

## IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 329/03

In the matter between:

INYATSI CONSTRUCTION (PTY) LTD

Applicant

and

CLEMENT MABUZA

Respondent

CORAM:

P. R. DUNSEITH JOSIAH YENDE NICHOLAS  
MANANA

PRESIDENT  
MEMBER  
MEMBER

FOR APPLICANT FOR RESPONDENT

D. JELE S. MOTSA

### J U D G E M E N T - 13/02/09

1. On 17 December 2008 under Case No. 498/2008 the Industrial Court entered judgement against the present Applicant for payment to the present Respondent of the sum of E2646-85 in respect of outstanding wages and leave pay.
2. The court refused to allow the Applicant to set off an unliquidated claim for damages against the Respondent's claim, firstly because an unliquidated claim for damages cannot be set-off against a liquid debt for unpaid wages and leave; and secondly because section 57 of the Employment Act does not permit deductions from wages in respect of loss or damage caused to an employer's property by the default or neglect of the employee, without the written consent of the employee

See the judgement in the case of **Clement Mabuza v Inyatsi Construction (unreported IC Case No. 498/2008)**.

11. The Applicant has now applied to the court for an order staying execution of the judgement of the 17<sup>th</sup> December 2008 pending finalization of a damages claim which it has instituted against the Respondent in the High Court of Swaziland.
12. The Applicant tenders to pay the judgement debt of E2646-85 into an interest bearing account controlled by the attorneys of the parties pending finalization of its damages claim, and requests that execution be stayed subject to such payment.
13. In support of its application, the Applicant submits that it has good prospects of success in its damages claim for payment of the sum of E4954-35. On the evidence the Applicant's prospects do appear to be good.

The Applicant further submits that it will suffer irreparable harm if the judgement amount is paid to the Applicant, because the Applicant is an unemployed man of straw from whom it will never be able to recover its damages, should its claim be successful in the High Court.

The Applicant finally submits that the balance of convenience favours keeping the judgement debt in an account to abide the outcome of the damages claim.

14. The Respondent opposes the application. He denies that he is an unemployed man of straw, and he stated that he will be in a position to pay any damages awarded against him. In support of his claim to solvency he has furnished the court with a letter from First Watch Security Services which confirms that he is employed as a security officer earning E1500-00 per month. He has also filed of record a statement from the Swaziland National Provident Fund which reflects that he has a sum of E17,781.52 standing to his credit in the Fund. Finally, the Respondent alleges that he owns furniture worth over E10.000-00 and three head of cattle. These allegations are not denied by the Applicant.
15. This is not the kind of case where the Applicant requests a stay of execution whilst it seeks to set aside the underlying causa of the judgement, for instance by rescission, appeal or review. Instead, the basis for the relief sought by the Applicant is that execution may result in an injustice. The Applicant is not asserting a right but seeks an indulgence to avert the alleged injustice.

See **Gois t/a Shakespeare's Pub v Van Zyl & Others (2003) 24 ILJ 2302 (LC) at 2310.**

8. The court must determine whether, on a balance of probabilities, the

interests of real and substantial justice require a stay of execution.

16. The first point to be noted is that the Respondent has a judgement in his favour upon which he is entitled to execute. There is no challenge to the underlying causa of the judgement.

17. Secondly, the legislature enacted section 57 of the Employment Act 1980 for the express purpose of ensuring that wages earned by an employee should (subject to specific exceptions set out in the Act) pass directly and without deduction into his own hands.

See **New Rietfontein Gold Mines v Misnum 1912 AD 704 at 709.**

18. As we held in **P. Ramuntu Freight Services (Pty) Ltd v Fortunate Hlatshwayo (Unreported IC Case No. 366/2005)** at page 15, the legislature has prohibited an employer from deducting a loss it has suffered from the salary of the alleged culprit. The employer may go to court and seek to prove and recover its loss from the employee, but in the meantime it must pay the employee's wages as and when they fall due.

19. The only basis set out for a stay of execution is that the Applicant apprehends that it will be left with a hollow judgement if the judgement debt is paid to the Respondent. This apprehension does not appear to be reasonable since the Respondent has assets against which execution may be levied, and he is in paid employment.

20. We do not consider that the Applicant has proved a real likelihood that it will suffer irreparable loss should execution proceed. The application is dismissed with costs.

