

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN

DATE: 1 December 1999
CASE NUMBER: C 452/99

In the matter between:

LIONEL SMITH Applicant

and

POLYOAK (PTY) LTD Respondent

JUDGMENT

BASSON, J:

[1] This is an application for making an arbitration award an order of court in terms of section 158(1)(c) of the Labour Relations Act, 66 of 1995 ("the Act").

[2] The respondent has reinstated the applicant in its employ, but has refused to pay the backpay ordered by the arbitration. It now opposes the making of this award an order of court on the basis of the principle of set-off.

[3] The principle of set-off is a principle which has been widely applied in our law and described in Schiedhout v Union Government 1926 AD 286 at 289, as follows:

"The doctrine of set-off with us is not derived from statute and regulated by rule of court as in England. It is a recognised principle of our common law when two parties are mutually indebted to each other, both debts being liquidated and fully due, then the doctrine of compensation comes into operation - the one debt extinguishes the other pro tanto as effectually as if payment had been made. Should one of the creditors seek thereafter to enforce his claim, the defendant would have to set up the defence of compensation by bringing the facts to the notice of the court as indeed the defence of payment would

also have to be pleaded and proved. But compensation, once established, the claim would be regarded as distinguished from the moment the mutual debts were in existence together".

[4] See also in this regard, inter alia, the judgment in Joint Municipal Pension Funds v Pretoria Municipal Pension Funds 1969 (2) 87 TPD.

[5] The facts which presented themselves in the present matter were the following. The respondent instituted separate proceedings in the Magistrate's Court and was awarded a judgment by default. However, this judgment was rescinded later. This is the position which applies at the moment, that is, this matter is at present lis pendens in the Magistrate's Court.

[6] I believe that one could cogently apply Rule 22(4) of the Rules of the High Court to proceedings in the Labour Court in terms of Rule 11 which allows the Labour Court some leeway in determining its procedures.

[7] Rule 22(4) of the Uniform Rules of the High Court makes it possible for the postponement of judgment of one claim under this Rule, pending a decision of another counterclaim. I do not see any necessity of quoting Rule 22(4) as the contents thereof is well-known to all before Court.

[8] However, the question is whether Rule 22(4) of the Uniform Rules of the High Court can be utilised in circumstances where the counterclaim has to be decided in a different forum, namely, for instance, by the Magistrate's Court and not by the High Court or, as is the case in casu, by the Labour Court.

[9] In the informative judgment by Didcott J (as he then was) in Pareg v Shah Johan Cinemas (Pty) Ltd & Others 1981 SA 301 (Durban and Coast Division) the following dictum is to be found at 308B-E:

"Counsel told me that they had found no reported instance of the court's postponement of judgment on a claim ripe for adjudication, merely an order that proceedings in some other forum might be completed. This, Mr Law submitted, was unthinkable whether the forum in question was the Magistrate's Court, a different division of the Supreme Court or a foreign tribunal. To the list he added

arbitration. He conceded that once a reciprocal claim was involved, the case for delay was no weaker in equity on account of its prosecution elsewhere, but a deferment had drawbacks then, he maintained, which outweighed its equitable advantages. Without control over the parallel proceedings, lacking even firsthand knowledge of their progress, the Court would tend to lose touch with the situation. More important, indeed fatal altogether to the stratagem, was the impossibility in such circumstances of a simultaneous judgment on both claims which, when all was said and done, was the essence of the equitable solution. Far from synchronising the verdicts, the one claim's obstruction would usually result in the prior determination of the other. Potential prejudice instead of being eliminated would thus be shifted from the defendant to the plaintiff. The argument had marked force, I am inclined to think, when applied to proceedings truly separate in their forum" (emphasis supplied).

[10] Clearly, these counter-arguments have strong persuasive value and I am in respectful agreement with these views.

[11] In the event, the fact that the counterclaim is to take place in a separate forum, that is, the Magistrate's Court, over which this Court has no control, and which would result in prejudice to the applicant in that the Labour Court's judgment would be deferred or postponed, I find that the principle of set-off should not be applied in casu.

[12] In the event, the defence put up by the respondent should fail and in this application to make the arbitration award an order of court (and in view of the fact that only a part of this arbitration award has been adhered to) I make the following order:

1. The award issued by the commissioner in this matter, in so far as it applies to payment of backpay to applicant, is made an order of court in terms of section 158(1)(c) of the Labour Relations Act, 66 of 1995.
2. The respondent is ordered to pay the applicant an amount equal to the remuneration he would have earned from 13 September 1998 to 6 August 1999, plus interest at the legal rate.
3. The respondent is to pay the applicant's costs.

Basson, J