



**IN THE CONCILIATION, MEDIATION AND ARBITRATION
COMMISSION (CMAC)**

HELD AT MBABANE

CMAC NO: SWMB 460/08

In the matter between:

JUSTIN CHIRWA

APPLICANT

And

PEAK TIMBERS LIMITED

RESPONDENT

CORAM:

ARBITRATOR

VELAPHI ZAKHELE
DLAMINI

FOR APPLICANT:

NO APPEARANCE

FOR RESPONDENT

MR. THOBA SIMELANE

RULING

DATE(S) OF ARBITRATION:

9TH JULY AND 17TH AUGUST
2010

VENUE:

CMAC OFFICES, 1ST FLOOR
MBABANE HOUSE,
MBABANE

1. **PARTICULARS OF THE HEARING AND REPRESENTATION**

1.1 This is an application for the dismissal of the Applicant's claims made by the Respondent, following the former's non- attendance of an arbitration hearing scheduled for the 9th July 2010 at 14hr30. The Respondent (Peak Timbers Limited) was represented by Mr. Thoba Simelane.

1.2 The Application was orally moved by Mr. Simelane at the hearing.

2. **ISSUE TO BE DECIDED**

2.1 Whether the Commission has the power to hear the matter afresh.

2.2 Whether the Applicant's claim should be dismissed in terms of CMAC Rule 27 (1)(a).

3. **SUMMARY OF SUBMISSIONS**

3.1 **REPRESENTATIONS OF THE EMPLOYER PARTY
(RESPONDENT)**

3.1.1 Mr Simelane submitted that the Applicant had failed to attend the arbitration on three occasions, despite proof that he was served with notification to attend. These occasions were the 25th May, 16th June and 9th July 2010.

3.1.2 It was Mr Simelane's argument that on all these instances, the Applicant did not provide a just and reasonable explanation for his failure to attend the hearing. I was urged to dismiss his claims in terms of CMAC Rule 27 (1) (a).

3.2 **REPRESENTATIONS OF THE EMPLOYEE PARTY
(APPLICANT).**

3.2.1 Although the Applicant failed to attend arbitration, after the first notification, he wrote a letter to the Commission dated the 20th May, 2010 in which he was objecting to having the matter commence *de novo*.

3.2.2 In the same letter, the Applicant applied that the Commission issues the original arbitration award in the matter between the same parties, which was heard by former Commissioner Ms. Lindiwe Ngcamphalala.

4. **ANALYSIS OF SUBMISSIONS OF PARTIES**

4.1 In the process of preparing this ruling, which was due on the 29th July 2010, I came to the conclusion that, CMAC Rule 27(1) (a) should be considered in light of the Applicant's reasons for not attending the arbitration.

4.2 It is for the foregoing reason that I invited the parties on the 17th August 2010 at 10:00am, to address me on the following questions;

4.2.1 Whether the Applicant had acted reasonably in refusing to attend arbitration, on the grounds that the Commission had failed to issue an award in the matter.

4.2.2 Whether the Commission had the power to hear the matter afresh.

4.3 However none of the parties attended the hearing on the 17th August, 2010.

4.4 CMAC Rule 27 (1) (a) reads as follows;

“If a party to a dispute fails to attend an arbitration hearing or is not represented at an arbitration, and the commissioner is satisfied that the party not in attendance or not represented was properly notified of the arbitration, and there is no just and reasonable explanation for that party’s failure to attend or non- representation, the commissioner may- dismiss the matter, if the party who referred the dispute to the Commission fails to attend the hearing or is not represented”.(emphasis added).

4.5 It is common cause that this matter was handled by former Commissioner Ms.Lindiwe Ngcamphalala before my appointment. There is no dispute that the matter was heard and completed when the parties filed closing submissions to the Arbitrator by the 1st June 2009.

4.6 The award could not be issued because Commissioner Ngcamphalala then left the Commission.

- 4.7 On the 22nd February 2010, the parties, under the auspices of the Commission, agreed that a new commissioner be appointed to arbitrate the dispute using the record of proceedings under Commissioner Ngcamphalala and that the matter should not be heard *de novo*.
- 4.8 On or about the 12th April 2010, the Commission wrote a letter to both parties advising that the matter would have to be heard afresh, because the Respondent party was reneging on the earlier agreement, which was that the new commissioner should continue to hear the matter using the record of proceedings before the former commissioner. That is how I was eventually appointed to hear the matter afresh.
- 4.9 The practice and procedure to be adopted in the Superior Court when a presiding officer, in civil proceedings, for some reason is unable to conclude a matter, is governed by Section 2 (1) of the High Court Act 20 of 1954 (Act 20/1954).
- 4.10 Section 2(1) of Act 20/1954 provides as follows:

“ The High Court shall be a Superior Court of record and in addition to any other jurisdiction conferred by the Constitution, this or any other law, the High Court shall within the limits of and subject to this or any other law possess and exercise all the jurisdiction, power and authority vested in the Supreme Court of South Africa.” (emphasis added).

4.11 Since there is no express provision on the subject in the High Court Act, one then has to have recourse to the South African Supreme Court Act 59 of 1959 (Act 59/1959).

4.12 Section 17 (2) of Act 59/1959 provides that;

“If at any stage during the hearing of any matter by a full court, any Judge of such Court dies or retires or is otherwise incapable of acting or is absent, the hearing shall, if the remaining judges constitute a majority of the judges before whom it was commenced, proceed before such a majority, or if any one judge remains, the hearing shall be commenced *de novo*, unless all the parties to the proceedings agree unconditionally in writing to accept the decision of the majority of such remaining judges or such one remaining judge as the decision of the Court”. (emphasis added).

4.13 Gubbay CJ in **Mhlanga v Mtenengari and Another 1993 (4) SA 119(ZS) at 122-3**, made the following remarks;

“As a general rule, where a judicial officer is unable to complete a part-heard civil trial, be it due to supervening death or resignation on account of ill-health or some other form of incapacity his successor should commence the trial *de novo*, notwithstanding that to do

so involves recalling those witnesses who have already testified and adducing their evidence afresh...The desirability of adopting such a course is self-evident. The second judicial officer would otherwise be deprived of the substantial advantage of seeing and hearing the witnesses for himself and of being able to compare their demeanor with that of the witnesses who testified in person before him...In such a situation the attitude of the litigants as to how best to proceed is, to my mind, of utmost importance. It is not for the judicial officer to dictate that the trial is to re-commence at the point reached by his predecessor... His duty is to consult the parties. He may bring his persuasive power to bear. But it is only in the event of it being agreed by the parties that he continues the trial, in the sense that the transcript of the proceedings so far be produced as evidence before him, that he is at liberty to do so. In the absence of consent, he must commence the trial afresh". (my emphasis)

4.14 Although the parties agreed in February 2010 that the new commissioner would re-commence the matter at the point

reached by the erstwhile commissioner, that agreement was not made unconditionally in writing. Moreover one of the parties reneged on that earlier oral agreement.

4.15 Ms. Lindiwe Ngcamphalala is no longer in the employ of the Commission, consequently, I find that she is incapable of acting in the position of a commissioner and the Commission has no power to compel her to issue the award.

4.16 In **Public Servants Association on behalf of Ntlaseng and Department of Finance (2003) 24ILJ 871 (CCMA)**, Commissioner Moletsane held that, in the absence of evidence that a commissioner had died or was incapable of issuing an award, the CCMA lacked jurisdiction to rehear a matter, unless compelled to do so by the Labour Court.

4.17 I find that in the circumstances, the Commission was justified in appointing a new commissioner to hear the matter afresh.

4.18 Further I find that the Applicant did not have a just and reasonable explanation for his failure to attend the arbitration.

4.19 I also find that the Applicant acted unreasonably by snubbing the notifications to attend arbitration. He should have attended the hearing in order to raise his objections.

5. **RULING**

The Applicant's claims are dismissed in terms of CMAC Rule 27(1)
(a).

DATED AT MBABANE THIS.....DAY OF SEPTEMBER 2010

VELAPHI ZAKHELE DLAMINI
CMAC ARBITRATOR