IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 252/2005**

In the matter between:

ZODWA GAMEDZE **Applicant**

and

SWAZILAND HOSPICE AT HOME **Respondent**

CORAM:

P. R. DUNSEITH	**:**	**PRESIDENT**
JOSIAH YENDE	**:**	**MEMBER**
NICHOLAS MANANA	**:**	**MEMBER**
FOR APPLICANT	**:**	**N. GUMEDZE**
FOR RESPONDENT	**:**	**S. SIMELANE**

J U D G E M E N T – 20/10/06

1. The Applicant instituted proceedings in the Industrial Court on the 27th July 2005, claiming payment of terminal benefits, compensation for unfair dismissal and acting allowance in the total sum of E161,304.23.

2. Pleadings were closed and the matter referred back to the Registrar for allocation of trial dates on 14 September 2005. A pre-

trial conference was held on the 17th November 2005, and the quantum of the claim was reduced to E157,173.53 by agreement.

3. The Applicant has now applied to the President of the Industrial Court for the matter to be referred to arbitration under the auspices of CMAC as provided by Section 8 (8) and 85 (2) of the Industrial Relations Act 2000 (as amended).

4. The stated reason for the application is that "the determination of this matter has dragged on for too long due to the backlog of cases in the Industrial Court."

5. The Respondent opposes the application. Referring to the ruling of the Court President in the case of Sydney Mkhabela v Maxi-Prest Tyres (IC Case No. 29/2005), Mr. Simelane for the Respondent set out the following factors which militate against the referral to arbitration:

5.1 There are complex issues of law arising for determination. These include the question whether the Applicant was an employee to whom Section 35 of the Employment Act 1980 (as amended) applies. This question requires legal analysis regarding the nature and duration of the Applicant's employment.

5.2 The claim is for a substantial amount, namely E157.173.53.

5.3 There are numerous disputes of fact for determination, such as whether the Applicant was

unfairly dismissed; whether the Applicant is entitled to an acting allowance; whether the Applicant was retrenched or whether the employment contract expired by effluxion of time; and whether the Applicant has correctly cited the Respondent as her employer.

These disputes can best be thrashed out, argues Mr. Simelane, in the more formal surroundings of a court of law.

5.4 Finally, the Respondent states that it has no control over the choice of arbitrator, and it has more confidence in the Industrial Court than in an arbitration tribunal.

6. Mr. Gumedze for the Applicant gamely responded to these arguments, stressing that his client's right to an expeditious hearing should override the Respondent's objections. He denied that the matter is complex, and submitted that the Respondent can suffer no prejudice if the matter is referred since the Industrial Relations Act 2000 confers a right of appeal from the decision of an arbitrator appointed under Section 8 (8) of the Act.

7. The potential prejudice of a referral to arbitration arises from one of the parties being deprived against its will from access to a court of law for determination of the dispute. The President will be reluctant to close the doors of the Industrial Court to a litigant unless he is satisfied that the litigant will not be unduly disadvantaged by the less formal procedure of arbitration, or the comparatively lower standard of judicial process and reasoning available at arbitration under the auspices of CMAC.

8. As stated in the Maxi-Prest case, *"it is the duty and function of the President of the Industrial Court to weigh the benefits of robust justice by way of CMAC Arbitration against the benefits of a more formal judicial determination by the Industrial Court, in the scales of fairness and equity."*

9. It is unfortunate that there is a backlog of cases in the Industrial Court resulting in delay in the finalization of trial matters. This was no doubt one of the reasons why the legislature saw fit to amend the Act so as to permit the President in his discretion to assign suitable matters to CMAC for arbitration. Nevertheless, the President will only exercise his discretion in favour of referral where he is satisfied that the demands of expediency can be met without compromising the required standards for the fair adjudication of the particular case.

10. I am not persuaded that this matter should properly be referred to arbitration. There are complexities of fact and law which require adjudication by a court of law. The claim is substantial, and an adverse outcome would have grave consequences for the Respondent, which is a charitable non-profit association. The right of appeal (on questions of law only) as provided by the Act would not effectively cure any shortcomings in procedure or findings of fact.

11. In the premises, the application for referral is dismissed.

There is no order as to costs.

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PETER R. DUNSEITH

PRESIDENT OF THE INDUSTRIAL COURT