

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE CASE NO. 39/04

In the matter between:

LEWIS STORES (PTY) LTD APPLICANT

And

GUGULETHU NSIBANDZE 1st RESPONDENT

DEPUTY SHERIFF

(MASWAZI SIBANDZE) 2nd RESPONDENT

THE ATTORNEY GENERAL 3rd RESPONDENT

In re:

GUGULETHU NSIBANDZE APPLICANT

And

LEWIS STORES RESPONDENT

CORAM:

NKOSINATHI NKONYANE : ACTING JUDGE DAN MANGO : MEMBER

GILBERT NDZINISA : MEMBER

D. MADAU : FOR APPLICANT

NDLANGAMANDLA : FOR 1st RESPONDENT

NO APPEARANCE : FOR 2ND RESPONDENT

JUDGEMENT-31 MAY 2004

This matter came before the court on a certificate of urgency. The Applicant who was Respondent in the arbitration proceedings is seeking for an order staying the execution of the writ dated the 5th April 2004 pending the determination of the application herein.

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The application is opposed by the Respondents. Briefly the history of this matter is that on the 23rd January 2004 C.M.A.C made an award in favour of the Respondents. The arbitrator in those proceedings awarded the Respondents (then Applicants) seven month's salary each as compensation. The Respondent paid out some of the money to the Applicant's attorney. The other part of the award was paid to the Commissioner of Taxes. Seeing that they were not receiving all their dues, the Applicants then issued out a writ of execution to recover the remaining amounts. The Respondent is now asking the court to stay the execution of the writ and also make a ruling whether it was proper for it to seek the Commissioner of Taxes' directive in this matter.

The Applicant's attorney argued that it acted in terms of the Income Tax Order No. 21 of 1975 when it sought the tax directive in particular in terms of Section 58 and Section 9(3) of the Second Schedule.

Section 9 (3) reads as follows:

"The amount to be deducted or withheld in respect of employee's tax from any lump sum to which the proviso to paragraph (b) of the definition of "gross income" applies or any other lump sum to which the employee is entitled by virtue of the employee's agreement of employment, shall be ascertained by the employer from the Commissioner before paying out such lump sum and the Commissioner's determination of the amount to be so deducted or withheld shall be final".

It is also important to ascertain the meaning of the employee's tax. In this regard the interpretation section of the Second Schedule is helpful. In that section employees' tax is defined as follows:

"employees' tax" means the tax which an employer is required or requested to deduct or withhold from remuneration paid or payable to an employee".

From this definition it is clear that the Respondents were not employees as defined in that at the time of the award they were no longer in receipt of remuneration by the Applicant. Further, the amount that was directed to be deducted was not in respect of "employees' tax" as defined as it was not in respect of remuneration of an employee, The High Court of Swaziland came to the same conclusion in the case of Mahlalela Lucky G. v Swaziland Royal Insurance Corporation and Four Others, Civil Case N. 281/2001, decided by Sapire CJ, as he then was. In that case the Applicant had also challenged the 1st Respondent's action of seeking a tax directive. The court found there that the 1st Respondent was not obliged or entitled to deduct any amounts from the payment made to the Applicant.

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Again, the court will note as the Learned Chief Justice also noted in the Mahlalela case, that the issue before the court is not whether the amounts are taxable or not. The issue before the court is whether the Applicant was obliged to seek the tax directive.

The court will come to the conclusion that the Applicant acted ultra vires the Income Tax Order of 1975 as amended by seeking the tax directive as it was no longer the employer of the Respondents and the Respondents were no longer the employees of the Applicant in terms of the definition section of the Second Schedule under Section 58 of the order. The court's attention was brought to the Income Tax (Amendment) Order of 2003. The amendment does not touch on the question of whether a former employer is entitled or obliged to seek a tax directive from the Commissioner of Taxes.

The application is therefore dismissed with costs. This Ruling applies also to Case No. 39/04. The members agree,

N.NKONYANE ACTING

JUDGE - INDUSTRIAL COURT

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