

**IN THE INDUSTRIAL COURT OF SWAZILAND**

**HELD AT MBABANE**

**CASE NO. 501/2006**

In the matter between:

**METRO CASH & CARRY HOLDINGS (SWD)  
(PTY) LTD T/A METCASH TRADING**

**Applicant**

and

**DANTON MHLANGA & 5 OTHERS**

**Respondents**

In Re:

**DANTON MHLANGA & 5 OTHERS**

**Applicants**

and

**METRO CASH & CARRY HOLDINGS (SWD)  
(PTY) LTD T/A METCASH TRADING**

**Respondent**

**CORAM:**

**P. R. DUNSEITH : PRESIDENT**

**JOSIAH YENDE : MEMBER**

**NICHOLAS MANANA : MEMBER**

**FOR APPLICANT : M. SIBANDZE**

**FOR RESPONDENT : NDLANGAMANDLA**

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**J U D G E M E N T – 10 NOVEMBER 2006**

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1. The Applicant and the Respondent entered into a Memorandum of Agreement at the Conciliation Mediation & Arbitration Commission on the 8<sup>th</sup> September 2005, in terms of which the Applicant agreed to pay to the Respondents their statutory benefits, namely-
  - . one month notice pay
  - . additional notice pay
  - . severance allowance
  - . leave pay
2. The Applicant expressly agreed to pay these benefits by the 16<sup>th</sup> September 2005.
3. Unfortunately the CMAC Commissioner did not take the trouble to calculate the amount of the statutory benefits payable and incorporate such amount into the Memorandum of Agreement. He left the calculation to the parties, and by doing so he left open the door to further dispute.
4. The Applicant calculated the amount it considered to be payable to the Respondents, in a total sum of E137,899.30. From this amount it deducted the total sum of the contributions it had made to the company retirement fund on behalf of the Respondents. It then paid the Respondents the balance, amounting to E64,886.02.
5. This deduction was apparently effected by the Applicant in the erroneous belief that it was entitled to do so in terms of Section 34 (3)

of the Employment Act of 1980.

6. The Applicant's attorney has conceded that the Applicant had no lawful right to make the deduction. Indeed, both the Court of Appeal and the Industrial Court of Appeal of Swaziland have made it clear that Section 34 (3) of the Employment Act does not authorize an employer to set off its pension contributions against the statutory severance allowance payable to an employee.

See - **The Trustees of Swaziland Railways Gratuity Scheme v STAWU (SCA Case No. 1442/93)**

**Small Enterprises Development Company v Phyllis P. Ntshalintshali (ICA Case No. 13/2004).**

7. Moreover, the Memorandum of Agreement did not permit any deduction from the statutory benefits which the Applicant agreed to pay by the 16<sup>th</sup> September 2005.

8. The Respondents were not satisfied with the calculation of the benefits paid to them, which is not surprising having regard to the unlawful deduction of more than half their entitlement. The representative of the Respondents applied for the Memorandum of Agreement dated 8<sup>th</sup> September 2005 to be made an order of court. Such order having been granted on the 12<sup>th</sup> September 2006, he thereupon caused the Registrars of the Industrial Court and the High Court to issue out a writ of execution for the recovery of the sum of E74,565.76.

9. This sum of E74,565.76 was an amount calculated by the Respondent's representative as being the balance due and payable to his clients. As stated earlier in this judgement, the Memorandum of Agreement which was made an order of court did not sound in money. The amount payable to each of the Respondents was not readily ascertainable on the face of the agreement, which did not contain any agreement as to :

9.1 the dates of employment of the Respondents;

9.2 the salaries of the Respondents;

9.3 the accumulated leave days of the Respondents.

10. Although the Respondent's representative furnished the Registrars of the Industrial Court and the High Court with his calculations, these officers were not in a position to objectively verify whether the calculations were correct and whether the amount of the Writ was duly authorized by order of the court.

11. The issue of a writ of execution in terms of the rules of court contemplates a judgement in which the monetary obligation of the judgement debtor is specifically and with certainty described. A writ may be set aside if the judgement in respect of which it has been issued is not definite and certain.

**De Crespigny v De Crespigny 1959 (1) SA 149 (N)**

**Ras v Sand River Citrus Estates 1972 (4) SA 504 (T) at 510 E**

**Butchart v Butchart 1997 (4) SA 108 (w) at 110.**

12. In matters involving the issue of writs to recover unpaid maintenance, it has been the practice in the South African Courts to allow a judgment creditor to issue out a writ on the filing of an affidavit showing what amount is outstanding, provided that the amount is easily quantifiable.

**Williams v Garrick 1938 TPD 147.****Butchart's case (supra) at 112.**

Maintenance orders are however sui generis (See Williams v Garrick (supra) at 156) and usually specify the amount payable (periodically) in clear monetary terms.

13. In the case before us, the Respondents could have approached the court for quantification of the Applicant's liability, or even enforced the agreement by contempt proceedings. In our view they were not entitled to obtain the issue of a writ for an amount not readily ascertainable ex facie the court order and without consensus on the underlying computation factors. A fortiori where the calculations were not placed before the Registrar on affidavit.
14. In the premises, the issue of the Writ of Execution was irregular.
15. Having been presented with the Writ for payment, the Applicant applied to court on a certificate of urgency for the setting aside of the Writ and an interim stay of execution.
16. The court granted an interim stay, and directed the Applicant to produce its

calculations of the amounts payable to the Respondents.

17. Having had the opportunity of scrutinizing the respective calculations of the parties and hearing submissions from their representatives, the court is in a position to make the following observations:

17.1 the parties agree as to the dates of employment of all the Respondents save for Danton Mhlanga. With respect to Mhlanga, the Applicant records his employment date as 27/04/81 and the Respondent as 27/04/82.

Notwithstanding that the Applicant's date is more favourable to the calculation of Mhlanga's benefits, Mhlanga's representative refused to accept the more favourable date. In these circumstances, the court will take 27/04/82 as Mhlanga's date of employment;

17.2 the parties agree as to the monthly salaries of the Respondents at date of termination of their services;

17.3 the parties agree as to the method of calculation of additional notice and severance allowance;

17.4 the Applicant's calculation of notice pay does not accord with the monthly salary of each Respondent. Mr. Sibandze for the Applicant

could not explain this discrepancy and accepted that the notice pay (excluding so-called additional notice) should be equivalent to the monthly salary)

17.5 the parties do not agree on the leave pay due to each Respondent. Neither party furnished any proof of the Respondents' leave entitlement or accumulated leave days;

17.6 the parties agree that the Applicant had no lawful right to deduct its retirement fund contributions from the statutory benefits;

17.7 the parties agree as the amounts already paid to the Respondents on account of their statutory benefits.

18. On the basis of the foregoing observations, the court calculates the balance of notice pay, additional notice pay and severance allowance payable to the Respondents as follows:

	Notice	Add. Notice	Severance	Total	Amount
Balance					
					Allowance
	Paid				
Danton Mhlanga 16666-86	2441-47	8263-47	20658-59	31363-50	14696-64
Dumisa Sibiyi 3992-73	1911-00	3234-12	8085-30	13230-42	9237-69
Lungile N. Ngwenya 11484-25	2323-83	5362-68	13406-71	21093-22	9608-97

Paulos Simelane 6186-84	2100-07	3553-85	8884-62	14538-54	8351-70
Eric M. Hlophe 16495-43	2382-65	7697-79	19244-48	29324-92	12829-49
Lungile Manana 4426-29	2107-13	3565-91	8914-78	14587-82	10161-53
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TOTAL	13,266.15	31,677.79	79,194.48	124,138.42	64,886.02
59,252.40					

19. The court is unable to ascertain the leave pay due to each Respondent, in the absence of proper proof. The Applicant has tendered payment of the following amounts in lieu of accumulated leave pay:

Danton Mhlanga	2300.62
Dumisa Sibiyi	2609.35
Lungile N. Ngwenya	2100.38
Paulos Simelane	444.23
Eric M. Hlophe	2932.49
Lungile Manana	3079.65
<b>TOTAL</b>	<b><u>E13,466.72</u></b>

20. The representative of the Respondents rejected the court's proposal that he meets with the Applicant's representative in order to agree on the number of leave days standing to the credit of his clients. The court is at a loss to understand the uncooperative stance of the representative, which did not advance the interests of his



clients in any way.

21. The court makes the following order:

- (a) the writ of execution issued by the Respondents on the 8<sup>th</sup> August 2006 is hereby set aside;
- (b) the Applicant is ordered to pay to the Respondents the respective amounts set out in paragraph 18 of this judgement under the column "Balance" totalling to E59 252-40;
- (c) the Respondents are granted leave to apply to this court within seven days, on notice to the Applicant, for judgement to be entered against the Applicant for payment in terms of the Applicant's tender of leave pay, as set out in paragraph 19 of this judgement. Failing such application, the matter is referred to the Registrar for allocation of a trial date for the determination of the leave pay due to the Respondents;

22. Although the Applicant has been successful in setting aside the irregularly issued writ of execution, it transpires that the Applicant unlawfully withheld a substantial portion of the statutory benefits in breach of the agreement entered into at CMAC. In these circumstances, there will be no order as to costs.

The members agree.

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**PETER DUNSEITH**

**PRESIDENT OF THE INDUSTRIAL COURT**