IN THE INDUSTRIAL COURT OF SWAZILAND
HELD AT MBABANE

CASE NO. 66/06

In the matter between:

U.S.A DISTILLERS [PTY] LIMITED **APPLICANT**

and

KENNETH JOSEPH ENGLISH **1st RESPONDENT**

DEPUTY SHERIFF FOR LUBOMBO
BONGANI MAMBA **2nd RESPONDENT**

CORAM:

NKOSINATHI NKONYANE: ACTING JUDGE

GILBERT NDZINISA: **MEMBER**

DAN MANGO: **MEMBER**

FOR APPLICANT/RESPONDENT: **MR. B. MAGAGULA**

FOR RESPONDENTS/APPLICANTS: **MS. L. ZWANE**

RULING 18.05.06

[1] The applicant instituted proceedings by way of Notice of Motion for an order in the following terms:-

> *1. That execution of the judgment delivered by the above Honourable Court on the 13th February 2006 in the amount of E300 000.00 (Three Hundred Thousand Emalangeni) be stayed pending the finalisation of the appeal lodged by the Applicant/Appellant against the judgment of this court.*

2. That the Second Respondent should not execute the writ of execution which has already been issued by the Respondents Attorney against the movable property of the Applicant.

3. That the payment of E300 000.00 (Three Hundred Thousand Emalangeni) already made to the Respondent's attorneys LR. Mamba & Associates be deposited to a joint interest bearing account to be administered by Counsel of the respective parties, pending the determination of the appeal.

4. Costs of this application only in the event of the Respondent choosing to oppose same.

5. Further and/or alternative relief.

[2] The application is opposed by the 1st respondent

[3] When dealing with applications for stay of execution, the court does not lose sight of the provisions of Section 19(4) of the Industrial Relations Act No.l of 2000, That section provides that the noting of an appeal shall not stay the execution of the court's order, unless the court on application, directs otherwise.

[4] The onus therefore rests on the applicant to persuade the court to direct otherwise. The court in such applications is not concerned with the merits of the underlying dispute. The court has discretion in such application.

[5] In exercising its discretion, the court is guided by considerations of justice and fairness. The court consider, inter alia, the potentiality of irreparable harm or prejudice being sustained by the applicant if leave execute were to be granted, the potentiality of irreparable harm being sustained by the 1st respondent if leave to execute were to be refused the prospects of success on appeal and lastly, where there is the potentiality of irreparable to both parties, the court must consider the balance of convenience (see **SOUTH CAPE CORPORATION V. ENGINEERING MANAGEMENT SERVICES 1977(3) S.A. 534 at 545.).**

[6] Each case must however be considered on its own peculiar facts and circumstances.

[7] It was argued on behalf of the 1st respondent that the orders prayed for in prayers 1 & 2 of the Notice of Motion have been overtaken by events as the writ has already been executed. The applicant admitted that the execution has taken place in its Founding Affidavit. In paragraph 22 of the Founding Affidavit it is stated that:-

"*On the 16th February 2006 the second respondent came to our premises to execute the writ. He undertook that if we make the cheque payable to the respondent's attorneys L.R. Mamba & Associates, it will be kept in their trust account, until we move this application. He assured us that it will not be paid out to the respondent*"

[8] It was argued on behalf of the applicant that although the writ was executed, the process was not yet complete, as the 2nd respondent has not yet filed the returns in the court file. That argument will be dismissed by the court. What is clear to the court is that the amount of E300,000:00 was paid out by the applicant as the result of the writ of execution in possession of the 2nd respondent, which was sued out by the 1st respondent. That the paper work is not yet complete, does not change the fact that the applicant has already paid out the money in satisfaction of the judgement debt after due demand by the 2nd respondent. Further, this court, in terms of Section 11(1) of the Industrial Relations Act, 2000, is not strictly bound by the rules of evidence or procedure which apply in civil proceedings, and may disregard any technical irregularity which does not or is not likely to result in a miscarriage of justice.

[9] The court will accordingly make a finding that in this case execution has already taken place.

[10] The facts as they appear from the judgement appealed against, show that the 1st respondent was not an illegal immigrant. He was lawfully in the country as he had a valid pass. The only problem was that he did not have a work permit. The employer was aware of that. The applicant therefore knowingly

employed the 1st respondent without a work permit.

[11] There are presently two conflicting judgements of this court on this point. It is therefore in the interest of justice that the point be decided by the Industrial Court of Appeal.

[12] Since both parties were at fault the maxim " in *pari delictio potior est conditio* defendentis" is therefore applicable. In dealing with this maxim **STRATFORD CJ. IN THE CASE OF 3A3BHAY V. CASSIM 1939 AD 537 AT 544 held as follows:-**

the rule expressed in the maxim *in pari delictio potior conditio defendentis* is not one that can or ought to be applied in all cases, that it is subject to exceptions which in each case must be found to exist only by regard to the principle of public policy."

[13] In the light of the above-mentioned observations, the application will be dismissed.

[14] That is the order that the court makes. No order

for costs is made.

The members agree.

NKOSJNATHI NKONYANE A.J.
INDUSTRIAL COURT