



REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN
JUDGMENT

Case no: C 143/2012

In the matter between:

**RANK SHARP SOUTH AFRICA
(PTY) LTD**

Applicant

and

ROBIN KLEINMAN

Respondent

Heard: 17 May 2012

Delivered: 24 May 2012

Summary: Set-off – settlement agreement at CCMA made order of court – employer setting amount off against alleged debt on loan account – stay of execution refused.

JUDGMENT

STEENKAMP J

Introduction

- 1] The applicant seeks an order setting aside, alternatively suspending, a writ of execution on the basis that the underlying debt has been discharged through set-off.

Background

- 2] The respondent was an employee, director and shareholder of the applicant. He was dismissed for operational requirements. He referred an unfair dismissal dispute to the CCMA. He also claimed severance pay.
- 3] At conciliation on 12 October 2011, the parties signed an agreement of settlement under case number WECT 10071-11. The applicant was represented by its current attorney of record, Neville R Cohen; and the respondent by his attorney of record, Michael Bagraim.
- 4] Sadly, these two attorneys – both of whom were present at and active in the negotiations leading to the settlement agreement – now proffer conflicting versions as to whether a further, oral, side agreement had been reached at the same time. It is indeed unfortunate that two attorneys should allege that their counterpart is not telling the truth; but such are the disputes before this court. Distasteful as it is, those are the allegations before me.
- 5] The relevance of the existence – or not – of the side agreement arises in the context of an application to stay a writ of execution. The writ was issued pursuant to the settlement agreement. In terms of that agreement, the applicant had to pay an amount of R180 000 to the respondent. It did not do so. Instead, it argues that it had set off that amount against an amount of R505 946, 88 owing to it by the respondent arising from a loan account the respondent had with the applicant.
- 6] The settlement agreement reads in part as follows:

“1. The respondent [Rank Sharp] agrees to pay the applicant [Kleinman] the amount of R180 000 (One Hundred and Eighty Thousand and Rand) by

no later than 31 October 2011;

2. The amount in paragraph 1 hereof is subject to tax deductions as directed by the receiver of revenue;

3. The amount in paragraph 1 has been calculated on the basis that applicant was employed by respondent for a period of 13 years and has been paid 13 weeks' severance pay;

4. The payment is in full and final settlement of all labour claims applicant may have against the respondent arising from his employment;

5. The settlement does not compromise any claim applicant has qua shareholder of respondent nor any commercial claims respondent may have against the applicant;

6. The remaining terms of this agreement are as provided for in the pro forma settlement agreement / award to which this document is an Annexure."

- 7] The "pro forma" agreement referred to is the standard form used by the CCMA. In that part of the agreement, under the heading "method of payment", it is stated that "payment will be deposited by the respondent [i.e. Rank Sharp] into the applicant's [i.e. Kleinman's] bank account".
- 8] Despite this agreement, the applicant (Rank Sharp) did not pay the respondent (Kleinman). As a result, the respondent obtained a writ of execution on 6 February 2012. The applicant now seeks to have that writ of execution stayed or set aside. It argues that the debt it owes to the respondent was discharged by way of set-off against his loan account.

The claim

- 9] The applicant alleges that the respondent had a loan account with it and that he owes it an amount of R505 941, 68 in terms of that account.
- 10] The applicant has attached bank statements showing that numerous private expenses for the respondent were paid from the applicant's business account. These included payments to the respondents daughter,

Ms Koetser; his domestic worker, Ms Oor; his Diner's Club card; personal expenses incurred on another credit card; payments made out of petty cash on his instructions; and payments made in respect of his private business interests, namely Green Bubble and Home Direct.

11] Although the status of the so-called loan account and the amounts owing are in dispute, the respondent does not deny that the applicant paid for certain of his private expenses. He alleges that they were repaid to the applicant by way of fixed monthly payments allocated from his salary. I shall nevertheless direct the registrar to make a copy of this judgement available to the South African Revenue Services.

12] On 3 November 2011 the applicant's financial director, Stewart Welsh, sent the respondent an e-mail message in the following terms:

'Dear Mr Kleinman

I refer to the meeting held on 31 October 2011, which meeting you failed to attend despite due notice. The remaining directors have resolved to claim the amount due by you to the company (in respect of your loan account) by setting off the amount due to you in terms of the agreed CCMA award against the said loan account and recovering the balance from you. Should the aforesaid balance of R325 941, 68 (Three hundred and twenty five thousand nine hundred and forty one Rand and sixty eight cents) not be paid by close of business on Friday, 4 November 2011 summons will be issued against you without further notice."

13] The next day, on Friday 4 November 2011 – and clearly before close of business –the applicant did indeed issue summons for that amount against the respondent. The respondent did not respond to the e-mail. The applicant subsequently, on 7 March 2012, amended its declaration and attached further particulars about the alleged debts owed by the respondent. Those proceedings are pending before the Western Cape division of the High Court.

14] On 1 February 2012, the applicant's attorney of record, Neville R Cohen, wrote to the respondent's attorney, Michael Bagraim. He noted that Kleinman had procured a writ of execution in this court arising from the

settlement agreement of 12 October 2011. He also referred to the e-mail from Welsh to Kleinman of 3 November 2011 and asked for an undertaking that Kleinman would not execute upon the writ of execution.

15] Bagraim wrote back in the following terms:

"You will recall that we specifically debated the offset of the monies from the settlement proposals at the CCMA.

We took a lower among settlement on the basis that you weren't going to offset any alleged monies owing to Rank Sharp South Africa (Pty) Ltd.

We find the attempt to offset the monies now as being completely disingenuous. Please let us have your remarks on this as soon as possible."

16] Cohen responded in these terms on 5 February 2012:

"If there had been an agreement as alleged by you in your letter it would have been incorporated in the settlement agreement. There was no such agreement."

17] Bagraim retorted on 6 February 2012:

"We once again point out to you that we spent in excess of thirty minutes discussing your request to be able to offset the settle [*sic*] amount from the loan account and our final position of lowering the settlement amount was not to offset against the loan account. This discussion took place with you and your counsel with Robin Kleinman overhearing most of these discussions."

18] The skirmish ended on this unhappy note, with two officers of the court casting doubt on the other's version of events. On 23 February 2012, the applicant launched the current proceedings to stay the writ of execution.

The defences

19] The respondent does not accept that set-off had taken place, and hence opposes the application for a stay of the writ of execution. He contends that there was a collateral oral agreement not to set off the settlement

amount of R180 000 against the applicant's commercial claim against him based on the alleged loan account; and in any event, he claims that the debt is not liquidated.

- 20] I am loath to decide which of the two attorneys, Cohen or Bagraim, is telling the truth with respect to the existence or not of a collateral oral agreement. Fortunately, this case can be decided without the court having to do so. The basis for that decision is whether or not the respondent's debt to the applicant is indeed liquidated.
- 21] The respondent raised a further defence, and that is that the amount due constitutes "remuneration" and that no deductions are permissible in terms of s 34 of the Basic Conditions of Employment Act (BCEA).¹

Evaluation / Analysis

- 22] I shall first consider the defence under the BCEA. If that defence is a good one, *caedit questio*. If not, I need to consider whether there was a claim capable of set-off.

Basic Conditions of Employment Act s 34

- 23] Section 34(1) of the BCEA provides as follows:

"34. Deductions and other acts concerning remuneration.—(1) An employer may not make any deduction from an employee's remuneration unless—

(a) subject to subsection (2), the employee in writing agrees to the deduction in respect of a debt specified in the agreement; or

(b) the deduction is required or permitted in terms of a law, collective agreement, court order or arbitration award."

- 24] "Remuneration" is defined as:

"any payment in money or in kind, or both in money and in kind, made or

¹ Act 75 Of 1997.

owing to any person in return for that person working for any other person, including the State, and “remunerate” has a corresponding meaning”.²

- 25] In the settlement agreement, there is no agreement that any amount may be deducted. Mr *Crowe* argued that the amount due to Kleinman in terms of the settlement agreement constituted “remuneration” as defined. He based this argument on the fact that the agreement specifies that the amount payable is calculated on the basis of severance pay.
- 26] In terms of s 41 of the BCEA, an employer must pay to an employee who is dismissed because of operational requirements, “severance pay equal to at least one week’s remuneration for each completed year of continuous service with that employer.”
- 27] It will be immediately apparent that this formulation merely sets out the basis for the calculation of the statutory minimum severance pay, i.e. it must be “equal to” at least one week’s remuneration for each year of service – in this case, 13 years’ service.
- 28] In my mind, this formulation in s 41 of the BCEA does not equate the amount payable in terms of the settlement agreement to “remuneration”. Even if it is calculated on the basis of severance pay, it is an amount over and above the remuneration owing to the employee “in return for that person working for” the applicant. He was paid his monthly salary during his tenure in return for his work; the settlement amount, even if it is calculated on the basis of severance pay, is an amount owing to the respondent over and above his “remuneration” as defined. Set-off cannot be equated to a prohibited deduction in terms of s 34 of the BCEA under these circumstances.
- 29] This defence cannot be upheld. The next question is then whether the amount allegedly due under the loan account was capable of set-off against the settlement agreement.

² BCEA s 1.

A liquidated claim?

30] Set-off operates automatically and not only after or as a result of a plea of set-off.³

31] If there was indeed a liquidated debt owing by the respondent to the applicant, once set-off had taken place, the reciprocal debt of R180 000 owing to the respondent by the applicant was discharged as effectively as if payment had been made.⁴

32] The requirements for set-off to operate can be summarised as follows:⁵

32.1 The debts must be owing between the same parties in the same capacity.

32.2 The debts must be of the same kind.

32.3 The reciprocal debts must be due and enforceable.

32.4 Both debts must be liquidated in that they are capable of speedy and easy proof.

33] In this case, it is common cause that the applicant owes R180 000 to the respondent in terms of the settlement agreement. The alleged reciprocal debt is disputed. But even though the debts are owing between the same parties, it is not in entirely the same capacity.

34] The settlement agreement specifies that the R180 000 is owing to the respondent in full and final settlement “of all labour claims” that the employee may have against the company “arising from his employment”. It further specifically records that it does not compromise any claim Kleinman has qua shareholder, nor any “commercial claims” the company

3 *Great North Farms (Edms) Bpk v Ras* 1972 (4) SA 7 (T); *Western Cape Housing Development Board v Parker* 2005 (1) SA 462 (C).

4 *Joint Municipal Pension Fund Transvaal v Pretoria Municipal Pension Fund* 1969 (2) SA 78 (T).

5 See *LAWSA* vol 19 (“Obligations”) para 244 and authorities there cited; *AAA Brick Co (Pty) Ltd v Coetzee* 1996 All SA 23 (B); 1996 (3) SA 578 (B); *Penny v 600 SA Holdings (Pty) Ltd* [2003] JOL 1422 (LC).

may have against him. It appears from the parties' own wording that they drew a distinction between "labour claims" arising from Kleinman's employment and dismissal – the subject of the CCMA dispute and settlement agreement – on the one hand, and "commercial claims" or "shareholder's claims" on the other hand. The alleged debt due under the loan account does not appear to be owing by Kleinman "in the same capacity" as the amount due to him in terms of the settlement agreement.

- 35] But even if it were, it is by no means clear the amount allegedly owing under the loan account is "due and enforceable"; much less that it is liquidated in the sense that it is capable of speedy and easy proof.
- 36] The applicant has not been able to show convincingly what the terms of the alleged loan account agreement were and when it became due and payable. Welsh says that, "at a time, date and place the [company] can no longer recall", Kleinman caused it to make certain payments to third parties on his behalf. He relies on a tacit agreement between the parties, and he does not know when and where it was concluded.
- 37] From the accounts and the affidavits before this court, the exact amount allegedly owing is by no means clear. Between the time of filing answering and replying affidavits, it differed by more than R147 000. The account attached to the applicant's papers starts off with a debit entry of R120 798, 91 that is not explained. In the financial statements for the financial year ending 29 February 2008, an amount of R28 929 is reflected as owing by the respondent; yet, in terms of the loan account, the amount of R120 078, 91 appears to be owing the very next day. The applicant offers an unsatisfactory explanation in reply that this is due to a dividend of R150 000 having been reflected on 31 March 2008, whereas it was actually declared in the previous financial year. But even then the amounts do not balance.
- 38] The respondent submits that it is entitled to a proper debatement of the account. I agree that, as it stands, the amount allegedly owing under the loan account is not clear and does not constitute a liquidated amount.

Conclusion

39] I am not satisfied that the underlying *causa* for the debt owing to the respondent by the applicant has been extinguished.⁶ As Ackermann J noted in *Le Roux v Yskor Landgoed (Edms) Bpk en andere*⁷:

“Die algemene reël is dat ‘n eksekusielasbrief tersyde gestel sal word as die lasbrief nie ondersteun of nie verder ondersteun word deur sy *causa* nie. Die *causa* is die skuld en die vonnis wat daarop verleen is.”

40] A court will generally grant a stay of execution where real and substantial justice requires it or where injustice would otherwise be done. The court has a discretion that must be exercised judicially.⁸

41] In this case, I am not persuaded that the court should exercise its discretion in favour of the applicant. In terms of the settlement agreement, the applicant had to pay the amount of R180 000 into the respondent’s bank account by 31 October 2011. The injustice occasioned to the respondent by the applicant’s refusal to do so outweighs any potential prejudice to the applicant.

42] The relief sought is in the nature of final relief. As Walsh states in his founding affidavit:

“The purpose of this application is to set the writ against the applicant aside...[and] interim urgent relief to immediately suspend the writ pending the outcome of this application.”

43] The applicant has not established a clear right. It suffers no irreparable harm. And in any event, it has an alternative remedy in the form of a pending High Court action.

44] In conclusion, the applicant is not entitled to a stay of execution.

6 See, in this regard, *Wichmann v Standard Bank van Suid-Afrika Bpk en andere* [2002] 1 All SA 558 (T).

7 1984 (4) SA 252 (T) 257.

8 *Santam Ltd v Norman & Another* 1996 (3) SA 502 (C) 505 E-F; *Strime v Strime* 1983 (4) SA 850 (C) 852 B-G.

45] Both parties have asked for costs to follow the result. I see no reason in law or fairness not to heed their request.

Order

46] The application is dismissed with costs, including the costs of the hearing on 29 February 2012.

Steenkamp J

APPLICANT: Adv P Tredoux

RESPONDENT: Instructed by Neville R Cohen.
Adv MA Crowe SC

Instructed by Bagraims attorneys.