IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 347/08**

In the matter between:

THEMBEKILE DLAMINI & SEVEN OTHERS **Applicant**

and

THE PRINCIPAL SECRETARY IN THE MINISTRY OF PUBLIC SERVICE & INFORMATION **1ST Respondent**

THE EXECUTIVE SECRETARY, TEACHING SERVICE COMMISSION **2ND Respondent**

THE ATTORNEY GENERAL **3RD Respondent**

CMAC **Intervening Party**

CORAM:

P. R. DUNSEITH	**:**	**PRESIDENT**
JOSIAH YENDE	**:**	**MEMBER**
NICHOLAS MANANA	**:**	**MEMBER**
FOR APPLICANTS	**:**	**N. MTHETHWA**
FOR RESPONDENTS	**:**	**N. ZWANE**
FOR INTERVENING PARTY:		**D. JELE**

J U D G E M E N T – 12/12/08

1. The parties agreed to their dispute being referred to arbitration under the auspices of CMAC in terms of section 17 of the Industrial Relations Act 2000 (as amended).

2. The dispute was duly determined by the Arbitrator who issued his award on 4th July 2008.

3. The Applicants, who were the successful parties in the award, applied to the Industrial Court for the award to be made an order of court.

4. The Respondent opposes this application and has raised as a point of law that the arbitration award is irregular and unenforceable because it was made outside the time frame of 30 days prescribed by section 17 (5) of the Act.

5. Section 17 (5) provides:

"Unless a referral to arbitration provides otherwise the arbitrator shall issue an award with concise reasons by the arbitrator ***within 30 days after the conclusion of the arbitration proceedings.***" (emphasis added).

6. Guideline 7.8.3 of the CMAC Arbitration Guideline issued under General Notice No. 54/2005 in terms of section 64 (2) (e) of the Industrial Relations Act provides:

"If an arbitrator is unable to comply with the 30 day period, the arbitrator should within that period approach the Commission for an extension specifying in writing the reasons for the extension. The Commission is entitled to extend the number of days in exceptional circumstances."

7. It appears from a report furnished by the Commission on the direction of the court that the arbitration proceedings were concluded at the end of October 2007. The arbitrator applied for two extensions of time to enable him to finalize his award. The first extension was granted to February 2008, and a further extension was granted to 12 May 2008. The award was eventually issued on the 4th July 2008.

8. The award was thus issued about eight months after the conclusion of the arbitration proceedings, and some 8 weeks after the expiry of the final extended date.

9. Counsel for the Respondents submits that the provisions of section 17 (5) are peremptory and the arbitration award is null and void because it was issued outside the prescribed 30 day period. He further submits that CMAC guideline 7.8.3 is ultra vires since it purports to allow the extension of a mandatory period laid down by Act of Parliament.

10. The Applicants on the other hand argue that the provisions of section 17 (5) are merely directory and they ask the court to make the award an order of the court to enable the award to be enforced.

11. The Industrial Relations Act does not expressly declare that an arbitration award issued outside the period prescribed in section 17 (5) shall be null and void. The Act does not in fact indicate any

consequences of the award being issued out of time. It is therefore necessary for the court to decide whether the section is peremptory, in which case the late award will be null and void, or merely directory in which case the award still stands.

[See: **The Interpretation of Statutes (3rd Ed) at 158]**

12. "Whether the provisions are peremptory or directory is a matter of statutory construction. Being a matter of statutory construction it is necessary to ascertain the intention of the legislature, and it is now trite law that this is determined by having regard to the language used, the scope and object of the enactment as a whole, and the consequences in relation to justice and convenience of adopting one view rather than the other."

Kuhne & Nagel (Pty) Ltd v Elias & Another 1979 (1) SA 131 (T) at 133 C-D.

13. Having regard to the language used, the use of the verb "shall" is indicative of peremptoriness unless there are other circumstances which negative this construction.

Pio v Franklin N. O. & Another 1949 (3) SA 442 © at 451

14. On the other hand, *"if a provision is couched in positive language, and there is no sanction added, in case the requisites are not carried out, then the presumption is in favour of an intention to make the provision only directory."*

per **Herbstein J in Rio v Franklin N.O. (supra) at 451.**

15. Provisions imposing time limits without giving the court a power of extension are generally regarded as peremptory.

Le Roux v Grigg-Spall 1946 AD 244 at 249.

16. On the other hand provisions imposing public duties subject to performance in a specific manner are as a rule taken to be directory, especially if holding them to be peremptory would result in inconvenience or injustice to people who have no control over the way in which they are performed.

Pio v Franklin N.O. (supra) at 451.

Du Plessis: The Interpretation of Statutes p. 146

17. The object and purpose of section 17 (5) is to keep an arbitrator appointed by CMAC on a short leash and to ensure that awards are issued promptly after conclusion of the arbitration proceedings. This is in accordance with the overall purpose and objective of the Industrial Relations Act to provide mechanisms and procedures for speedy resolution of conflicts in labour relations (see section 4 (1) (d). The time limit for issue of an award is provided for the benefit of the parties to the arbitration and it is also in the public interest that labour disputes be expeditiously brought to finality.

18. Having regard to these objects and purposes it is most unlikely that the legislature intended section 17 (5) to be peremptory with the result that awards could not be issued after 30 days or, if so issued, would be null and void. Such a construction would mean

that the default of the arbitrator, even for good reason, would necessitate that completed arbitration proceedings would have to commence de novo. Not only would this obstruct and delay the final resolution of the dispute and frustrate the process of justice, but it would visit great inconvenience and added expense on the parties, not to mention CMAC under whose auspices the arbitration is conducted.

19. The parties to the arbitration have no control over the issue of the award in compliance with the time – limit, and holding the time-limit to be peremptory would in our view result in gross injustice.

20. The court permitted CMAC to intervene in the matter, and we are grateful to its counsel Mr. D. Jele for referring the court to South African judgments relevant to the question in issue.

21. We agree with the judgement of the SA Labour Court in **Standard Bank of SA Ltd v Fabb & Others 2003 (2) SA 692 IC** (following **Free State Buying Association Ltd t/a Alfa Farm v SACCAWU and Another (1998) 19 ILJ 1481 (LC)** where the court stated (with reference to a section in the Labour Relations Act similar to our section 17 (5)) as follows:

"*The time limits in this context are a guideline and not peremptory. I say so, first, because peremptory treatment can lead to absurdity. Secondly, it is not in the interests of litigants, the public and the national interest to rehear arbitrations for no reason but the fact that the award is issued outside the time limit. Thirdly, it would conflict with the object of the LRA to resolve labour disputes effectively. In the nature of arbitration, awards are issued late. If they are a nullity and*

no effect can be given to them, then the referral for a fresh arbitration would not be an effective, expeditious solution" (at 696).

22. Taking all the relevant considerations into account, we hold that the provisions of section 17 (5) are directory, not peremptory.

23. It is commonly said that a directory requirement need only be "substantially" complied with to have full legal effect, but there are cases where compliance with a directory requirement, although desirable, may sometimes not be necessary at all, and non-or defective compliance therewith may not have any legal consequence.

Sutter v Scheepers 1932 AD 165

Nkisimane & Others v Santam Insurance Co. Ltd 1978 (2) 430 (AD) at 433.

24. In the view of the court, section 17 (5) confers the right on the parties to the arbitration, and on CMAC as the supervisory authority, to compel the arbitrator to issue his/her award within the 30 day period, or so soon thereafter as may be possible. The CMAC Guidelines provide regulation of the arbitration procedures and a mechanism for the Arbitrator to obtain an extension of the time limit provided in section 17 (5). Where an award is delivered outside the time limit, or the extended time limit it is our view that this has no consequence with regard to the validity of the award. The court may however, in its discretion, set aside the award or decline to make the award an order of the court where it is satisfied that an interested party will sustain prejudice as a result of the

award being issued out of time.

25. The mere fact that the Respondents were the unsuccessful parties in the arbitration is not prejudice resulting from the award being issued out of time. No other prejudice has been shown. In our view no reason has been shown why the arbitration award should not be made an order of court.

26. The court makes the following order:

(a) **The arbitration award dated 4th July 2008 is made an order of court.**

(b) **The Respondents are to pay the costs of the application.**

The members agree.

PETER R. DUNSEITH
PRESIDENT OF THE INDUSTRIAL COURT