IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 395/07

In the matter between:

SWAZILAND AGRICULTURAL AND ALLIED STAFF ASSOCIATION (SIMUNYE BRANCH) **APPLICANT**

And

ROYAL SWAZILAND SUGAR CORPORATION **RESPONDENT**

CORAM;

NKOSINATHI NKONYANE: **JUDGE**

DAN MANGO: **MEMBER**

GILBERT NDZINISA: **MEMBER**

FOR APPLICANT: **M. MKHWANAZI**

FOR RESPONDENT: **M. SIBANDZE**

RULING 07/09/07

[1] The applicant instituted application proceedings on an urgent basis against the respondent on 23 August 2007 for an order;

> "1. Dispensing with the normal and ordinary rules of court relating to notices and service of documents and that this matter be enrolled as one of urgency.
>
> 2. That *a rule nisi* do hereby issue, calling upon the respondent to show cause, on a date to be determined by the above Honourable court, why an

order in the
following terms should not be made final;

2.1. Restraining and interdicting the respondent from withdrawing the 10% merit pay from applicant members remuneration / salary pending the determination of a Notice in terms of **SECTION 26 OF THE EMPLOYMENT ACT** filed by the applicant and pending before the Labour Commissioner.

2.2. Directing the respondent to pay to applicants' members their performance bonus based on their performance appraisals for the financial years 2005 / 2006 / and 2006 / 2007.

3. That prayer 2.1 and 2.2 above operate with immediate effect, pending final determination of this application.

4. Costs.

5. Further and or alternative relief."

[2] The respondent filed its answering affidavit in opposition of the application and also filed a notice to raise points in *limine.*

[3] The court is presently called upon to make a ruling on the points raised in *limine.*

[4] **Urgency:**

It was argued on behalf of the respondent that the applicant has failed to satisfy the requirements of urgency. Mr. Sibandze argued that there was no need for the applicant to approach the court on an urgent basis because it has other remedies in terms of the Employment Act and that a litigant is allowed to bring an urgent application only if he has no other or alternative remedies available to him.

[5] The evidence revealed that the matter was reported to the Conciliation, Mediation and Arbitration Commission ("CMAC") and a certificate of unresolved dispute was issued and is marked "annexure G" of the applicant's founding affidavit.

[6] Mr. Sibandze's argument was premised on the understanding that the members of the applicant's complaint was a financial one. He submitted that financial loss is not a ground for urgency.

[7] It is true, and this court has pointed out a number of times in cases, that have come before it that financial prejudice is not a ground for urgency. The cases where the court has pointed this out however were cases of unfair dismissal. **(See Kenneth Makhanya v. The National Football Association of Swaziland (IC) case no. 268/2004).**

[8] The court was referred to the case of **SWAZILAND AGRICULTURE AND PLANTATION WORKERS UNION V. UNITED PLANTATIONS (SWAZILAND) LIMITED (I.C.) CASE NO. 79/98** and the cases cited therein. With respect, the present case is distinguishable in that the applicant's members have not been dismissed or retrenched by the respondent. They are still the employees of the respondent. The question now is whether the respondent has a right to withhold a portion of their monthly financial benefit which forms part of the terms and conditions of their employment? The court does not think so. This court has in the past entertained an application brought on a certificate of urgency to stop an employer from unlawfully deducting certain monies due to an employee. **(See:Sonnyboy Zwane v. Pincipal Secretary/Justice and Two Others (IC) case no. 308/2000).**

[9] A proper reading of the papers before court will show that prayers 2.1 and 2.2 are inextricably linked. The evidence as per "ANNEXURE F" of the founding affidavit shows that the parties have had numerous meetings and extensive negotiations on this issue of the 10% merit payment but have not been able to

resolve the matter. The applicant reported the dispute at CMAC. The dispute was not resolved at CMAC hence the certificate of unresolved dispute dated 6 August 2007. Management has since written a letter to the applicant dated 13 August 2007 to the effect that it will discontinue the 10% merit payment on 31st August 2007. This has led to the applicant bringing the matter to court on certificate of urgency. Clearly, since the matter is now before the Labour Commissioner, both the respondent and the court must wait for his determination.

[9] **Prima Facie Right: -**

Mr. Sibandze argued that the applicant's members have failed to establish a *prima facie* right because there is no active collective agreement in place and the merit increase is based on a collective agreement that expired on 31 December2004. It is true that the collective agreement between the parties was for the period 1st January 2004 to 31st December 2004 in terms of clause 12.1 thereof. This collective agreement was however agreed and signed by the parties on 15 March 2005. This conduct by both parties was a tacit agreement that although on paper the collective agreement lapses on 31st December 2004, they regarded it as binding even after that date. The respondent can not approbate and reprobate.

[10] Further,the provisions of the collective agreement became part of the terms and conditions of employment between the parties. This position is strengthened by "ANNEXURE Bl" of the founding affidavit. This document is the letter of appointment of one of the workers of the respondent signed by the parties on 31st October 1995. The 10% merit increment is mentioned there as part of the terms and conditions of employment. The 10% merit payment being part of the terms and conditions of employment of the workers, it is clear therefore that the applicant's members have a *prima facie* right to claim continued payment of this amount.

[11] **Labour Commissioner: -**

It is argued that there was no *prima facie* evidence that the matter was pending before the Labour Commissioner. Mr. Sibandze argued that the applicant referred the matter to the Labour Commissioner outside the fourteen days as required by

SECTION 26 OF THE EMPLOYMENT ACT.

[12] There was no evidence that the Labour Commissioner has refused to deal with the applicant's request in terms of **SECTION 26 OF THE ACT.** This court has no jurisdiction to determine the question whether the Labour Commissioner should or should not entertain the applicant's application. The Labour Commissioner is the one that must make that determination. For the purposes of this application therefore all that the evidence shows is that the matter is still before the Labour Commissioner.

[13] It is clear on this point that it will not be proper for the court to entertain the application as the Labour Commissioner has not yet made his determination on the matter in terms of **SECTION 26 OF THE ACT.**

[14] The matter having been referred to the Labour Commissioner, it can only come to court on referral by him in terms of **SECTION 26 (4) OF THE ACT.** It follows therefore that the application must be dismissed. The court will therefore make the following order;

a) THAT THE APPLICATION IS DISMISSED AS THE QUESTION FORMING THE BASIS OF THE APPLICATION IS STILL PENDING BEFORE THE LABOUR COMMISISONER.

b) NO ORDER AS TO COSTS IS MADE.

NKOSINATHI NKONYANE
JUDGE - INDUSTRIAL COURT