

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 5441/08

In the matter between:

CHRISTIAN KHUMALO

APPLICANT

And

METCASH TRADING AFRICA (PTY) LTD

RESPONDENT

CORAM:

NKOSINATHI NKONYANE: JUDGE

DAN MANGO: MEMBER

GILBERT NDZINISA: MEMBER

FOR APPLICANT: S.M. SIMELANE

FOR RESPONDENT; P.L. MNGOMEZULU

JUDGEMENT-10.12.08

[1] The applicant instituted an urgent application on Notice of Motion for an order;

"1 Dispensing with the normal and usual requirements relating to

time limits, manner of service of procedure in ordinary applications and enrolling this matter as one of urgency.

2. Condoning any non compliance with the rules of court.

3. That a *rule nisi* do issue operating with interim and immediate effect and returnable on a date to be determined by the Honourable Court calling upon the respondent to show cause why prayers 3.1, 3.2, 3.3 and 3.4 herein below should not be confirmed and made final orders of court.

3.1. Directing the respondent to furnish the applicant with a transcribed and signed copy of the minutes of the disciplinary hearing of applicant that took place from June to August 2008.

3.2. That the minutes referred to in 3.1 above be furnished to the applicant within seven days from date of service of a court order in this matter to the respondent.

3.3. Pending finalization of this matter the respondent be interdicted and restrained from proceeding with appeal proceedings in the internal disciplinary proceedings of the applicant.

4. Costs of this application at the scale of attorney and own client.

5. Further and/ or alternative relief."

[2] The application is opposed by the respondent.

[3] The brief facts of the application show that the applicant was subjected to a disciplinary hearing from 02.07.08 to 20.08.08 held at Metro Manzini and Metro Nelspruit. After this lengthy hearing the applicant was found guilty by the chairman of the disciplinary hearing. He was advised of his right to appeal within two days after receipt of the written judgement. In order to prepare for the appeal he requested for the record of the hearing.

The respondent indeed sent him the tapes. The applicant wrote to indicate that he wanted a transcribed record in order to be able to prepare for his appeal. The respondent refused to do that and pointed out that it was under no duty to furnish the applicant with a transcribed record of the proceedings. The respondent also suggested to the applicant that if it was required to produce a transcribed record the applicant must pay half of the expenses.

[4] The respondent argued further that;

4.1 It has done everything on its part to enable the applicant to appeal as it has given him the record of the hearing, that is, the tapes.

4.2. The record is bulky. It consists of twenty-one tapes. It is unreasonable to expect it to transcribe the record for the applicant especially because he refused to meet the respondent halfway on the costs involved.

4.3. The request for a transcription is unreasonable.

4.4. The applicant was represented by an attorney and a written judgement has been handed down. The applicant could therefore be in a position to lodge the appeal.

[5] On behalf of the applicant it was argued that;

5.1. The applicant requested that the proceedings be tape recorded so that thereafter a written record is made.

5.2. The employer as the initiator of the proceedings has the duty to provide the applicant with a transcribed record.

5.3. The respondent is not showing good faith in its conduct towards

the applicant as it has already advertised the applicant's post.

[6] The respondent in this case has advised the applicant that he has the right to appeal the decision of the chairman of the disciplinary hearing. The applicant therefore wants to exercise that right of appeal. The respondent, was the one that initiated the proceedings against the applicant. The proceedings have not yet been finalized as the applicant still has to exercise his right to appeal. The respondent argued that the record of the proceedings, in the form of the tapes, is bulky and that it would be unreasonable for it to be expected to bear the costs of transcription. It is however also unfair to expect the person being prosecuted to incur the costs of the prosecution process. The applicant did not initiate the disciplinary proceedings. Why should he be required to be out of pocket for a process that was not initiated by him.

[7] The authorities refer to a record without specifying the form or nature thereof. **John Grogan Workplace Law 8th edition at p.202** states that;

"Where there is a record, however, the employee must be given access to it."

The respondent accordingly argued that it has fulfilled its obligation by giving the tapes to the applicant. An employee however is entitled to both a fair hearing and a fair appeal. In this case the applicant has indicated that he will consider the appeal hearing as being fair if he is given a transcribed record of the disciplinary hearing. The respondent says it will be too costly for it to do that.

[8] As already pointed out in paragraph 7, the applicant has a right to a fair appeal hearing. He cannot have a fair appeal hearing if he has not been able to adequately prepare for the hearing. In order to do that he says he needs a transcribed record of the disciplinary hearing. We do not think that this request is unreasonable because;

- a) The evidence shows that the disciplinary hearing took more than a month to complete. Twenty one tapes were produced as record of the hearing.
- b) The applicant is presently out of employment. It will be unfair to require him to pay or contribute towards the transcription of the record.
- c) It will be more convenient for him to analyse the evidence led at the disciplinary hearing if it is in written form.

[9] Taking into consideration therefore that the applicant has a right to a fair appeal hearing, the bulkiness of the original record (21 tapes) and the length of the disciplinary proceedings, the court will make the following order;

a) The respondent is directed to furnish the applicant with a transcribed and signed copy of the minutes of the disciplinary hearing of the applicant to enable him to lodge the appeal within twenty one days of the court's order.

b) The applicant is to be given at least seven days to prepare and lodge his appeal after receipt of the transcribed record.

c) No costs order is made.

The members agree.

**NKOSINATHI NKONYANE
JUDGE OF THE INDUSTRIAL COURT**