IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 392/07

In the matter between:

ANTIOCH PRIMARY SCHOOL **APPLICANT**

And

THEMBISILE MHLANGA **1ST RESPONDENT**

THE CONCILIATION MEDIATION ARBITRATION COMMISSION **2ND RESPONDENT**

ZWELIJELE N.O. **3RD RESPONDENT**

CORAM:

NKOSINATHI NKONYANE: JUDGE
DAN MANGO: MEMBER
GILBERT NDZINISA: MEMBER

FOR APPLICANT: S. MADZINANE
FOR 1st RESPONDENT: NO APPEARANCE
FOR 2ND RESPONDENT: M. SIMELANE
FOR 3RD RESPONDENT: NO APPEARANCE

JUDGEMENT 05/09/07

[1] This is an urgent application in which the applicant is seeking an order, *inter alia,* compelling the second and third respondents to allow the applicant's attorney to have reasonable access or have copies of the record regarding the arbitration proceedings between the applicant and the 1st respondent.

[2] Only the 2nd respondent filed an answering affidavit in opposition of the

application.

[3] The brief facts of this application are as follows; the 1st respondent had her service terminated by the applicant on 14 December 2005. She reported a dispute to the 2nd respondent. The matter was set down for conciliation but the dispute was not resolved. The parties agreed that the matter be referred to arbitration. The 3rd respondent was appointed an arbitrator. At the initial stages the applicant was represented by the chairman Mr. Bhembe, Mrs Kunene and Mr. Mlipha. These three later decided to engage the services of an attorney.

[4] The attorney then asked to have access of the record of the proceedings so as to appraise himself of what has taken place prior to his involvement. The 2nd respondent refused to make available the copies of the record of the proceedings. The 2nd respondent's officers pointed out that would not do so unless there is an order of the court compelling them to do that.

[5] During the submissions before the court it became clear to the court why the 2nd respondent's employees were refusing to make the copies of the record available to the applicant's attorney. It was argued that they were prohibited from doing so by the **INDUSTRI AL RELATIONS ACT.** The section relied upon is **SECTION 75 OF THE ACT.** That section provides that:-

"Limitation of liability and disclose of Information
75 (1) No action or proceedings may be instituted against -

(a) a member of the Governing Body

(b) an employee of the Commission

(c) a member of any committee established by the Governing Body; and

(d) any person whom the Governing Body has contracted to do work for the Commission;

for or in respect of any act done or omitted to be one in good faith in

the exercise of that person's functions under this act.

(2) The persons referred to in subsection (1) (a) to (d) shall not disclose to any person or in any court any information, knowledge or document acquired in the course of performing their functions except on an order of any court."

[6] The 2n respondent was prepared to make the copies of the record of the proceedings available but was only prepared do so on the strength of a court order.

[7] The 2nd respondent's attorney raised a number of preliminary points. It is not clear to the court why did the 2nd respondent raise these points as it became clear that the 2nd respondent was not against the production of copies of the record. In its paragraph 6 of the answering affidavit it is stated that;

> *"I humbly submit that at no stage was the applicant's attorney denied access to the record but what was stated to him was that he could read through the Arbitrator's notes as that is the record of the matter. "*

[8] The first point of law raised was that the matter was not urgent. It was argued that the applicant became aware as far back as 30 November 2006 that it did not have the record. This argument only shows arrogance on the part of the 2nd respondent. The evidence of the numerous correspondence between the parties where the applicant was asking for the record were not denied. On seeing that the date of the hearing was coming closer the applicant then decided to seek the court's intervention. I do not think that the applicant should be punished for that. There was clearly nothing wrong with the applicant in first trying to have the matter settled without the need to come to court. It is therefore not correct to say the applicant created its own urgency.

[9] It was also argued on behalf of the 2nd respondent that the applicant had other

remedies available to him other than running to court. It was argued that it could file review proceedings. I do not believe that a litigant should allow its right to a fair hearing to be trampled upon just because it can thereafter appeal or file review proceedings. During the appeal or review the 2nd respondent could argue that the applicant never asked for the record.

[10] It was also argued that the applicant could have asked for a postponement at the hearing. At the hearing the applicant would be at the mercy of the Arbitrator. He may or may not allow the postponement. I do not think that it would be wise for the applicant to wait for an uncertain future event.

[11] It was also argued that the applicant has not shown that it has *locus standi* This point was never raised at CMAC before the Commissioner. It is CMAC that is presently seized with the matter. If any of the parties is not properly before the Commissioner or the Arbitrator that must be raised before those presiding officers.

[12] Mr. Madzinane argued that the points of law should not have been raised in the manner that the 2nd respondent's attorney did, that is, without notice. Indeed it is good practice that if a party intends to raise points of law, he must give notice of such to the other party and not take the other party by surprise in court. Mr. Madzinane however did not ask for a postponement, he seemed to be prepared to argue the points there and then.

[13] There was clearly no need for the lengthy arguments in court as it was clear what the 2nd respondent's position was in this matter.

[14] Taking all the above observations into account, the court will make the following order:

a) THAT 2nd RESPONDENT OR THE 3rd RESPONDENT IMMEDIATELY MAKES AVAILABLE THE COPIES OF THE ARBITRATION PROCEEDINGS BETWEEN THE

APPLICANT AND THE 1st RESPONDENT TO THE APPLICANT OR ITS REPRESENTATIVE.

b) NO ORDER FOR COSTS IS MADE.

The members agree.

NKOSINATHI NKONYANF

JUDGE - INDUSTRIAL COURT