle, which does not satisfy the above requirements.

21. On this note, there is no other conclusion to make than finding that no case is made for a set-off claim relied upon by the respondents. The counter-application falls to be dismissed for the reasons set out above.

#### Costs

22. Although there is no employment relationship between the parties to be nurtured, it will not in my view be within the confines of law and fairness to make a cost order. This is an application that was made in reaction to an ill-conceived application that the applicant withdrew. The parties deserve closure to the perpetual litigation which is centred on the same issue. It will therefore be in the interest of justice that each party should pay its own costs.

#### Order

23. In the premises, the following order is made:
1. The counter-application is dismissed.
  2. There is no order as to costs.

BALOYI AJ

Acting Judge of the Labour Court of South Africa

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Appearances:

For the applicant: Mr K Mahlase of VTM Sekhukhuni Attorneys For the first respondent: Adv. L Makua Instructed by State Attorney, Johannesburg

[1] (2005)(4) SA 148 C at par 13.

[2] 1973 (4) SA 667 (N) - the Court held that a litigant who seeks to serve an additional affidavit is under a duty to provide an explanation that negatives mala fides or culpable remissness as the cause of the facts and/or information not being put before the court at an earlier stage. There must furthermore be a proper and satisfactory explanation as to why the information contained in the affidavit was not put up earlier, and what is more important, the court must be satisfied that no prejudice is caused to the opposite party that cannot be remedied by an appropriate order as to costs.

[3]

(2021) 42 ILJ 2603 (LC) (27 August 2021)

[4]

(2012) 33 ILJ 2937 (LC) at par 32.

[5]

(2003) 24 ILJ 967 LC.

[6]

(1947) 4 SA 860 W

[7] Herbstein and Van Winsen, The Civil Practice of the High Court of South Africa, fifth edition Volume1 at page 995 it is said: The purpose of taxation was really twofold: first, to fix the costs at a certain amount so that execution could be levied on the judgment and, secondly, to ensure that the party who was condemned to pay the costs did not pay excessive costs and that the successful party did not receive insufficient costs in respect of the litigation culminating in the order,

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