

IN THE LABOUR COURT OF SOUTH AFRICA

CASE NO: J565/02

In the matter between:

Applicant

and

Respondent

—

JUDGMENT

—

FRANCIS J

Introduction

1. This is an application in terms of section 158(1)(c) of the Labour Relations Act 66 of 1995 ('the Act') to make an arbitration award an order of court.
2. On 30 November 2001, commissioner Wynand Stapelberg ("the commissioner") of the CCMA ordered the respondent to pay to the applicant compensation in an amount of R312 000.00 which was payable on or before 30 December 2001.
3. The respondent opposed the application on the basis that it tendered compliance with the award, which tender was rejected by the applicant. The respondent had offered the applicant a cheque in the amount of R113 960.00 in settlement of the arbitration award after it had deducted an amount of R131 040.00 in respect of

income tax and an amount of R67 000.00 in respect of an alleged balance of a loan by the applicant during the course of his employment.

The issues

4. The crisp issue for determination is whether the tender by the respondent constitutes a tender in compliance with the award made by commissioner Stapelberg (“the commissioner”) of the CCMA. This inquiry into the merits of the tender demands that consideration be given to the following two issues:
 - 4.1 Whether there is an obligation on the respondent to deduct tax from the compensation to be paid to the applicant, and in view thereof whether the tender made by the respondent for payment less any amount reflected on a tax directive is tantamount to a tender in compliance with the award.
 - 4.2 Whether a loan by the respondent to the applicant and alleged to be due and payable to the respondent - an allegation denied by the applicant - may be set off against the award made by the commissioner.
5. It follows that, if the deductions were correctly made, that the respondent’s tender of payment was a tender in compliance with the award by the commissioner and no purpose would be served to make the award and order of court.

The parties contentions

6. It was contended on behalf of the applicant that the respondent should be ordered to pay over to the applicant the full amount of R312 000.00 being the amount of

compensation awarded to the applicant in terms of the award, without any deduction of any amounts whatsoever together with interest and costs because no tax should be levied where compensation had been awarded in terms of section 194 of the Act. The award is in the nature of compensation in the form of damages due to the fact that the respondent made himself guilty of having committed an unfair labour practice and not income. It was therefore not subject to the deduction of tax.

7. It was contended further on behalf of the applicant that the respondent was not entitled to deduct the amount of R67 000.00 being the alleged balance due in terms of a loan by the applicant during the course of his employment. The applicant's alleged indebtedness to the respondent is not capable of prompt ascertainment. The amount of the indebtedness is disputed and unliquidated and therefore not capable of being set off against the arbitration award.
8. It was contended on behalf of the respondent that an employer has a statutory obligation to deduct the required tax from any remuneration which it pays to an employee. Further that the amount due to the applicant should be set off since the applicant's debt is admitted. It was capable of easy and speedy ascertainment.

Liability for tax

9. There are two issues of dispute which require an expert ruling by the office of the

Receiver of Revenue. These are:

1. 9.1 Whether any tax should be deducted from an award for compensation by the CCMA at all, having regard to the nature of such an award.
- 9.2 The rate at which the award for compensation should be taxed.
10. An employer has a statutory obligation in terms of the Income Tax Act 58 of 1962 (“the Income Tax Act”) to deduct the required tax from any remuneration which it pays to an employee. Gross income is defined in section 1(d) of the Income Tax Act as:

“Any amount, including any voluntary award, received or accrued in respect of the relinquishment, termination, loss, repudiation, cancellation or variation of any office or employment or any appointment (or right or claim to be appointed) to any office or employment: Provided that”
11. Part 1 of Schedule 4, item 1 defines remuneration as:

“Means any amount of income which is paid or is payable to any person by way of any salary, leave pay, allowance, wage, overtime pay, bonus, gratuity, commission, fee, emolument, pension, superannuation allowance, retiring allowance or stipend, whether in cash or otherwise and whether or not in respect of services rendered”
12. In terms of schedule 4 item 2(1) of the Income Tax Act, an employer who “pays

or becomes liable to pay any amount by way of remuneration to an employee shall, unless the Commissioner has granted authority to the contrary, deduct or withhold from that amount by way of employee's tax an amount which shall be determined as provided in paragraph 9, 10 and 12 whichever is applicable, in respect of liability for normal tax of that employee".

13. I am of the view that the issues referred to in paragraph 9 above are both issues which neither this Court nor the CCMA is competent to determine, but are issues which are required to be determined by the appropriate expert forum to be taken on appeal in terms of the provisions of the Income Tax Act, if necessary.
14. There are a number of decisions by this Court that deals with settlement agreements wherein it was stated that such amounts attract income tax. I do not deem it necessary for purposes of this judgment to deal with the said cases.
15. I am also of the view that even if this Court is competent to determine the issue it should not do so on the grounds that the Receiver of Revenue who may be an interested party in this matter was not cited as such.
16. I am also of the view that nothing prevents the applicant from obtaining the necessary tax directive and present it to the respondent. The respondent had attempted to obtain the tax directive, but was unable to do so in view of the

applicant's outstanding returns. The respondent has at all times confirmed that it is prepared only to deduct such income tax as it is directed to do and pay the remainder to the applicant.

17. The applicant indicated that it intended to apply for such a tax directive. The respondent's tender to pay over to the applicant the award, less the tax directed by the office of the Receiver of Revenue to be deducted, constitutes a tender in compliance of the award save on the issue of the set-off.

Set off

18. The principles pertaining to set-off in common law are as follows:
 - 18.1 Set-off is in essence a method by which debts are extinguished. It comes into effect when two parties are reciprocally indebted to each other - if both debts are equal, they are discharged; if they are unequal, the smaller amount is discharged and the larger is reduced by the amount of the smaller. See *R H Christie, The Law of Contract*, 4th ed. at pl 552.
 - 18.2 Set-off operates automatically irrespective of whether it is invoked by either party (for example by raising it in a plea or a defence) from the moment when the compensating debt came into existence. In *Schierhout v Union Government* 1926 AD 286 at 289 to 290 it was stated that:

"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 compensatio by bringing the facts to the notice of the court - as indeed the defence of payment would have to be pleaded and proved. But compensation once established, the claim would be regarded as extinguished from the moment the mutual debts were in existence together.”

- 18.3 In *Mohamed v Nagdee* 1952(1) SA 410 (A) at 416H, the Appellate Division confirmed its acceptance of this view. It was also confirmed in *Great North Farms (Edms) Bpk v Ras* 1972 (4) SA 7 (T) at 8F where the Court quoted from *Harris v Tancred N.O.* 1960 (1) SA 839 (C) AT 843F and recorded that:

“Therefore when the defence of set-off is invoked it operates retrospectively, so that the two debts are extinguished as soon as they balance each other.”

- 18.4 Set-off is equivalent to payment and therefore operates ipso facto and by operation of law extinguishes the debt pro tanto. In this regard the Court in *Great North Farms (Edms) Bpk* (supra) quoted from *In re: Trans African Insurance Co. Ltd (in liquidation)* 1958 (4) SA 324 (W):

“Set-off or compensation by our law is really equivalent to payment; it operates ipso facto as a discharge. As soon as there are two debts in existence between which there is mutuality, so that the one can be compensated against the other, then by the operation of law the one debt extinguishes the other pro tanto...”

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.
20. 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. Pothier*

(Obligations, 3, c 4 sec 2) says a debt is liquidated when it is evidence that is due, and to what amount ...”

21. To the extent that the applicant's debt is not admitted, it will qualify for set-off if it is capable of easy and speedy proof. A bank overdraft and charges and an agent's commission has been held to constitute debts which are capable of easy and speedy proof.
1. 22. The applicant has admitted his debt. It is contained in a written agreement wherein he has admitted that he had applied for a loan of R67 000.00 and that he has authorised the respondent to deduct the full outstanding amount from any monies due to the applicant upon him leaving his employment.
23. The applicant disputes two aspects pertaining to the loan to be set-off against the judgment debt: the one is the interest to be charged in respect of the debt and the other is the extent to which the applicant has repaid the loan. The question therefore is whether the debt is capable of prompt and easy ascertainment. The respondent contended that it is and the applicant has denied this.
24. In a letter dated 22 January 2002 the respondent's attorney's stated that in terms of the reconciliation an amount of R47 593.67 was due and owing. In addition the applicant owes interest on the amount in an amount of R6164.34. The letter states further that an amount of R67 893.01 should have been deducted instead of R67

000.00 and for purposes of bringing the matter to a finality the respondent was prepared to forego R893.01 in interest.

25. In a letter dated 29 January 2002 the applicant's attorneys stated that in terms of the respondent's reconciliation the amount owing by the applicant to the respondent is R47 593.67. It pointed out that the respondent's calculation was incorrect and should have amounted to R53 758.01 instead of R67 893.01. It stated further that the amount of R33 654.76 do not include all the commissions due to the applicant up to and including 31 March 2001. It stated that the amount owing to the respondent is in dispute. It requested that it be provided with a full reconciliation of the commission earned by the applicant during the course of his employment up to the date of dismissal in order to determine the correct amount to be deducted, if any.
26. In the respondent opposing affidavit it has stated that the full amount that should be made from the award is R68 223.90 and that the applicant would still owe the respondent R1 223.90.
27. The respondent has deducted an amount of R67 000.00 from the amount of the award. The respondent is disputing the amount of commission earned by the applicant of R33 654.76 and has failed to furnish the applicant with a detailed reconciliation of all the commission earned during the relevant period. The

applicant stated that with regard to the balance due to the respondent the matter could still be sorted out once a full reconciliation of the commission due had been furnished to him.

28. I accept that the rate at which interest will be charged is governed by the Prescribed Rate of Interest Act, 55 of 1975, and is currently 15,5% per annum. The date at which the applicant would be in mora is recorded in the agreement that the applicant signed. It records: *“In the event that I leave the company, I hereby authorise the company to deduct the full outstanding amount”*. The applicant was dismissed in March 2001. The interest was calculated from 1 April 2001. The award was handed down on 30 November 2001. The rate of interest is fixed and the period in respect of which it is due is similarly fixed.
29. The applicant does not deny that the loan agreement for R67 000.00 was concluded on the terms as alleged by the respondent. The applicant does not deny the advance of R20 000.00 was to be repaid from commissions (it being an advance in respect of commissions already earned by not yet due and payable). The applicant's only dispute on the calculation of outstanding debt relates to the fact that he alleges he earned more commission than the R20 310.71 accounted for in annexure “A” to the answering affidavit. The allegation is that this additional commission was neither paid to him, nor set-off against the outstanding loan.

30. There is a material dispute of fact about what the exact amount of commission that was earned is. The onus is on the respondent to proof what the amount is that needs to be set-off. The respondent has given different amounts as can be seen from paragraphs 24, 25 and 26 above. The respondent has not discharged that onus. It has failed to proof that the amount is capable of prompt and easy ascertainment.
31. I do not believe that this is a matter where costs should be awarded to any of the parties.
32. In the circumstances I make the following order:
1. (a) The arbitration award dated 30 November 2001, issued by Wynand Stapelberg, a commissioner of the Commission of Conciliation, Mediation and Arbitration, is made an order of Court in terms of section 158(1)(c) of the Act.
 - (b) The respondent to pay within five days of this order to the applicant the sum of R180 960.00.
 - (c) The applicant is to obtain a tax directive from the Receiver of Revenue on whether the sum of R312 000.00 is taxable and should it be found that it is, the respondent to pay any shortfall to the applicant within ten days of receiving the tax directive.
 - (d) Should it be found that no income tax is payable on the amount referred in paragraph (c) above, the respondent is to pay to the applicant within ten days of receiving the tax directive, the outstanding amount.

(e) There is no order as to costs.

FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

PLICANT : I G GELDENHUYS INSTRUCTED BY GIESSING ATTORNEYS

PONDENT : W G LA GRANGE INSTRUCTED BY HOFMEYER HERBSTEIN &
GIHWALA INC

DATE OF JUDGMENT : 29 NOVEMBER 2002