

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 50/2004

In the matter between

LIDLELANTFONGENI STAFF ASSOCIATION (L.I.S.A.) Applicant

and

SWAZILAND NATIONAL PROVIDENT FUND Respondent

CORAM:

NDERI NDUMA: PRESIDENT

JOSIAH YENDE: MEMBER

NICHOLAS MANANA: MEMBER

FOR APPLICANT: MTHETHWA

FOR RESPONDENT: S. SIMELANE

RULING ON STAY OF EXECUTION - 27/01/05

The Applicant has noted an appeal against the judgement of the court dated the 17th September 2004. The court in its judgement directed the Respondent to grant recognition to the Applicant as the employee representative for the Respondent's staff concerning all terms and conditions of employment including wages and hours of work.

The court further excluded the members of the Executive Committee, designated as Directors from being members of the Staff Association and/or participating in any of its activities as members.

It is this latter part of the judgement to which the appeal is directed.

The Applicant/Appellant now seeks the court to allow the Executive Directors to become members of the Staff Association and participate in all its activities pending the determination of the appeal.

Put another way, the Applicant seeks a stay of execution of the judgement of the court pending the appeal.

In terms of Section 39 (1) (4) of the Industrial Relations Act No. 1 of 2000, the noting of an appeal shall not stay execution of the court's order unless the court on application, directs otherwise. The statute has expressly and unequivocally deviated from the common law position in terms of which the noting of an appeal automatically stays the judgement of the court aquo.

The considerations by the court in deciding whether or not to grant a stay includes:

1. The probability of success of the appeal.

2. The balance of convenience as determined from:

(a) The prejudice likely to be suffered by the Applicant if the stay is not granted and the appeal is successful in due course.

(b) The prejudice likely to be suffered by the Respondent if the stay is granted and the appeal is not successful in due course.

The issue of probability of success is always a difficult one for the court that gave the judgement.

Where the appeal is arguable in the sense that it is neither frivolous nor vexatious, then the court should grant a stay.

This however should be weighed against the two pillars of the balance of convenience aforesaid. In the court's view, the issue of possible prejudice to either party or lack of it should carry much more weight in determination of the issue of stay.

In this regard, having particular consideration to the nature of the matter and the reasons for the judgement, the court is of the view that granting a stay would not be the best option to meet the end of justice at this stage taking all the circumstances of the case into consideration.

Accordingly the application for the stay, of execution of the judgement dated 17th September 2004 is refused.

NDERI NDUMA

JUDGE PRESIDENT- INDUSTRIAL COURT