IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN

Case No:

J883/2001

In the matter between:

VILJOEN, JJ Applicant

And

NKETOANA LOCAL MUNICIPALITY First Respondent

CHARL JACOB VENTER N.O. Third Party

JUDGMENT

WAGLAY J:

[1] The Applicant was employed by the Respondent as a town clerk. He was suspended from his employment on the grounds that he was suspected of dishonest behavior and was ultimately dismissed on 16 July 1999.

[2] Applicant regarded his dismissal to be both substantively and

procedurally unfair and accordingly referred his dismissal to the Commission for Conciliation, Mediation and Arbitration (the ACCMA@) for conciliation and, thereafter, arbitration.

[3] The CCMA commissioner found that the dismissal of the Applicant by the Respondent was substantively fair but procedurally unfair and awarded Applicant compensation in the amount of R136 160.00 in an award handed down on 23 March 1999. The award required the Respondent to pay the said amount by 31 May 1999.

[4] Before the award aforesaid was handed down the Applicant=s estate was sequestrated. The Applicant was provisionally sequestrated on 6 August 1998 and finally sequestrated on 17 September 1998. The Applicant is yet to be rehabilitated.

[5] A month after the award was handed down by the CCMA the Respondent by letter addressed to the Applicant advised the Applicant that the compensation awarded by the CCMA was set - off against the amount owed by the Applicant to it and consequently no monies were payable by the Respondent to the Applicant.

[6] The Applicant now seeks for the CCMA award to be made an order of this Court in terms of s158 (1)(c) of the Labour Relations Act 66 of 1995 (the ALRA@). The Respondent opposes the application. One of the grounds upon which the application is opposed is based on the doctrine of effectiveness. According to the Respondent because the payment of compensation as set out in the award has been discharged by set-off, if this Court is to make the award an order of this Court such order will serve no purpose and be of no effect because it cannot be enforced and this violates the doctrine of effectiveness.

[7] Respondent=s further argument and based also on the doctrine of effectiveness, is that the recent amendments to the LRA render the award sought, superfluous because the amended sections of the LRA make the award handed down self-executing.

[8] The amendment, which Respondent seeks to rely upon, relates to the effect and enforceability of an arbitration award issued under the auspices of the CCMA. The relevant section being s143. This section in its unamended form read as follows:

A143. **Effect of arbitration awards**

(1) An arbitration award issued by a commissioner is final and binding

and may be made an order of the Labour Court in terms of section 158(1)(c), unless it is an advisory award.

(2) If an arbitration award orders a party to pay a sum of money, the amount earns interest from the date of the award at the same rate as the rate prescribed from time to time in respect of a judgment of debt in terms of section 2 of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), unless the award provides otherwise.@

[9] ss(1) of s143 is now replaced with the following amendment:

A (1) An arbitration award issued by a commissioner is final and binding and it may be enforced as if it were an order of the Labour Court,

unless it is an advisory arbitration award.@

[10] In addition to the above, the amendments introduce two new subsections:

A(3) An arbitration award may only be enforced in terms of subsection

(1) if the director has certified that the arbitration award is an award

contemplated in subsection (1).

(4) If any party fails to comply with an arbitration award that orders

performance of an act, other than the payment of an amount of money, any other party to the award may enforce it by way of contempt proceedings instituted in the Labour Court.@

[11] Based on the amendments as recorded above I find Respondent=s submission that the award handed down by the CCMA is self - executing problematic on a number of levels:

(a) the amendments to the LRA have left s158 (1)(c) in tact for current purposes B it is therefore still possible to have the arbitration award made an order of this Court in terms of s158 (1)(c). While it may be that this section would apply chiefly to private arbitration awards handed down in terms of the Arbitration Act (No 42 of 196(5)), there is nothing precluding a party to a CCMA award having it made an order of this Court.

(b) s143 (1) does not render every CCMA award self - executing: it is only those awards which the director of CCMA has certified as being an award in terms thereof as provided in ss(3). There is nothing before this Court indicating that the director has certified the award which Applicant seeks to make an order of Court, as

required by ss(3). The award in question here therefore does not fall within the self-executing provisions of the new s143 (as amended).

(c) in any event, the amendments in question do not apply to the matter before me. It is a well - known principle of statutory interpretation that legislation is intended by the legislature to only effect matters after its enactment unless the contrary appears from the context of the statute. (see Unitrans Passenger (Pty) Ltd t/a Greyhound Coach Lines v Chairman, National Transport Commission 1999 (4) SA 1 (SCA).

[12] Where the statutory provisions are procedural in nature they are said to operate

retrospectively on all matters that come before a Court after the passing of the statute. It has however now become acceptable that procedural provisions can and do impact on substantive rights and therefore emphasis has shifted from a formalistic identification of amendments as Aprocedural@ or Asubstantive@ to the more purposive criteria of whether or not the statutory provisions impact upon existing substantive rights and obligations. Where the amended provisions have an impact on substantive rights it is deemed that in the absence of the expression of the Legislature=s intention to the contrary, not to

have retrospective effect. See Unitrans (above) and National Iranian Tanker Co v MV Pericles GC 1995 (1) SA 475 (A) at 484 A-B.

[13] In the present matter, the provision in question operates to affect the substantive rights and obligations of the parties. The nature and effect of an award handed down under the auspices of the CCMA is changed by the amendments, altering the rights of the Applicant and the obligations of the Respondent. Bearing in mind the principles referred to above the amendment of s143 cannot be interpreted to apply retrospectively to the present matter.

[14] Respondent=s argument therefore that s143 as amended is applicable to the present matter and that the award is therefore self - executing is rejected.

[15] Turning then to the issue of set-off. Respondent firstly argues that this Court has no jurisdiction to hear the matter as it deals with set-off. This concern can be dealt with simply. The Applicant seeks to make a CCMA arbitration award issued in terms of s138 of the LRA an order of this Court in terms of s158 (1)(c) of the LRA. The Respondent raises the defence of set-off as one of the basis for its claim that the order sought violates the doctrine of

effectiveness due to set-off. The Respondent goes further in stating that the set - off should properly be dealt with by the Acivil courts@.

[16] Apart from the bald allegation that the Acivil courts@ alone have jurisdiction over the question of set-off there is nothing in the papers indicating why this Court does not have jurisdiction. This matter is concerned with making a CCMA award an order of court, as such it falls squarely within the jurisdiction of the Labour Court. In addition there is nothing whatsoever precluding the Labour Court from dealing with common law principles of law. It does so on a daily basis. s151 (2) of the LRA provides that:

> AThe Labour Court is a superior court that has authority, inherent powers
> and standing, in relation to matters under its jurisdiction, equal to that which a court of provincial division of the High Court has in relation to matters under its jurisdiction.@

[17] Respondent=s submission therefore that the Applicant should approach the High Court for a declaratory order as to whether he can enforce the award in light of the defence of set-off raised is unfounded and falls to be dismissed out of hand.

[18] With regard to whether there has been a set-off or not I shall deal with later. What needs to be dealt with before that is whether the Applicant as an unrehabilitated insolvent is entitled to personally

claim compensation in terms of s194 (1) of the LRA.

[19] For the record I might mention that Applicant=s trustee has been included in these proceedings as a third party.

[20] In general all property of an insolvent at the date of sequestration and all property subsequently acquired by or accruing to him or her during sequestration, vests in the Master of the High Court, and subsequently in the trustee, upon his/her appointment.

[21] The insolvent estate consists of all of the insolvent=s property as stated above. There are, however, a number of important exceptions to this rule, as appear in the Insolvency Act No 24 of 1936 (the AInsolvency Act@) as well as other statutory enactments. These exceptions include remuneration for work done: s23(9)) of the Insolvency Act stipulates that the insolvent may recover for his own benefit the remuneration or reward for work done or professional services rendered by or on his behalf after the sequestration of his estate; Pension monies: the insolvent may recover for his own benefit any pension to which he is entitled for services rendered by him, s23 (7); and compensation for personal injuries and defamation, s23 (8).

[22] With regard to compensation for personal injuries and defamation, the relevant part of s23(8) of the Insolvency Act provides:

> A The insolvent may for his own benefit recover any compensation for any loss or damage which he may have suffered, whether before or after the sequestration of his estate, by reason of any defamation or personal injuryY@

[23] In Santam Versekeringmaatskappy Bpk v Kruger 1978 (3) SA 656 (A) the Appellate division confirming the decision of the court a quo: 1977 (3) SA 314 (O) held that the words compensation for any loss or damage include not only general damages (compensation for pain and suffering, loss of amenities, etc) but also special damages (e.g. medical expenses and loss of earnings).

[24] In the decision handed down by the Appellate Division in the Santam matter (supra) the Court commented that the right of action for general damages Ais not transmissable and >cleaves to= the person who enjoys it - hence the appellant=s concession that the Respondent is entitled to claim general damages for his own benefit.@ (at 663 B-C)

[25] In the decision of the court a quo, Steyn J had the following to say

regarding the underlying reasoning for the various exceptions set out in the Insolvency Act:

A Die Wetgewer is deur middel van die Insolvensiewet primÍr daarop

ingestel om die insolvent en sy bate s van mekaar te skei, beheer van die boedel aan die kurator oor te dra en die bates na die krediteure op >n

sekere rangorde van voorkeur oor the skuif. Die liggaam van die insolvent word egter nie ook so oorgeskuif nie. Sy persoonlike integriteit

bly onaangetas en sy status gedeeltlik ook. Die beleid van die Wetgewer is klaarblyklik dat die insolvent as mens en nuttige landsburger gehoue moet bly en in staat moet wees om homself te rehabiliteer. Hy kan, met sekere uitsonderings en onderworpe aan sekere beperkings, nog steeds vryelik kontrakteer en moet slegs soveel van sy inkomste of verdienste aan sy krediteure afstaan as wat na die Weesheer se oordeel nie vir die onderhoud van hom en sy afhanklikes nodig is nie. In daardie sin is die insolvent is liggaam =n Abate@ wat by tot voordeel van homself en sy familie selfs na sekwestrasie kan aanwend. So bly hy na my mening daarop geregtig om na sekwestrasie sy liggaam gesond te hou en na siekte of besering weer sover en so spoedig moontlik tot volle krag en doeltreffendheid te laat herstel of

genees. Skade aan sy vlees of gees berokken, is gevolglik *sy* skade en vergoeding daarvoor kom hom persoonlik en vir eie voordeel toe.@

at pg 317 C-F.

[26] The above passage was referred to with approval by the Appellate Division. Miller JA expressed at 664 D-G, the following:

AYThe need not to leave the insolvent destitute of means whereby to

support himself and his dependant is recognized by Roman-Dutch law (see, eg. *Voet* 42.3.8), and the pattern of South African legislation shows that not only has the insolvent for very many years been entitled to retain, to the extent reasonably necessary for the support of himself and his dependants, money which is derived from specified sources. (Section 21 (3), (4) and (5) of the 1916 Act and the comparable sections of the current Act.) The sources so specified relate not to his business, trade or occupation but to circumstances personal to him, such as his right to receive a pension, or damages suffered by reason of bodily or other injuries he has personally sufferedY@

[27] The decision in Santam (supra) makes it clear that the exception in s23 (8) of the Insolvency Act relates to injuries suffered by the

insolvent personally which Acleave@ to him/her and which, due to their personal nature are not transferable as an ordinary property right. Compensation for these types of personal loss does not fall within the general insolvent estate and may therefore be claimed personally by the insolvent for his own benefit.

[28] The next issue, and an issue which has been the subject matter of some debate is whether or not the term Apersonal injury@ means injury affecting the rights of personality: see Smith C The Law of Insolvency (3ed) 91. In De Wet NO v Jurgens 1970 (3) SA 38 (A) the Appellate Division considered what was included in the definition of the words Apersonal injury@ as they appear in s23 (8) of the Insolvency Act, more specifically, the court was called upon to determine whether an action for adultery (contumelia) and alienation of affection (loss of consortium) fell within the ambit of this section.

[29] The court in that matter found that, although the ordinary, everyday meaning of the words Apersonal injury@ refer to bodily injury, the terms could be used in a wider sense, which would not be limited to physical injury alone. The court went on to hold that the context of this section supported the wider meaning:

A YDit is egter hoogs onwaarskynlik dat die Wetgewer, vir sover

hy bedoel het dat vergoeding vir liggaamlike beserings geëis kon word, so =n enge betekenis van die woord Aletsel@ in gedagte kon gehad het, want dit is moeilik om te begryp waarom by vergoeding wou beperk het tot gevalle waar daar verwondings of kwetsure was. M.i. moet dus aanvaar word dat die Wetgewer nie bedoel het om Aletsel@ in sy geheel enge betekenis te gebruik nie. Uit die woordeboekbetekenisse waarna hierbo verwys is, wil dit verder blyk dat in Afrikaans, altans, Aletsel= ook =n wyer betekenis as liggaamlike besering het, al is dit dan ook >n minder gewone betekenis. Vgl. Abeskadiging@ (*Kernwoordeboek)*, Anadeel, skade@ (*H.A.T.*) A,damage,harm@ (*Tweetalige Woordeboek*) en Ahurt, damage, injury@ (*Groot Woordeboek*)@

at 50 C-E.

[30] The Court thus held that the term Apersonal injury@ was not limited to injuries of a physical nature, stating at page 53 A-C:

A In verband met die vraag of =n enge of wye betekenis aan Apersoonlike letsel@ gegee moet word, wil ek ten slotte byvoeg dat dit na my mening onwaarskynlik is dat die Wetgewer sou bedoel het om die skuld-eisers van =n insolvent geregtig te maak op geld wat hy ontvang om hom te vergoed vir geestelike leed wat hy weens die een of ander persoonlikheidskrenking gely het. Dit is m.i. ook onwaarskynlik dat die Wetgewer sou bedoel het

om vergoeding wat t.o.v. beserings aan =n insolvent se liggaam betaal is, teen sy skuldeisers te beskerm, maar nie ook geld wat ter vergoeding van geestelike leed betaal is nie. Ek kan aan geen rede dink waarom die Wetgewer op hierdie wyse sou wou onderskei het nieY@

[31] It should be noted that the Appellate Division, in coming to the above finding, explicitly considered the matter of Ex Parte Wood 1930 SWA 117, to which this Court was referred by counsel for the Respondent. In the Wood case, Bok J held that the term Apersonal injury@ did not include an insult, however it should be noted that the section in question in that matter was s21 (4) of the Insolvency Ordinance 1928 (SWA), which provided that an insolvent could sue in his own name for any damages claimable Aby reason of any insult or personal injury@. The court there, therefore while accepting that Apersonal injury@ could bear a wide meaning, adopted a narrow approach because the Insolvent could in any event base his claim on the Ainsult@ provision in that Act. The court stated:

A In its widest possible sense, personal injury would include an insult, and as it is specially enacted that besides reason of a personal injury the insolvent can also sue by reason of any insult, it seems probable that the word injury is here used in a narrower

sense.@

[32] The court=s finding in Wood cannot therefore affect the interpretation set out in De Wet and accordingly the term Apersonal injury@ as used in s23 (8) of the Insolvency Act should be interpreted broadly and should not be limited to physical injury alone.

[33] Having determined that compensation awarded consequent upon personal injury does not form part of the insolvent estate and that personal injury is not limited to physical injury, I need to determined what is the nature of compensation awarded in procedurally unfair dismissal disputes. This enquiry concerns the application of s194 (1) of the LRA (now amended) which, at the relevant time stated:

A(1) If a *dismissal* is unfair only because the employer did not follow a fair procedure, compensation must be equal to the *remuneration* that the *employee* would have been paid between the date of *dismissal* and the last day of the hearing of the arbitration or adjudication, as the case may be, calculated at the *employee=s* rate of *remuneration* on the date of *dismissal*. Compensation may however not be awarded in respect of any unreasonable period of delay that was caused by the *employee* in initiation or

prosecuting a claim.@

[34] The nature and basis of compensation award under this section was after some initial controversy finally settled by the Labour Appeal Court in the matter of Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union (1999) 20 ILJ 89 (LAC). In this matter the Court held that once a decision was made to award compensation as a remedy in circumstances of dismissal which are found to be procedurally unfair, s194 (1) of the LRA sets out how the amount of compensation must be calculated. However, with regard to the nature of compensation under s194 (1) of the LRA the Court had the following to say:

A[41] The compensation for the wrong in failing to give effect to an employee=s right to a fair procedure is not based on patrimonial or actual loss. It is in the nature of a *solatium* for the loss of the right, and is punitive to the extent that an employer (who breached the right) must pay a fixed penalty for causing that loss. In the normal course a legal wrong done by one person to another deserves some form of redress. The party who committed the wrong is usually not allowed to benefit from external factors which might have ameliorated the wrong in some way or another. So too, in this instance. The nature of an employee=s right to compensation may be exercised in

circumstances where the employer has already provided the employee with substantially the same kind of redress (always taking into account the provisions of s 194(1)), or where the employer=s ability and willingness to make that redress is frustrated by the conduct of the employee.@

[35] An award of compensation in terms of s194 (1) is therefore not an award of damages in the contractual sense, but rather a combination of solatium for the employee and punishment against an employer for unfair treatment in the employment context.

[36] The nature of solatuim in the context of the actio injuriarum has been expressed in the following terms:

ATwo basic civil remedies are available to a person to protect his or her personality rights: he or she can apply for an interdict restraining or prohibiting the infringement of these rights or bring an action to recover damages for an impairment of reputation, dignity (including privacy, or physical integrity).

AAn award of damages under the actio injuriarum, serves two broad purposes: vindication of the plaintiff=s personality and providing him or her with a solatium (or solace) for wounded

feelings. The objective of the plaintiff is to compensate for impairment of personality rights.

AThe remedy for damages under the actio injuriarum is a personal one. It is not transmissible, on the death of the plaintiff, to his or her heirs or estate, or, on the death of the defendant, against his or her heirs or estate, unless the closing of pleadings stage (litis contestatio) has been reached. The Aquilian action, in contrast, is transmissible both ways, even prior to the commencement of pleadings@

Burchell J Personality rights and Freedom of Expression: The Modern Actio Injuriarum 435.

[37] The actio injuriarum is not limited to defamation but includes injury to property, dignitas and other rights. While it is not necessary to postulate whether the Labour Appeal Court in Johnson & Johnson (supra) intended to fit s194 (1) compensation under the banner of the actio injuriarum by the use of the word Asolatium@ or simply as a statutory claim for compensation in circumstances where an employee has been unfairly dismissed, it is clear that compensation flowing from an unfair dismissal claim is payable as a solatium (solace) for the unfair treatment of the employee.

[38] There would therefore seem to be no difference in principle between a solatium under the actio injuriarum and compensation awarded in terms of s194 (1) of the LRA: both are awarded as a result of some injury (unfair treatment in the course of dismissal in the case of the latter) to the applicant/plaintiff personally. There is also, in the case of compensation awarded in terms of s194 (1) of the LRA an element of punishment, meted out against the employer who has been unfair, which is also present under the actio injuriarum.

[39] Having regard to the above it is not necessary to decide whether s194 (1) compensation falls under any of the various banners of the actio injuriarum. The decisive question is that of whether an action for unfair dismissal constitutes Apersonal injury@ within the meaning of s23 (8) of the Insolvency Act i.e. does the unfair treatment inherent in a procedurally unfair dismissal amount to a Apersonal injury@ within the expanded meaning of s23 (8) of the Insolvency Act?

[40] The answer to the above is that it does. An unfair dismissal constitutes an injury to the personality of an employee in a very personal sense because it affects the livelihood and the future

employment prospects of an individual. Compensation awarded in terms of s194 (1) of the LRA is aimed at providing solace to the employee personally for the unfair treatment she or he has suffered at the hands of the employer. In the light of wider meaning of s23 (8) of the Insolvency Act the only conclusion that must be drawn is that compensation under s194 (1) constitutes compensation for a Apersonal injury@ within the meaning of that section.

[41] In the circumstances the compensation award handed down in favour of the applicant is claimable by the Applicant personally notwithstanding his status as an insolvent. This then brings me to the issue of set - off as claimed by the Respondent.

[42] Set - off or compensatio is a method whereby contractual and other debts may be extinguished. It operates where two parties are reciprocally indebted to each other. If the debts are equal, both are discharged; if they are unequal, the smaller is discharged and the larger is reduced by the amount of the smaller. See Christie The Law of Contracts (4ed) 552.

[43] The basic conditions for set-off are:

(a) the existence of mutual indebtedness between the parties;

(b) that both debts are liquidated and same in nature;

(c) that both debts are fully due and legally payable.

[44] As soon as the above conditions are fulfilled set-off operates automatically. Where it is relied upon as a defence, it should be pleaded in order to prove its occurrence, but once proved it will be accepted as operating from the moment of the debts mutual existence. In Schierhout v Union Government 1926 AD 286 at 289-290 the court had the following to say in respect of the doctrine of set - off:

AY When two parties are mutually indebted to each other, both debts being liquidated and fully due, then the doctrine of compensatio 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

compensatio by bringing the facts to the notice of the Court B as indeed the defence of payment would also have to be pleaded and proved. But, compensatio once established, the claim would be regarded as extinguished from the moment the mutual debts were in existence together.@

[45] It is therefore acceptable for Respondent to raise the defence of

set-off in these proceedings. It was also possible for Respondent to institute separate proceedings at a later date raising set-off against the judgment debt. This would however have had adverse costs implications for the Respondent.

[46] In the present matter however set-off has to be considered in the insolvency context i.e. what is the effect of the sequestration of the Applicant=s estate on the Respondent=s claim of set-off?

[47] To answer the above question one needs to consider the insolvent estate. Upon the sequestration of the estate of the insolvent, a concursus creditorum is instituted. This, according to Walker v Syfret NO 1911 AD 141 at 166, means that:

> Athe hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered with regard to estate matters by a single creditor to the prejudice of the general body. The claim of each creditor must be dealt with as it existed at the issue of the order.@

[48] One of the effects of concursus creditorum is that a set-off, the requisites for which materialize only after the institution of the concursus, cannot occur. (see Meskin Insolvency Law 5-50 (1)

and the authorities cited at footnote 4). In the case of compulsory sequestration of an estate the concursus is instituted once the order for provisional sequestration of an estate has been made. Where, however a set-off is accomplished before the sequestration it will not be affected by the sequestration subject to s46 of the Insolvency Act which empowers the trustee of the insolvent estate to disregard the existence of a purported set-off under certain circumstances.

[49] In Thorne & another v The Government 1973 (4) SA 42 (T) it was held at 45 F-G that:

A In regard particularly to the question of set - off, the rule is that, once a *concursus creditorum* has been established, there can be no compensation unless mutuality between the respective claims existed at the date of the orderY[authorities cited]Y The mutuality here required is that the reciprocal debts both existed and that both were liquidated and payable, before the *concursus creditorum* was established.@

[50] The court accordingly held that, as the two claims relied on had arisen after the liquidation order, the requisite Amutuality@ was not present before the concursus. The court therefore ordered that the respondent was not entitled to withhold payment of the

amount purportedly set - off. In the subsequent appeal of this matter the Appellate Division in The Government v Thorne and Another 1974 (2) SA 1 (A) held at 9 E that:

A The breach occasioned by the abandonment of the Y contract occurred only after liquidation had supervened. Once liquidation of the company occurred, appellant=s Arights of deduction@ (which, for the reasons stated above are in law no more than a right to set-off) deriving from the breach of the Y contract were no longer effectiveY@

[51] In Roman Catholic Church (Klerksdorp Diocese) v Southern Life Associates Limited 1992 (2) SA 807 (A) the court at 815 A - C confirmed the above position thus:

AThe effect of the winding-up order was to established a concursus creditorumY Thereafter there could be no set-off unless there existed, at the date of the order mutuality between respective claims: or reciprocity of debts as it is also calledY In the present case there was no mutuality between respective claims Y prior to liquidation in as much as neither the loan nor the policy had become due and payable as at the date of the winding up order.@

[52] The above demonstrates that the requirements for set-off must be met prior to the sequestration in order for it to be effective. Where a debt against a soon - to - be -insolvent party arises, in the absence of a counter - debt coming into existence prior to the date of the provisional sequestration order, the creditor is obliged to submit its claim along with all the other creditors, to be dealt with in accordance with the general concursus creditorum.

[53] In the matter before me there is nothing to indicate that the debt in question was proved against the insolvent estate by the Respondent. It is not open for a creditor to neglect to prove its claim against the insolvent estate and then claim set-off upon debt owed by it to the insolvent after the sequestration of his or her estate. Where the set-off is composed of debts which arose prior and subsequently to sequestration respectively, there cannot be said to be the requisite mutuality or reciprocity of indebtedness. In other words the requirement that the debt exist between the same parties is jeopardized once the trustee is appointed to the insolvent estate.

[54] De la Rey E Mars: The Law of Insolvency (8ed) 347 (and the authorities cited there) properly states that:

AThe mutuality of indebtedness essential for the operation of set

- off must have existed prior to the sequestration, and once it is shown the court will not by extensive interpretation of the law deprive a creditor of the right of set - off.@

[55] The Respondent in this matter argued that both the debts in question Abecame mutually payable after sequestration@ and relying on the passage from Mars: The Law of Insolvency (8ed) 348 which states:

A Where both debts in respects of which set - off is claimed come into existence after sequestration, there is nothing to prevent its operating@

contended that set-off can take place in respect of debts which arose after sequestration. The broad interpretation which Respondent seeks to give this passage is not warranted. A proper reading of the relevant passages of Mars makes it clear that operation of set - off for debts arising after sequestration are very limited. The specific examples appearing in that authority is set - off between the trustee of the insolvent estate and a creditor, in situations where there is no prejudice to other creditors. Debts arising after the sequestration of the insolvent=s estate will in the ordinary course be against the trustee of the estate, in whose charge the estate is vested.

[56] The only exception is where the insolvent is permitted by her/his trustee to trade or carry out his profession. The debts that arise within the course of such trade or professional practice, after the consent has been granted by the trustee, should be able to be set-off.

[57] Even if I assume that Respondent=s submission that set - off in respect of debts that arose after the insolvency can take place is of some merit, Respondent must satisfy this Court that the debts in question are capable of being set-off and that both arose after the sequestration of the Applicant=s estate, i.e. as the Respondent is the party relying on set - off, the onus is on it to prove that both debts arose after the sequestration of the Applicant=s estate and that there is no bar to the one claim being set-off against the other.

[58] The Applicant was provisionally sequestrated on 6 August 1998 and finally on 17 September 1998. The arbitration hearing commenced on 5 March 1998 continued with a number of postponements inbetween, and the award was handed down on 23 March 1999. The award required the Respondent to pay compensation to the Applicant by 31 May 1999. The debt owed to the Applicant thus arose after the Applicant=s sequestration.

[59] For Respondent to succeed in its allegation that both debts arose after the sequestration of the Applicant=s estate it is required to prove that the debt allegedly owed to it by the Applicant arose after the sequestration of the Applicant=s estate. There is nothing before the court that can justify this conclusion.

[60] The Respondent=s opposing papers simply allege that the Applicant was aware of his indebtedness to the Respondent. The papers do not set out the date on which such indebtedness arose. The opposing papers refer to two judgment debts but no court orders are attached, nor does the Respondent attempt to set out the dates upon which the judgments were handed down. This Court has therefore no way of knowing whether or not the alleged debt owing to the Respondent by the Applicant arose after the sequestration of the Applicant=s estate.

[61] In the circumstances Respondent has failed in its very first and basic step of alleging and proving facts necessary to prove that both the debts came into existence after the sequestration of the Applicant=s estate.

[62] Had the Respondent succeeded in satisfying this Court that the

debts did arise after the sequestration of the Applicant=s estate, the Respondent would still have failed to successfully claim set-off. This is so because Respondent=s claim lies against the Insolvent Estate and not against the Applicant personally. The debt owed to Respondent is not one which in terms of any law falls outside the ambit of being claimed against the insolvent estate, nor is it a claim which arose in circumstances referred to in paragraph [56] above. While the Respondent, therefore, has to submit its claim to the Insolvent Estate, the debt that it owes in terms of the arbitration award is not a debt that has accrued to the insolvent estate but to the insolvent personally. There is therefore no mutuality of debts or reciprocity of claims for purposes of set-off.

[63] In the result there is no basis for me to refuse the application sought. With regard to costs I am satisfied that this is a matter in which costs should follow the result.

[64] In the result:

(a) The arbitration award issued by the CCMA dated 23 March 1999 is hereby made an order of court. Respondent is therefore required to pay to the Applicant the sum of R136 160.00 together with interest thereon at the rate of 15,5% per annum as and from

1 June 1999 to date of payment.

(b) Respondent is to pay the costs of this application.

Waglay J

Date of judgment: 27 November 2002

for the Applicant: Adv J.W. Steyn instructed by Le Roux, Mathews Du Plessis

for the Respondent: Adv J.Y. Claasen instructed by Grimbeek, van Rooyen and Partners Inc

for the Third Party: no appearance.