



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

Held at Manzini

**CMAC REF : SWMZ 296/09**

**Albert Mndzebele & 33 Others**

**Applicants**

AND

**Civil Service Commission and 3 Others**

**Respondents**

CORAM:

<b>Arbitrator</b>	<b>:</b>	<b>Mr Robert S. Mhlanga</b>
<b>For Applicants</b>	<b>:</b>	<b>Mr Quinton Dlamini</b>
<b>For Respondents</b>	<b>:</b>	<b>Mr Goodman S. Dlamini</b>

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**ARBITRATION AWARD**

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**VENUE : CMAC OFFICES, ENGULENI BUILDING,  
GROUND FLOOR MANZINI**

**DATE OF ARBITRATION: 10<sup>TH</sup> SEPTEMBER, 2010**  
**1. DETAILS OF HEARING AND REPRESENTATION**

- 1.1 The Applicants were represented by Mr Quinton Dlamini during the arbitration proceedings.
- 1.2 On the other hand, the Respondents were duly represented by Goodman Dlamini in this case.

## **2. ISSUE TO BE DECIDED**

The relief sought by the Applicants herein is an order directing the Respondents to release or issue a Circular effecting new schemes of service for the Environmental Health/Health Inspectors Cadre. Therefore, I am required to decide whether or not the Applicants are entitled to be granted the relief sought herein.

## **3. THE BACKGROUND TO THE DISPUTE**

- 3.1 The Applicants, in June, 2009 reported a dispute of unfair labour practice and discrimination to the Commission (CMAC), it being alleged by the Applicants that the Respondents are reluctant to release a circular effecting the new schemes of service.
- 3.2 Following several Conciliation meetings, the dispute was finally declared unresolved on the 21<sup>st</sup> October, 2009; a Certificate of unresolved Dispute was accordingly issued by the Commission (CMAC). Consequently, the dispute was referred to arbitration by the Applicants in terms of section 96 (3) (b) of the Industrial Relations Act 2000 (as amended). I was duly appointed on the 29<sup>th</sup> October, 2009 by the Commission to arbitrate the dispute. The matter was set down for a pre-arbitration meeting (1<sup>st</sup> session) on the 23<sup>rd</sup> November, 2009.

- 3.3 During the pre-arbitration meeting, the Respondents through their representative advised me that they intended to raise a preliminary point to the effect that they never consented to arbitration; and that the Environmental Health Cadre does not fall under the Essential Services and as such the dispute could not be referred to arbitration by one party (without the consent of the other). I advised the Respondents' representative to reduce into writing the aforesaid Point In Limine, and to serve same on the Applicants and the original to be filed with the Commission. The matter was by consent postponed to the 11<sup>th</sup> December, 2009 for submissions on the Point In Limine.
- 3.4 On the 11<sup>th</sup> December, 2009, it transpired that the Respondents were not going to pursue the issue of the Point In Limine. In other words the intended Point In Limine was abandoned by the Respondents. The Respondents through their representative admitted that the Applicants are entitled to the relief sought herein namely; the issuance of the circular effecting new schemes of service. It was submitted on Respondents' behalf that the processing or drafting of the circular was about to be finalized and the Respondents requested a postponement to enable them to attend to some minor technicalities on the circular before it could be released.
- 3.5 In light of the Respondents' concession, I suggested that the dispute should be conciliated; and indeed with the parties' consent the dispute was conciliated in terms of Rule 28 of the Commission's (CMAC's) rules. The matter was by consent postponed to 21<sup>st</sup> January, 2010 in order to give the Respondents time to finalize the

processing of the circular. The Respondents promised that on this date, the circular would be ready and that it would be presented to the Applicants.

- 3.6 On the 21<sup>st</sup> January, 2010, the Respondents' representative requested a further postponement, because the circular was not yet ready to be issued. The matter was subsequently postponed by agreement to the 5<sup>th</sup> February, 2010.
- 3.7 On the 5<sup>th</sup> February, 2010, the Respondents' representative advised me that the circular was not yet ready, and again he asked for a postponement of the matter to enable the Respondents to work on the issue of the issuance of the circular in question. The Applicant's representative opposed the further postponement of the case. But after some deliberations, the case was by consent postponed to 26<sup>th</sup> February, 2010. On the 26<sup>th</sup> February, 2010, the Respondents failed to submit the circular, they cited the same aforementioned reasons. On this day, I advised the parties that the matter should now be heard. I directed the Applicants' representative to file the Applicants' application, and that same should be served on the Respondents.
- 3.8 The matter was set down for hearing on the 26<sup>th</sup> March, 2010. Unfortunately on this date, the matter was further postponed to the 16<sup>th</sup> April, 2010 for hearing, due to the fact that the Respondents had not filed their Replying papers. On the 16<sup>th</sup> April, 2010, the matter did not proceed due to administrative reasons on the part of the Commission. The Commission rescheduled the matter for the 23<sup>rd</sup> April, 2010. On this date,

none of the parties attended. Again the matter was reset for hearing on the 27<sup>th</sup> May, 2010. On the 27<sup>th</sup> May, 2010, the Respondents, through their representative presented the circular, dated 26<sup>th</sup> January, 2010, titled- **“Establishment Circular No. 1 of 2010 - Amendment Register 2009/10”**

3.9 It transpired that the following positions were omitted in the circular namely; Health Assistant (HLT019), Senior Health Assistant (HLT018) and Health Inspectors / Environmental Officers (HLT041). Consequently, the matter was by consent deferred to the 18<sup>th</sup> June, 2010, to enable the Respondents to attend to the said anomalies. The Respondents accordingly rectified the aforesaid anomalies as per the Memorandum dated 2<sup>nd</sup> June, 2010.

3.10 Despite the fact that the circular was finally submitted by the Respondents; the Applicants through their representative argued that the circular does not fully address their concerns and it was further argued that their request was not met. The matter was then referred to arguments or submissions.

3.11 After several postponements, which were occasioned by various reasons, as fully appears from the agreements to postpone (Form 21), the matter was eventually heard or argued on the 10<sup>th</sup> September, 2010.

#### **4. SUMMARY OF EVIDENCE AND SUBMISSIONS**

##### **APPLICANT'S CASE**

- 4.1 The Applicants' application as encapsulated in the founding affidavit of Mr Albert Mndzebele, and as appears in the Applicants' Report of Dispute is that the Respondents are reluctant, refusing and or failing to release a circular effecting the new schemes of service. As a result hereof the Applicants are praying for an order compelling the Respondents to release or issue a circular effecting the new schemes of service for the Environmental Health Inspectors Cadre; and further and or alternative relief.
- 4.2 Following the issuance of the circular in question namely; **Establishment Circular No.1 of 2010**, now the Applicants' contention is that the Respondents have failed to fully comply with their request or main prayer in that the effective date of the circular was supposed to be backdated to 1<sup>st</sup> April 2009, instead of 1<sup>st</sup> October, 2005. It is the Applicants' submission that the Respondents have failed to justify the 1<sup>st</sup> October, 2009, as the effective date hereof, in view of the fact that they (Applicants) reported their dispute to the Commission (CMAC) in June 2009.
- 4.3 It is the Applicants' argument that the effective date of the Establishment Circular No. 1 of 2010 should be backdated to the 1<sup>st</sup> April, 2005, just like the **Establishment circular number 1 of 2007 (Implementation of the KPMG Consultancy Report on the job Evaluation Appeals process)**. The Applicants contend that the present circular should be harmonized with circular number 1 of 2007. It is further argued herein that in the event the effective date of circular number 1 of 2010 is not backdated to the 1<sup>st</sup> April, 2005, this would result in the

Applicants' prejudice in the form of unfair treatment and discrimination.

- 4.4 It is the Applicants' contention that the effective date for the evaluation of posts for the anti-abuse Inspectors was backdated to the 1<sup>st</sup> April, 2006.
- 4.5 In the light of the foregoing submissions, the Applicants pray for an order backdating the effective date of the Establishment Circular No. 1 of 2010 to the 1<sup>st</sup> April, 2005.

### **RESPONDENT'S CASE**

- 4.6 On the other hand, the Respondents' case is premised on the answering or replying affidavit of Ms Nyamile Manana.
- 4.7 Briefly, the Respondents' submission is that the Applicants' prayer or request for the issuance of a circular effecting the new schemes of service, has already been complied with in that the **"Establishment Circular No. 1 of 2010-Amendment to Establishment Register 2009/10"**, has already been released or issued by the Respondents.
- 4.8 It is the Respondents' further submission that following the issuance of the aforesaid circular, therefore the Applicants' application has been overtaken by events. It is the Respondents' argument that the Applicants have not stated in their report of dispute as to how the circular should be structured or look like. The Respondents contend that now that circular No. 1 of 2010 has been issued, therefore the Applicants' demand or prayer has been complied with in full.

4.9 It is the Respondents' argument that the issue of the backdating of the effective date of the circular in question to 1<sup>st</sup> April, 2005 is not an issue which I am called upon to decide, because this is a new issue. It is the Respondents' submission that issues which are not contained in the report of dispute should not be considered.

4.10 The Respondents submit that the Applicants are not entitled to have the effective date of circular No. 1 of 2010 backdated to the 1<sup>st</sup> April, 2005. Wherefore, the Respondents pray that the Applicants' application be dismissed.

## **5. ANALYSIS OF EVIDENCE AND SUBMISSIONS**

5.1 In my analysis I have only considered the evidence and submissions which are relevant and on which my decision is based.

5.2 In the present case, the issue which I am called upon to decide is whether or not the Applicants are entitled to the relief or prayer being sought. The onus, according to the trite principle of "the one who alleges must prove", rests on the Applicants.

5.3 The facts of the case at hand are simple and straightforward. Initially, the Applicants' case was that the Respondents were reluctant and or refusing to issue a circular effecting the new schemes of service. The Applicants' dispute related to the alleged refusal or failure by the Respondents to release or issue a circular effecting the new schemes of services for the Environmental Health Inspectors Cadre.



- 5.4 As I have already stated above, the Respondents eventually issued the circular namely, Establishment Circular No. 1 of 2010.
- 5.5 It is not in dispute that the aforesaid circular was presented to the Commission on the 27<sup>th</sup> May, 2010, and same was also served on the Applicants on the same day. It is also common cause that the concerns pertaining to the omission of certain positions (which I have mentioned above) were addressed by the Respondents as evident in the memorandum dated 2<sup>nd</sup> June, 2010.
- 5.6 After the Respondents have submitted the aforementioned circular, they thought that the dispute would be finally resolved, but that was never to be, because the Applicants raised an issue to the effect that the effective date of the circular was supposed to be backdated to 1<sup>st</sup> April, 2005, instead of 1<sup>st</sup> October, 2009.
- 5.7 The question which boggles my mind is, whether or not the issue of the backdating of the circular to 1<sup>st</sup> April, 2005 is a relevant issue which I have to take into account in this case. The Applicants have tried to persuade me to take this issue into consideration, and to find in their favour that the circular in question should take a retrospective effect from the 1<sup>st</sup> April, 2005. On the contrary, the Respondents' argument is that, this issue of the effective date of the said circular being backdated is not relevant herein and as such I should disregard it.
- 5.8 The question which falls for determination here is whether or not the Applicants are entitled to have a circular released effecting the new schemes of service for the Environmental Health Cadre, being the department under which they are employed.

The Applicants have been able to demonstrate that they are entitled to the order compelling the Respondents to issue a circular effecting their schemes of service. On the other hand, the Respondents have admitted that the Applicants are entitled to the relief sought herein, hence the issuance of Establishment circular No: 2010. It is also not in dispute that the schemes of service for the Environmental Health Cadre have been approved and issued by the Respondents.

## **6. CONCLUSION**

- 6.1** It is my finding that now that the circular has been issued by the Respondents as per the Applicants' request or prayer, this dispute can now be put to rest in so far as the prayer for an order compelling the Respondents to issue a circular effecting the new schemes of service, is concerned. It is my conclusion that the Respondents have complied with the Applicants' request in this regard.
- 6.2** With regard to the new issue of the backdating of the effective date of the circular to 1<sup>st</sup> April, 2005, I conclude that I do not have jurisdiction to entertain it in these proceedings, because this issue was never conciliated upon during the conciliation process. Even during the conciliation conducted in terms of Rule 28 of CMAC Rules, this new issue was never raised or discussed. My powers are only limited to the issues which have been conciliated and contained in the Certificate of Unresolved Dispute. The Certificate of unresolved Dispute reflects one issue in dispute namely; release of a circular effecting new schemes of service. Even in the report of dispute under paragraph 6.3, the outcome desired by the Applicants from the conciliation is "an order compelling Respondents to release a circular

effecting new schemes of service for the Environmental Health Cadre/Health Inspectors. The new issue of the backdating of the circular to 1<sup>st</sup> April 2005 was never specified in the Applicants' prayer contained in paragraph 6.3 of the report of dispute.

**6.3** I also find that the Applicants have failed to prove that they are entitled to any further or alternative relief, more so because their main prayer has since been complied with. However, it is my conclusion that the Applicants are entitled to raise as a grievance the issue of the backdating of the Establishment circular No. 1 of 2010, at the workplace level, wherein the issue (as a grievance) will be fully deliberated upon by the parties through the prescribed internal procedures. Should the issue not be resolved internally, then the Applicants can refer a dispute to the Commission (CMAC).

## **7. AWARD**

**7.1** Pursuant to my foregoing conclusion or findings herein; I make the following Award:

- (a) It is hereby affirmed that **Establishment Circular No.1 of 2010- Amendment to Establishment Register 2009/10** has been issued by the Respondents in compliance with the Applicants' main prayer herein.
- (b) The new issue regarding the backdating of circular No. 1 of 2010 is hereby referred to the parties to be dealt with in accordance with the internal procedures; that is, in the event the Applicants are still interested in pursuing this issue.

DATED AT MANZINI ON THE..... DAY OF NOVEMBER, 2010.

**ROBERT S. MHLANGA**  
**CMAC COMMISSIONER**