



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

**HELD AT MBABANE**

**SWMB 267/2014**

In the matter between:-

**WORKERS UNION OF SWAZILAND  
TOWN COUNCILS**

**Applicant**

And

**MBABANE CITY COUNCIL**

**Respondent**

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**RULING ON POINTS IN LIMINE**

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**1. BACKGROUND**

- 1.1 The Applicant is the Workers Union of Swaziland Town Councils (hereinafter referred to as WUSTC), a Trade Union duly recognized by the Mbabane City Council. It was represented by Mr. Musa Langwenya, a Union Official
- 1.2 The Respondent is Mbabane City Council, which was duly represented by Mr. Sicelo Dlamini, the Human Resources Manager.

- 1.3 The Trade Union reported a dispute to the Commission on behalf of five of its members
- 1.4 In the conciliation proceedings that were held on the 27<sup>th</sup> of August 2014, at 11:30 am, at the CMAC offices, Asakhe House, the Respondents raised a number of *points in limine* on why the conciliation should not proceed.
- 1.5 The reasons advanced by the Respondents on why the matter should not proceed were *inter alia* that:
  - 1.5.1 The Applicant should not have brought the matter to CMAC on behalf of the employees. The Respondent produced a letter written on the 17<sup>th</sup> December 2013, by one of the persons whose matter is brought on his behalf which states that *“Technically I and the other retired employees are no longer members of the Union. As such we do not pay subscriptions to it; we did not mandate the Union to handle the matter on our behalf”*.
  - 1.5.2 The Respondent further stated that the letter was written in response to a letter written to the employees by the City Council, wherein it had stated that it would not deal with the employees individually but would deal with them through their Union.
  - 1.5.3 In response, the Applicant representative stated that the letter was written by the employees because of the pain they were feeling at the time because of the way the employer was treating them by not wanting

to deal with them and the office of the Labour Commissioner regarding this matter

1.5.4 Further to that, Applicant states that the letters that the Respondent is bringing forward were withdrawn by them together with the first dispute they had lodged and withdrew at CMAC on the 9<sup>th</sup> June 2014; they do not understand why the Respondent is bringing up those letters since they are not part of the dispute they have lodged.

1.6 Another point of contention between the parties is whether the Commission had jurisdiction to hear this matter.

1.6.1 The Respondents referred to the case of ***Magdalen Thring v Dunns Swaziland ICA Case No. 08/2013***, which speaks to the issues of retirement and severance allowance

1.6.2 In light of that case, the Respondents state that since that judgment by the Industrial Court of Appeal, the CMAC has lost jurisdiction in hearing matters that have to do with retired employees and them getting severance allowance

1.6.3 Since this is a dispute about retired employees not getting their severance allowances, the Commission should have rejected the matter and not accepted it at all. Since the Commission is a creature of statute, it cannot go against what has been said by the Industrial Court of Appeal

1.6.4 The Applicant stated that this judgment came out after the employees had retired, therefore it did not affect them. They then pointed me in the direction of the case **of Trustees of Swaziland Railway v STAWU ICA Case number 1442/1993** and the case of **Khombisile Makhubu v Baylor College of Medicine IC Case number 89/2010**, which they stated talks to their issue of retirement and severance allowance

2. It is incumbent upon me at this point to point out that after hearing the submissions of both parties in the matter, I reserved my ruling and postponed the matter to give out a written ruling on the points in limine.

### **LEGAL ANALYSIS OF RESPONDENT'S POINTS IN LIMINE**

3. Section 76 (1) (c) of the Industrial Relations Act No. 5 of 2000 as amended, specifies who can report a dispute to CMAC and will serve to assist in determining whether the Union has the right to report the dispute on behalf of its members. It reads;

*“... a dispute may only be reported ... by an organization which has been recognized in accordance with Section 42*

- 3.1 The provision shows that a Union such as this one, which has been recognized by the employer, can well report a dispute to CMAC on behalf of its members.
- 3.2 The fact that the retired employees had disowned the Union in the letter dated 17 December 2013 does not mean that they

- have no right to right their wrong and go back to the Union to have it assist them. A fortiori, Section 11 (1) of the Industrial Relations Act allows the Industrial Court and by extension the CMAC not to be strictly bound by rules of evidence or technicalities which may not result in the miscarriage of justice. Allowing the Union to represent the employees despite their prior refusal will not result in a miscarriage of justice, but denying them same, may result in such miscarriage.
- 3.3 Section 30 (1) of the Industrial Relations Act, 2000 also states that *“A person eligible for membership in an organization ... has a right to membership in that organization ... as long as the person complies with the rules of the organization”*
- 3.4 Section 30 (3) of the same Act goes on to provide that *“An employer shall not infringe on an employee’s right to belong or not to belong to an organization of the employee’s choice”*
- 3.5 Section 30 (1) and (3) go hand in hand with Section 76(1) (c) of the Act. The employee has the right to be a member of a Union if he so qualifies, the employer has no right to infringe on the employee’s right to be a member of the Union and after choosing to be a member of that Union, the Union can then report a dispute on behalf of the employee.
- 3.6 To hold a contrary view, would be contrary to the spirit of reconciliation that the **Industrial Relations Act No. 5 of 2000 (as amended)**, seeks to promote. This legislation generally proscribes parties from going on to adjudication without having gone through reconciliatory processes which include conciliation. It seeks to encourage parties to try and informally resolve their differences before going on to adjudication. Therefore, where a

- party will seek to obtain benefit by insisting on the fault of the other party and ignore the other party's attempts to correct the fault and resuscitate the relationship, such conduct shall be frowned upon.
- 3.7 Denying erstwhile employees representation by their Union, on issues material to the termination of their employment (which termination has resulted in them not being an active member of the union), such as dismissal or retirement could be a miscarriage of justice.
- 3.8 The starting point on the Point of jurisdiction may be a brief description of CMAC and its purpose. The Commission is a creature of statute, as it was established by Section 62 of the Industrial Relations Act No. 5 of 2000 (as amended). The Act was enacted to consolidate the law in relation to employment, which means CMAC was established to further the purpose of the Act. The CMAC was established as an Alternative Dispute Resolution Mechanism, for the resolution of conflicts in Swaziland's labour relations
- 3.9 The matter reported by the Union to CMAC is a matter relating to labour relations and we have since established that it has been brought by the correct party. What is left is to consider whether the Commission has the jurisdiction to hear the matter or not.
- 3.10 A judgment was made in the Thring Case by the Industrial Court of Appeal with regard to severance allowance and whether it is payable to employees that have retired
- 3.11 CMAC can conciliate on disputes falling within the purview of the Commission, i.e. disputes between employer and employee

- 3.12 It must be pointed out that parties report disputes to CMAC and it is not all the time that they may be right concerning the dispute they have brought. The court might have made a judgment regarding that particular principle but it is within the right of the reporting party to have his matter heard as well. It is important to note that each matter must be heard on its own merits and a decision made after looking at all the circumstances of the case
- 3.13 To say a person is not entitled to have his dispute conciliated only because there is a judgment that suggests he may have no relief, is contrary to the natural justice principle (*audi alteram partem*). Such a person ought to be given the opportunity to be heard on the merits as there may be circumstances which distinguish his matter from that erstwhile decision of the court,
- 3.14 The Applicants indicate that they have a valid defense and will be able to prove that they are entitled to the relief sought. Parties are allowed to have differing views on a dispute brought to CMAC. If they do not agree after conciliation, the matter can then be taken for further determination of the unresolved dispute either at Arbitration or in the Industrial Court
- 3.15 CMAC is indeed a creature of statute but it is an independent body and it has the right to carry out its mandate of trying to bring about industrial harmony and reconciliation between employer and employee or their organizations respectively.
- 3.16 For the foregoing reasons, the Respondent's point in limine should fail.

- 4 Following the dismissal of all the points of law raised, the parties are hereby invited to *bona fidely* conciliate the matter under the auspices of the Commission.
- 5 The conciliation proceedings shall therefore proceed on the 9<sup>th</sup> September 2014 at 10:00am

**DATED AT MBABANE ON THIS 8<sup>TH</sup> DAY OF SEPTEMBER 2014.**

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**Lobenguni Manyatsi**  
**CMAC COMMISSIONER**