



**THE HIGH COURT OF SWAZILAND**

**JOHN HENWOOD IN HIS CAPACITY AS LIQUIDATOR FOR  
UMBERELLA SERVICES MANAGEMENT (PTY) LTD**  
Applicant

And

**LUCKY G. MAHLALELA**  
1<sup>st</sup> Respondent

**DEPUTY SHERIFF FOR THE DISTRICT OF MANZINI  
MR. MARTIN AKKER**  
2<sup>nd</sup> Respondent

**COMMISSIONER OF TAXES**  
3<sup>rd</sup> Respondent

**ATTORNEY GENERAL**  
4<sup>th</sup> Respondent

Coram  
For the Applicant  
For the Respondents

S.B. MAPHALALA – J  
MR. S. MADAU  
MR. M. NSIBANDZE  
(For the 1<sup>st</sup> respondent)  
MR DLAMINI (For the  
3<sup>rd</sup> and 4<sup>th</sup> Respondents)

**JUDGEMENT ON POINTS IN LIMINE**  
(13/06/2002)

Before me is an urgent application where points *in limine* have been raised by Mr. Nsibandze on behalf of the 1<sup>st</sup> respondent. The order being sought is as follows:

1. Dispensing with the rules of this Honourable Court regarding notice, service and that the matter be heard as one urgency;

2. That a rule *nisi* do issue calling upon the respondent to show cause on a date to be set by the court why:

a) The first and second respondents should not be immediately ordered to return to the applicant the following property;

- 1 x 10/100Mbps ethernet adapter
- 1 x canon S600 printer
- 1 x Samsung tower "P.C"
- 1 x keyboard
- 8 x 3 drawer chests
- 8 x cabinet set space desks
- 8 x secretary chairs (green material)
- 8 x P.C workstation inclusive of VGA screen, Mouse Keyboard
- 3 x wall hangings (prints)
- 1 x FP 7713 photocopier
- 1 x canon double jet fax B1 55 paperless
- 1 x pine desk
- 1 x presswood bookshelf
- 1 x brown presswood desk with vinyl insert
- 1 x IBM 4224 high speed dot matric printer
- 1 x IBM AS400 Management system server
- 1 x super stack 3 -- com and hub 24 port
- 1 x APC back-up UPS
- 1 x IBM 3476 intic window screen
- 1 x IBM keyboard for AS400
- 1 x link technology terminal inclusive of keyboards
- 2 x workstations "PC"
- 2 x two speaker reception counter
- 2 x VGA screens
- 1 x deluxe keyboard
- 1 x proline keyboards keyboard
- 1 x deluxe keyboard
- 1 x 56K modem
- 1 x reception unit and chair
- 1 x hub and AS 400 capelling
- 1 x Samsung aircon model WHO
- 4 x set speakers multi media
- 2 x easy mouse PS1 l mike

- b) That the writ of execution issued by the court in favour of the first respondent herein under case No. 348/2001 should not be stayed pending the finalisation of this application.
- c) That the court makes an order that the question of the Income Tax due to the third respondent be referred to the third respondent for determination and that such determination by the third respondent be made and order of this court.
- d) That pending finalisation of this application the applicant tenders the amount due to the first respondent to the above Honourable court.
- e) That pending the finalisation of this application prayers no. (a) and (b) hereof operate as an interim order with immediate effect.

3. Further and/or alternative relief.

The application is supported by the affidavit of Mr. Earl John Henwood who purports to act as a provisional liquidator of the company by virtue of a resolution of the company of the 2<sup>nd</sup> April 2002 placing it into liquidation. According to this affidavit on or about the 18<sup>th</sup> December 2001, the first respondent (hereinafter referred to as Mahlalela) brought an urgent application against the applicant to the Industrial Court seeking payment of arrear salary. The claim for arrear salary was based on an agreement concluded between Mahlalela and the applicant. Mahlalela contended that he had not been paid in accordance with the agreement. Mahlalela's contention was that the agreement constituted an employment contract whilst the applicant held the view that it was a consultancy service agreement. This was the gravamen of the dispute between the parties.

The applicant's contention was that since this was a consultancy agreement, Mahlalela would be responsible for the payment of any Income Tax from his allowance. Payment of the allowance would be linked to performances, as is the norm with consultancy agreements. The Industrial Court held that the contract entered into between the parties was indeed an employment contract.

Mr. Henwood avers in his affidavit that during the course of argument at the Industrial Court, it was submitted on behalf of the applicant that if the court found that the contract entered into between the parties was an employment contract, then in terms of the *Income Tax Order No. 21 of 1975*, the deductions of pay as you earn (PAYE) Income Tax should be effected by the applicant and that amount forwarded

to Commissioner of Taxes. When the court delivered its judgement it stated, *inter alia* that the applicant (Mahlalela) will thus receive a monthly allowance for the months of September, October, November and December at the contractual rate of E15, 000-00

In the result, the respondent (applicant in these proceedings) is to pay E60, 000-00 to the applicant (1<sup>st</sup> respondent in these proceedings).

Since the applicant did not remit PAYE taxation to the Commissioner of Taxes for the months of June, July and August 2001, the Commissioner of Taxes has been notified of this judgment to act as she deems fit. The question of remitting the taxable amounts became the applicant's duty.

Upon receipt of the judgment of the court and without having first made demand on the applicant's attorneys for payment of the judgment amount, Mahlalela's attorneys issued a writ of execution out of the Industrial Court on the 30<sup>th</sup> May 2002. Mr. Henwood avers in his affidavit at paragraphs 20, 20.1, 20.2, 21, 22, 23, 24.1, 24.2, 25, 26.1, 26.2 the sequence of events leading to the launching of this urgent application that actions of Mahlalela's attorneys demonstrated a high degree of high handedness upon receipt of the judgement of the Industrial Court.

Mr. Henwood avers further that the applicant company is under voluntary liquidation and for this reason its assets rest in the liquidator. The applicant's erstwhile directors made a commitment to both the Industrial Court and to the liquidator that they would meet all their obligations with their creditors. The other creditors have accepted this arrangement particularly since it had been agreed that once the creditors claims have been settled, the applicant's business could be sold as a going concern. In so far as Mahlalela is concerned, the only issue that has prevented payment being affected to him is the question of the tax directive. To this end, the applicant tenders payment of the judgment amount to court and that the money be kept by the Registrar of the Court whilst the issue of the tax directive is resolved with the Commissioner of Taxes provided that the attached goods be returned to the applicant.

Mr. Henwood avers that the matter is urgent at paragraphs 32.1, 32.2, 32.3, 32.4, 32.5, 32.6 of the founding affidavit.

Mr. Nsibandze on behalf of the 1<sup>st</sup> respondent raised a number of points *in limine*. These points were argued before me on Friday, the 7<sup>th</sup> instant where Mr. Nsibandze filed Heads of Argument and I reserved judgement. Following is the determination of those points of law.

The points of law raised in their abbreviated form are as follows:

- a) This court does not have jurisdiction to grant the order sought in prayers 2 [a] and [b]. The appropriate action would have been for the applicant to approach the Industrial Court for an order staying execution pending either that court or this court determining whether prayers 2 [c] should be granted;
- b) The applicant has no *locus standi* to bring this application;
- c) There is no basis of urgency in this matter;
- d) No *prima facie* right to the relief sought has been established;
- e) The applicant has not established a well-grounded apprehension of irreparable harm in the event that the interdict is not granted; and
- f) The applicant has not even suggested in his papers that he has no other remedies other than to approach this court for the relief which he is seeking. The applicants remedies are clear that (27.1) he can approach the court which issued the order pursuant to which the goods have been attached or (27.2) pay the judgement amount to the 1<sup>st</sup> respondent.

Mr. Madau replied only on point (a) viz the question of jurisdiction and conceded point (b) that the applicant has no *locus standi* to launch these proceedings. He did not address the court on the other points raised and left them in the "hands of the court". My *prima facie* view then was to dismiss the application on the basis of the

concession made by Mr. Madau, however, Mr. Nsibandze rightly impressed on me the need to address the point about jurisdiction, thus this judgement.

For the sake of completeness I will consider all the points *in limine* raised, thus:

**a) Jurisdiction**

The execution that the applicant is requesting this court to stay is the execution of the judgement of the Industrial Court.

In terms of Section 14 [a] of the Industrial Relations Act No. 1/2000:

“An order of the court made under this Act and directing the payment of money or the delivering of property shall be enforceable by execution in the same manner as an order of the High Court”.

In terms of Section 19 [43]; “The noting of an appeal under subsection 1 shall not stay execution of the court order, unless the court on application directs otherwise” (my emphasis). The court is defined in Section 2 of the Industrial Relations Act as follows, “means the Industrial Court established under Section 6”.

I agree in *toto* with the submissions made by Mr. Nsibandze that the circumstances on this matter are not that an appeal has been noted and that a stay of execution is being sought on that basis, nonetheless stay of execution proceedings relating to orders of the Industrial Court, it is clearly intended and contemplated by the Industrial Relation Act should be brought before the court.

The staying of execution of an order of the Industrial Court should properly be brought before the Industrial Court as with any order for the return of goods attached pursuant to an order of the Industrial Court and accordingly this court does not have jurisdiction to entertain this application in its totality in that it is the Industrial Court that ordered that its judgement be notified to the Commissioner of Taxes and should therefore be appropriate that any interdict, pending a determination by the

Commissioner of Taxes against the execution, should be obtained from the Industrial Court.

Paragraphs 8.1 and 8.2<sup>1</sup> of the founding affidavit do not advance the applicant's case any further on the question of jurisdiction. I agree with Mr. Nsibandze that this is an order that the Industrial Court is clearly competent to make, particularly because that court; has,

- i) Heard the matter relating to the arrears wages of the 1<sup>st</sup> respondent;
- ii) Made the order that Umbrella Management Services (Pty) Ltd pay the 1<sup>st</sup> respondent E60, 000-00;
- iii) Ordered that the judgement be notified to the Commissioner of Taxes.

Admittedly the High Court has generally speaking, inherent jurisdiction to grant interim relief to avoid injustice and hardship but the court will only extend its jurisdiction to matter which properly be heard before another court, when exceptional circumstances are present and when but for the exercise of that power a litigant might be remediless. In the case of *Airoadexpress vs Chairman, Local Road Transportation Board, Durban and others 1986 (2) S.A. 663*. It was held *inter alia* that the inherent jurisdiction of the court to grant *pendente* relief to avoid injustice and hardship was a salutary power which had to be jealously preserved and even extended where exceptional circumstances were present and where, but for the exercise of such power, a litigant would be remediless as was the position in that case. In *casu* however the applicant does have a remedy, he can either approach the Industrial Court for the relief which he is approaching this court and which is the appropriate court; or to pay the judgment amount of E60, 000-00 to the applicant's attorneys and leave it to the 3<sup>rd</sup> respondent to make a determination as directed by the Industrial Court. (see *Herbstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa (4<sup>th</sup> ED)* pages 1063 to 1064).

In the result, for the reasons advanced above the point *in limine* as to jurisdiction by the 1<sup>st</sup> respondent ought to succeed.

- b) **Locus standi**

Mr. Madau, in my view correctly conceded that the applicant has no *locus standi* to move this application in view of the compelling arguments advanced by Mr. Nsibandze.

Shorn of all the frills it is Mr. Nsibandze's contention that the applicant has failed to establish *locus standi* in that whilst applicant alleges that he was appointed liquidator in terms of a Government Gazette attached to his founding affidavit "EJH1", the said Government Gazette which discloses a resolution of the directors of the company does not appoint either the applicant nor anybody as liquidator and the applicant states no other basis in his papers upon which he purports to have the authority to act as liquidator and to bring this application as the applicant.

I agree entirely with Mr. Nsibandze's submissions at paragraphs 17, 18 and 19 of his Heads of Arguments.

I rule that this point *in limine* ought to succeed.

**c) Urgency**

The applicant's basis of urgency is set out in paragraphs 32 sub paragraphs 1 to 6. These read *ipssisima verba* as follows:

**" Urgency**

I humbly submit that the matter is urgent for the following reasons:

- 32.1 The information stored in the removed computers both in the hard drivers and in the backup system is very valuable and in the event that the computers remain removed from the control backup system, I am advised, this information may be completely lost.
- 32.2 The removal of the items has brought the activities of the company to a complete stand still and this will undoubtedly cause difficulties in selling the business as a going concern.
- 32.3 In the event that the goods remain removed, there is no guarantee that they are safe and will not be destroyed in anyway.

- 32.4 I humbly submit that it is in the interest of fairness and justice that the goods be returned to the premises (as they were removed illegally in the first place against the tender for payment).
- 32.5 The first and second respondents herein acted maliciously in that despite the discussions going on between the parties they have gone ahead and attached applicant's goods without good cause.
- 32.6 If applicant is not granted immediate relief then it stands to suffer irreparable harm since it would not be trading within that period of time when on the other hand the first and second defendant do not stand to suffer any prejudice as they still have to wait for 21 days before they can make means to dispose of the attached items. In short the applicant has no immediate remedy and if it is afforded on in future the damage which it seeks to avoid would already have been suffered".

The applicant in a nutshell bases the urgency on the potential for the attached goods to be damaged or stolen or that some other evil will befall the attached goods. I agree with Mr. Nsibandze that this cannot be a basis for urgency in the circumstances and no order or determination is sought on whether or not the attachment was unlawful. The potential for damage to attached goods is inherent in every attachment of movable goods and therefore cannot be a basis for urgency.

For the above reasons the point *in limine* as regards urgency ought to succeed.

**d) No *prima facie* right to relief sought has been established.**

The applicant, by failing to establish his own *locus standi*, therefore has failed to establish that he has a right or that he has a right *prima facie* enforceable by law.

This point of law ought to succeed.

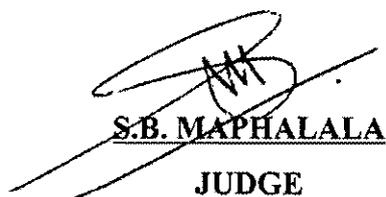
**e) Apprehension of irreparable harm**

I again agree with Mr. Nsibandze's contention that the applicant has not established a well-grounded apprehension of irreparable harm in the event that the interdict is not granted. The applicant only stated in paragraph 32.6 that he will suffer irreparable harm since he is not trading. Again this point *in limine* ought to succeed.

**f) No other remedies**

The applicant has not even suggested in his papers that he has no other remedies other than to approach this court for the relief which he is seeking. The applicant's remedies are clear he could approach the court which issued the order pursuant to which the goods have been attached or pay the judgement amount to the 1<sup>st</sup> respondent.

In the result, the application is dismissed with costs.

  
S.B. MAPHALALA  
JUDGE