

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 57/2000

In the matter between:

STANDARD BANK SWAZILAND LIMITED

APPLICANT

And

THEMBI DLAMINI

RESPONDENT

IN RE

THEMBIE DLAMINI

APPLICANT

And STANDARD BANK SWAZILAND (LTD)

RESPONDENT

CORAM

KENNETH NKAMBULE:

JUDGE

DAN MANGO:

MEMBER

GILBERT NDZINISA:

MEMBER

MR. E. HLOPHE:

FOR APPLICANT

MR. M. SIBANDZE:

FOR RESPONDENT

RULING

20/11/00

The applicant has brought an application for an order -

1. That the execution of the court order under case no. 57/2000 be stayed pending the determination of the review application against the Judgement of the honourable court handed down on the 8th September 2000.
2. Further and/or alternative relief.

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There is filed of record a launching affidavit in support of the application. The respondent has filed an answering affidavit in which objections in limine have been raised.

It is the respondent's contention that from the applicant's papers the deponent does not state whether the facts deposed to in the affidavit are within his personal knowledge and belief and are true and correct. He states that as a consequence the facts deposed to in the affidavit amounts to hearsay. At resumption Mr. E. Hlophe for respondent decided to abandon this point of law and go to the merits of the application.

Briefly the background of this application is as follows: In its judgement dated the 8th of September 2000 the court made an award in favour of applicant amounting to E26,850- being compensation for unfair dismissal, additional notice and severance pay.

Respondent contends that in the event that the review pending before the High Court is successful and that the order of this court is reviewed and set aside, the respondent will not be in a position to make good or repay the judgement amount to the applicant. This they say, is because respondent in her evidence stated that she was yet unemployed and did not have any income at all.

On the other hand respondent in the event the applicant succeeds on review she is in a position to make good or repay the judgement amount. In support of the foregoing she is willing to furnish security against the judgement amount in the form of a motor vehicle registration number SD 110 PL worth over E50,000-

Respondent further states that her position two months ago regarding her status as unemployed has changed. She states that she is now employed by government on temporal basis with hope of being confirmed on permanent and pensionable status in December 2000. She avers that by the time this matter is finalised by the High Court she will be in permanent employment and the applicant will be able to recover the judgement amount from her.

In this court the mere noting of an appeal or a review does not stay execution and the respondent is entitled to issue a writ and proceed with execution at any time. However, in the High Court it is to-day the accepted common law rule of practice that generally the execution of a judgement is automatically

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suspended upon the noting of an appeal, with the result that, pending the appeal, the judgement cannot be carried out and no effect can be given thereto, except with the leave of the court which granted the judgement.

The purpose of the suspension of a judgement on the noting of an appeal is to prevent irreparable damage from being done to the intending appellant, either by levy under a writ of execution or by execution of the judgement in any other manner appropriate to the nature of the judgement appealed from. The relevant provision of the Industrial Relations Act states that:

Section 11 (4) "The noting of an appeal under Sub Section (1), shall not stay the execution of the court's order unless the court on application directs otherwise."

This provision on proper interpretation, gives the Industrial Court a wide general discretion on application, to either grant or refuse the application for stay of execution of a court order. In exercising its discretion the court should determine what is just and equitable in all the circumstances.

In an application for leave to stay execution of a judgement pending appeal or review the onus proper (or overall onus) rests upon the applicant. This is so irrespective of whether the judgement in question is one sounding in money only or is one granting other forms of relief.

Where the judgement is for money only, then, in an appropriate case, the inference may be drawn, prima facie, that the furnishing of security de-restituendo would protect the appellant against irreparable harm or prejudice.

It is only in this instance that an 'onus' can be said to rest on the other party (respondent). This is however, not an onus proper but merely a burden of adducing evidence to rebut a prima facie case. If upon a proper consideration of all the evidence the court is left in doubt as to whether irreparable harm would be suffered or not, then the applicant upon whom the true onus rested, would fail on this issue.

Moreover, even if the applicant succeeded on this issue the court would still retain its discretion to decide whether in all the circumstances (including factors other than irreparable harm to either party) leave to stay execution should be granted or not.

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For this view see SOUTH CAFE CORPORATION (PTY) LTD V ENGINEERING MANAGEMENT SERVICES (PTY) LTD 1977 (3) SA 534. See also REID AND ANOTHER V. GODARD AND ANOTHER 1938 A.D. 511 AT 513.

In the instant case the Judgement was issued on the 8th of September 2000. This urgent application was only filed on 25th October 2000 almost two months from the date of Judgement. The review application was filed with the High Court on 24 October 2000. There has been no explanation advanced for such a delay. However, the relevant provisions of the Industrial Relations Act provides that an appeal shall be lodged within three months of the date of the decision. The Act does not state how long after the judgement shall a review be lodged.

From the aforementioned it is clear on evidence that applicant is gainfully employed by Swaziland Government. The issue of financial hardship is ruled out. Secondly, she has stated that she will be employed on full time basis in December and by the time this matter is resolved on review she will be permanent.

On the other hand we are not told how much she earns and whether she would be able to pay a sum of E26,000- from her salary without any hardship would it happened that the applicant succeeded in the review proceedings.

It is clear from the above mentioned facts that there is the potentiality of irreparable harm or prejudice that would be sustained by applicant if leave to stay execution was refused. The consequence is that the application to stay execution is hereby granted under the following terms and conditions:

1. Applicant to pay the sum of E26,850- to an account which shall be opened at the NEDBANK, MBABANE.

2. The title of the account shall be;

THEMBIE DLAMNI TRUST CALL A/C IN RE THEMBI DLAMENI VS STANDARD BANK CASE NO. 57/2000.

3. The account shall be a Joint Account - the signatories being Mr. M. Sibandze (Applicants attorney) - and Mr. E. Hlophe (respondent attorney)

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4. The account shall be opened on or before Friday 24/11/00.

5. On 24th November both Attorneys for the litigants shall file in court evidence (Documentary) to the effect that they have complied with this court order.

Members concur.

KENNETH P. NKAMBULE

JUDGE (INDUSTRIAL COURT)

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