

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 67/07

In the matter between:

MFUNDO TSHABALALA

APPLICANT

And

SWAZILAND GOVERNMENT

1ST RESPONDENT

ATTORNEY-GERNERAL

2ND RESPONDENT

SAFMARINE SWAZILAND (PTY) LTD

3RD RESPONDENT

CORAM:

NKOSINATHI NKONYANE: JUDGE

DAN MANGO: MEMBER

GILBERT NDZINISA: MEMBER

FOR APPLICANT: MZ. MKHWANAZI

FOR RESPONDENT: Q. ZWANE

JUDGEMENT 30.03.07

[1] The applicant is an employee of the 1st respondent.

[2] He was first employed by the 1st respondent in April 1987 as an accountant in the Treasury Department.

[3] In December 1997 he was seconded to work in the Swaziland Embassy in Brussels on secondment as a Third Secretary.

[4] He was later recalled from Foreign Service and he arrived in the country on the 1st October 2006. His personal goods were shipped to the country and they arrived in November 2006.

[5] The applicant's personal belongings were not however cleared on time and they have now attracted storage costs. The 1st respondent is however refusing to pay the accumulated storage costs. The 1st respondent says that these costs accumulated because the applicant was the one who delayed in presenting the invoice of the clearance charges to it for payment.

[6] The 1st respondent says the invoice was only presented to it on the 23rd January 2007. The applicant says he presented the invoice in time for the 1st respondent to pay, and that the storage costs would not have been incurred had the 1st respondent paid for the clearance charges in November 2006 when he presented the invoice.

[7] The applicant says when he presented the invoice to the Ministry of Foreign Affairs he did not find the Principal Accountant, whom he was told, was the only one who could assist him. He said he therefore left two copies of the invoice with two officers there.

[8] The court was unable to resolve the matter on the affidavits and ordered that oral evidence be led to resolve the dispute as to the cause of the delay in the payment of the clearance charges.

[9] The court heard the evidence of two witnesses for the applicant's case, and six witnesses for the 1st respondent's case. All the deponents to the affidavits testified. Five witnesses who were not deponents, but who were referred to in the affidavits testified on behalf of the 1st respondent.

[10] After the oral evidence and during submission Mr. Mkhwanazi questioned the court's power to refer the matter to oral evidence when neither party has applied for that to be done. He referred the court to **HARMS. LTC "CIVIL PROCEDURE IN THE SUPREME COURT" (2000) BUTTERWORTHS AT PAGE 200 PARAGRAPH G30** where the learned author stated that:-

"Whenever a genuine dispute arises in the affidavits about a material fact the court has a discretion to deal with the matter in various ways: (a) If neither party asks that the matter be referred for evidence or to trial, the court will usually not do so mero motu and will deal with the application on the undisputed facts..."

[11] What is clear however from this quotation is that the learned author is not saying that the court **cannot mero motu** refer a matter for evidence. The court has discretion. The only caveat attached is that the court should rarely do so.

See: **JOH - AIR (PTY) LTD V. RUDMAN 1980 (2) S.A. 420 (T)**

[12] Mr. Mkhwanazi further complained that the 1st respondent's witnesses who were not deponents irregularly appeared before the court as they were not subpoenaed and no leave of the court was sought by the 1st respondent's attorney. Mr. Mkhwanazi relied on the provisions of rule 6(18) of the High Court rules.

[13] Mr. Mkhwanazi was present in court when these witnesses appeared and gave their evidence. He did not raise any objection. Mr. Mkhwanazi was also unable to dispute the 1st respondent's attorney's submission that the two of them met and discussed how the proceedings would continue after the court's ruling.

[14] Furthermore, the issues that were raised by Mr. Mkhwanazi were questions of procedure. The test on issues of procedure is prejudice. Can it be said that the applicant was prejudiced because the witness appeared without the leave of the court first being sought? The court does not think so. There was no evidence that if the leave of the court was first applied for, the witnesses would have given different evidence than the one that they gave in the court.

[15] **Merits of the Case:**

The 1st respondent does not deny that it was its duty to pay the repatriation costs. That an employer is liable for the repatriation expenses is also provided for under Section 43 of the Employment Act of 1980 and also in the Government General Orders.

[16] The only issue before the court is that the applicant's goods overstayed with the shipping agent. There has now arise costs for the storage of the goods as they were not cleared soon after their arrival in November 2006, but the 1st respondent sought to pay for the goods to be cleared on the 24th January 2007.

[17] The question is, who should now bear those costs that were incurred as the result of the applicant's goods not being cleared on time? The 1st respondent says it's not liable to pay for the additional costs of storage, as it was the applicant himself who submitted the invoice to it late. The applicant says the 1st respondent should pay the additional costs as he submitted the invoice for the clearance charges early enough in November 2006 and that had the 1st respondent paid in November 2006, this matter would not be before the court today.

EVIDENCE LED IN COURT: -

The applicant said when he arrived in the country he went to inform the Ministry of Foreign Affairs. He met Mr. Alfred Khumalo and told him about the goods. He said he also gave his cellular phone number to Ambrose Dlamini, another official at the Ministry.

The applicant was informed by Interfreight (PTY) LTD that the goods had arrived. He prepared all the necessary documents. He was then given the invoice, which was addressed, to the Ministry of Foreign Affairs.

He took the invoice to the Ministry. He was in the company of Nhlanhla Mabuza. At the Ministry he was attended by Ambrose Dlamini who told him that the Principal Accountant, Mr. Alfred Khumalo the only officer who could deal with his matter was not in.

The applicant said he then went to report the matter to the Accountant-General. He said the Accountant-General phoned the Ministry of Foreign Affairs officials and told them to pay the clearance fees.

The applicant had no house as he had been in Foreign Service.

During cross-examination the applicant said that he presented the invoice to the Ministry on the 27th November 2006. He said no one could help him as he was told that the Principal Accountant was on leave.

Nhlanhla Mabuza testified and confirmed the evidence of the applicant about going to the Ministry of Foreign Affairs and to the office of the Accountant-General. He also told the court that he did see the invoice form Interfreight. His evidence about what happened in the offices that the applicant went into cannot be trusted as he said he did not get into these offices with the applicant.

RW1 Alfred Khumalo was a reliable and trustworthy witness. He told the court that he received a phone call from Interfreight and was told about the applicant's goods. He said that it was about the 23rd or 24th November 2006 when that happened.

The Interfreight people gave RW1 the applicant's contact number. The applicant met with RW1 and the applicant told RW1 and the applicant told RW1 that he did not have a house yet to keep the goods. Khumalo said he advised the applicant that the goods could be kept at the government stores while he was looking for a house. The applicant however said he was going to continue to look for the house.

Khumalo was apparently aware that if the applicant's goods were not moved to a house, they would start attract to storage costs. He then arranged with the Stores Department to have the goods kept there, he said he thereafter failed to get into contact with the applicant.

Mr. Khumalo and the applicant met each other again on the 23rd January 2007. Mr. Khumalo said the applicant told him that he had problems in getting his goods as he had been told that he should pay E17,000:00. Mr. Khumalo said it was only then that he learnt that the Ministry had been invoiced for the clearance of the applicant's goods by Interfreight.

Mr. Khumalo said the applicant told him further that he took that invoice to the Accountant-General's office where he was advised to take it to the Ministry of Foreign Affairs. Mr. Khumalo said the applicant also told him that he then returned the invoice to Interfreight. He said Interfreight advised him that it would be them who would take it to the Ministry of Foreign Affairs.

After Mr. Khumalo had seen the invoice, an order was made on the following day, the 24th January 2007. Interfreight did not honour the order because it was short of the accumulated storage costs.

Mr. Khumalo told the court that the clearance of the goods is done by the returning officer. He said the officer should report his arrival to the Principal Secretary or the Under Secretary, Administration. Mr. Khumalo was on duty during the whole month of November 2007 and only went on leave on the 1st December 2006. He said when he went on leave the Senior Accountant acted in his position.

During cross-examination Mr. Khumalo confirmed that he learnt that the applicant's goods have arrived when he received a telephone call from Interfreight around the 23rd or 24th November 2006. He said he did not ask Interfreight if there were charges to be paid. He said he expected the owner of the goods to bring the invoice to the Ministry of Foreign Affairs. He denied that the applicant presented the invoice on the 27th November 2006 at the Ministry of Foreign Affairs.

The officers that the applicant said he talked to at the Ministry denied that the applicant came to the Ministry on the 27th November 2006. They also denied that they informed the applicant that the only person who could assist him was Mr. Khumalo and that he was not available. These officers were Ambrose Dlamini and Makhosini Dlamini.

RW4, Khetsiwe Dlamini who is the Account's Officer at the Ministry also said she never received the invoice in November 2006.

RW5, Freda Dlamini was the acting Principal Accountant when Mr. Khumalo was on leave. She said she was instructed by Mr. Khumalo to look for the applicant. She said she was unable to locate him.

She said at some point they drove to Manzini to look for him at his parental home, but were not able to locate it.

RW6, Nikwani Dlamini is the Under Secretary, Administration. She said she became aware that the applicant had returned from Foreign Serve in 2006 when she met him in the lift. They went to her office and he reported that he had lost some of his goods. She said in November 2006 Mr, Khumalo came to her office to advise her that the applicant's goods have arrived. Mr. Khumalo told her that he got that information from Interfreight.

She said the applicant showed up again on the 23rd January 2007. She said he reported that he had a problem with his goods. On that day the applicant told the Ministry officials that he took the invoice to the Accountant-General and then back to Interfreight. She said the applicant never mentioned in that meeting that he gave the invoice to two of the Ministry's officials.

ANALYSIS OF THE EVIDENCE: -

The court finds that Mr. Alfred Khumalo and Nikwani Dlamini were credible and trustworthy witnesses. These witnesses admitted that they did meet the applicant in November 2006. Mr. Khumalo admitted that he got to know about the applicant's on or about the 23rd or 24 November 2006. If these witnesses had anything to hide, they would simply have denied that they first learnt that the applicant's goods have arrived in November 2006.

The court accepts the evidence of the applicant and his witness that he presented the invoice to the Ministry on the 27th November 2006. The applicant was also a credible witness. The evidence of the applicant was corroborated by the invoice from Interfreight, which is dated 30th November 2006. The applicant had an interest in getting his personal belongings released to him. It was highly unlikely that he would have delayed in submitting the invoice to the Ministry as soon as he got it.

He said he got the invoice from Interfreight on the 27th November 2006 and proceeded to the Ministry on that same day. He explained why the invoice was dated 30th November 2006. He said that date was the last day that the payment was expected and that after that the goods would attract storage costs.

The storage costs indeed were incurred as of the 1st December 2006. There is no reason that the court has not to accept this explanation.

Mr. Khumalo said the applicant told him that he took the invoice to the Accountant-General and thereafter back to Interfreight. That was precisely the applicant's evidence. According to the applicant's evidence there was no need to take the invoice back to the Ministry as he had been told there that the only person who could help him was not available.

RW6, Nikwani Dlamini's evidence that the applicant never said during the meeting that was held in her office that he had given the invoice to two officers of the Ministry does not take the 1st respondent's case any further. He indeed never left the invoice with those two officers, but left copies and proceeded to the Accountant-General's office to seek further advice.

Mr. Khumalo said he did suggest to the applicant that the goods could be kept at the Government Stores. He said the applicant told him that he was going to continue to try to find a house.

The applicant also had a motor vehicle. There was no suggestion from the employer where was it going to be kept. The applicant did not refuse that the goods be taken there. The question is what did the employer do after that knowing that the costs were escalating by the day.

The evidence revealed that some Ministry's officials tried to look for the applicant at his parental home in Manzini but could not find him. It is not clear to the court why were the officials looking for the applicant, as it was known by to the Ministry that he did not have accommodation as he was from Foreign Service.

[47] It is a mystery why did the Ministry not find a house for the applicant wherein he could put his goods instead of trying to find him. It was argued that it is government policy that an officer should find accommodation on his own.

[48] That policy should apply only to locally based civil servants and not those serving the government in Foreign countries. It is a notorious fact that a lot of government employees are without government accommodation. How then can someone who has just arrived in the country from Foreign Service be expected to secure a government house in a months' time.

[49] This government's policy undoubtedly works unfairly against government employees who have just returned from Foreign Service. To apply it equally to all government employees is clearly unreasonable.

[50] The unreasonableness of this government policy when applied to employees in Foreign Service is

easy to see. When the employee is in Foreign Service, the government is able to provide him with accommodation. When that employee is recalled he loses that benefit overnight. The court cannot allow this situation to persist. It is clearly unfair on the returning officers.

[51] The evidence revealed that the applicant secured a place of abode at Magevini. His friend Nhlanhla Mabuza said he had to move out and to stay with his girl friend in order to let the applicant stay in that house. An impression was created that it was dishonesty on the part the applicant not to reveal that to Mr. Khumalo.

[52] The court however disagrees with that view. The applicant is a government employee. Whilst still in Belgium government had provided him with accommodation. It was the employer that transferred or recalled him and the employer had the duty to see to it that he was again provided with accommodation at his new duty station. If the applicant's goods had to be moved to his parental home or to a friend's house, that should only be with the consent of the applicant.

[53] The evidence further revealed that the terms of the goods were that they were being moved from door to door. Mr. Khumalo was asked what is meant by door to door and he said it meant "From Belgium to the house of the applicant".

[54] The employer had a duty therefore to take the goods to the house of the applicant. That did not happen. The goods were therefore supposed to be moved from the door of the house of the applicant in Belgium, to the door of the house of the applicant in Swaziland.

[55] This court has duty to uphold the purposes and objectives of the Industrial Relations Act of 2000 as amended. One of the purposes and objectives of the Act is to promote fairness and equity in labour relations. (See Section 4 (1) (b) of the Act.)

[56] It is clearly unfair and highly oppressive to require a returning Foreign Service official to get accommodation within a short space of time wherein to put his personal belongings and if he fails to expect that officer to be responsible for the storage costs of the goods.

[57] The returning officer does not cease to be a government employee just because he had been recalled. If he had government accommodation abroad, there is no reason why he should lose that benefit upon his return to the country.

CONCLUSION:

[58] The court finds that the applicant did present the original invoice to the Ministry on the 27th November 2006 and did not leave it there as he was told that the only person who could help him, Mr. Khumalo, was not present.

[50] The court rejects the evidence of RW2 and RW3 denying that the applicant came to the Ministry with the invoice on the 27th November 2007. The evidence showed that the applicant had already done the clearance of some of the goods as early as on the 8th November 2006. There was no suggestion as to why the applicant could delay in presenting the invoice after it was given to him by Interfreight on the 27th November 2006.

[60] Even if it is the government policy not to pay storage costs for personal goods, the government must be ordered to pay for the storage costs in this case as the government became aware that the goods have arrived in November 2006 but failed to pay the clearance costs in time and also failed to deliver the goods to the door of the applicant's house.

[61] The government policy that a government worker is responsible to find for his own accommodation works unfairly and is oppressive against employees who are returning from Foreign Service who will have to join the long list of applicants when they have to take care of their goods that they are coming with from abroad. This policy cannot therefore be allowed by the court to operate against this cadre, as it is clearly prejudicial.

[62] Taking into account all the evidence before the court and the circumstances of this case, the court will make the following order.

1. THAT THE 1st RESPONDENT PAYS THE CLEARANCE CHARGES TO ITS AGENT INTERFREIGHT (PTY) LTD IN THE SUM OF E17.072.10
2. THAT THE 1st RESPONDENT PAYS THE ACCUMULATED STORAGE COSTS IN RESPECT OF THE APPLICANT'S GOODS.
3. THAT EACH PARTY PAYS ITS OWN COSTS.

[63] The members agree.

NKOSINATHI NKONYANE

INDUSTRIAL COURT