



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

**HELD AT SITEKI**

**SIM 071/11**

**In the matter between:-**

**ZIZWE MAMBA**

**Applicant**

**And**

**CARGO CARRIERS (PTY) LTD**

**Respondent**

**CORAM:**

Commissioner : Mr. Mthunzi Shabangu  
For Applicant : In person  
For Respondent : Mr. Mandla Mamba (Human  
Resource Officer)  
Date of hearing : 19<sup>th</sup> March, 2012

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**RULING ON JURISDICTION**

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**Particulars of Proceedings and Representatives**

1. The Applicant is Zizwe Mamba, an adult male Swazi of P.O. Box 1842, Manzini. He is an ex-employee of the Respondent. He elected to represent himself when arguing the jurisdictional point of law raised by the Respondent in lieu of commencement of the conciliation proceedings, his right to legal representation having been duly explained to him.
2. The Respondent is Cargo Carriers (Pty) Ltd, a company registered in terms of the company laws of Swaziland with its registered office situate at Simunye, Swaziland.
3. During the course of these proceedings the Respondent was represented by Mr. Mandla Mamba, the Respondent's Human Resources Officer, the right to legal representation having been duly explained to Mr. Mamba.
4. The proceedings were held at CMAC - Siteki Office on the 19<sup>th</sup> March, 2012 and were captured both on electronic and manual records. No evidence was led by the parties as the facts germane to the issue to be decided were agreed upon as common cause by both parties.

### **Issue for determination**

5. The issue to be decided is whether or not CMAC is seized with the requisite jurisdiction to conciliate over the Applicant's dispute, regard being had to the provisions of **Section 76 (2)** of the **Industrial Relations Act, 2000 (as amended)**.

### **Background To The Issue**

6. The following facts were agreed upon by the parties as common cause:-

- 6.1 That the Applicant is an ex-employee of the Respondent, having been employed as a Driver on the 7<sup>th</sup> November, 2007.
  - 6.2 That the Applicant's services were terminated by dismissal on the 25<sup>th</sup> June, 2010.
  - 6.3 That the dismissal was in writing and was preceded by a disciplinary enquiry.
  - 6.4 That the Applicant did appeal the decision of dismissal, the appeal hearing was conducted and its written ruling was issued on the 22<sup>nd</sup> July, 2010.
  - 6.5 That the Applicant has since lodged a dispute a CMAC against the dismissal, which dispute was received by the Commission's Case Management Administrator - Simunye office on the 4th January, 2012.
7. When the matter was called for conciliation on the 28<sup>th</sup> February, 2012, being the date of the first sitting, the Respondent's representative, Mr. Mamba, raised a pre-liminary point of law objecting to CMAC's jurisdiction to deal with this dispute on the basis that it was not reported on time, i.e. the **eighteen (18) months** period had elapsed since the issue giving rise to the dispute arose.
  8. Since the point of law was raised orally and not on prior written notice served on the other party who is lay in law, I postponed the matter to the 19<sup>th</sup> March, 2012 to enable both parties a fair opportunity to prepare themselves and gather authorities to back up their arguments. Full arguments were then made on that date, i.e. 19<sup>th</sup> March, 2012.

## **Analysis of the Arguments**

9. The provisions upon which this argument revolves is **Section 76 (2)** of the **Industrial Relations Act 2000 (as amended)** which reads as follows:

***“A dispute may not be reported to the Commission if more than eighteen (18) months has elapsed since the issue giving rise to the dispute arose.”***

10. The Respondent’s main argument is that the issue giving rise to the dispute, being the dismissal, arose on the 25<sup>th</sup> June, 2010. An arithmetic calculation of eighteen (18) months from that date lands on the 25<sup>th</sup> December, 2011.
11. Mr. Mamba argued then that as at the date when the Applicant’s dispute was received officially by CMAC, being the 4<sup>th</sup> January, 2012 the statutory eighteen (18) months period had elapsed. By consequence of that eventuality, CMAC no longer has jurisdiction to entertain the dispute inasmuch as the Commission does not even have powers to extend, by way of indulgence, the eighteen months period.
12. It was Mr. Mamba’s further argument that the 22<sup>nd</sup> July, 2010 being the date of delivery of the appeal ruling is not the date when the issue giving rise to the dispute arose since the noting of an appeal against a dismissal decision does not suspend or stay the dismissal. Reference in this regard was made to the decided cases of **Steven Mnisi vs. Asikhutulisane Savings and Credit Co-operatives, Case No.400/2007 (Industrial Court)** and **Lwazi Mdziniso vs. CMAC, Case No. 8/2007 (Industrial**

**Court**), both judgments by the then Judge President of the Industrial Court, P.R Dunseith.

13. As to the definition of a month, reference was made to **Rule 2** of the **CMAC Rules** which gives the following definition:

***“Month means a period commencing on any day in a calendar month and expiring on the day preceding the corresponding date in the succeeding month.”***

14. It was argued that this definition should be accepted as the appropriate definition of what constitutes a month, more in the absence of any definition in the Industrial Relations Act since the CMAC Rules were meant to complement the Act.

15. Mr. Mamba further took exception as to why the Applicant decided to delay this much to indicate his dissatisfaction about the dismissal as he was dismissed together with a group of other employees (twenty two (22) who swiftly reported a dispute as a group at CMAC. This fact was not denied by the Applicant in his counter-arguments.

16. The Applicant’s only counter-argument was that a month excludes weekends and public holidays and that thus he was still within time to file his dispute at CMAC as at the 4<sup>th</sup> January, 2012. The definition of CMAC Day as contained in Rule 2 of the CMAC Rules was used as a back-up authority by the Applicant. The Rules define CMAC Day as follows:

***“CMAC Day means any day other than a Saturday, Sunday or Public Holiday, and only CMAC days shall be included in the computation of any time expressed in days by these Rules or fixed by any order of Court.”*** (My emphasis)

17. The judgments referred to by Mr. Mamba for the Respondent are spot-on as with regards to the issue for determination herein. In the **Steven Mnisi's case** (supra), his lordship the then Judge President of the Industrial Court (PR Dunseith) confirmed that the issue giving rise to a dispute in dismissal cases arises when the employee's services are terminated, not when the appeal ruling is delivered. The Court ruled as follows at paragraph 7 of that judgment:

***“The Applicant's dispute concerns his alleged unfair dismissal. The issue giving rise to this dispute arose when his services were terminated on the 3<sup>rd</sup> September 2004, not when his appeal was dismissed in the 23<sup>rd</sup> December, 2004. I am satisfied that the report of dispute dated 9<sup>th</sup> May, 2005 was a nullity because it was out of time in terms of Section 76 (4) of the Act.”***

18. Dismissing the misconception that the noting of an appeal against a dismissal decision suspends the termination of employment, the Judge President expressed himself as follows in the **Lwazi Mdziniso case** (supra) (at paragraph 12):

***“This Court agrees with Nchabeleng and SACCAWU [judgments] that the doctrine of the automatic suspension of a decision upon the noting of an appeal is confined to orders of Court....and it is misconceived to attempt to extend the doctrine into the industrial relations environment as a general rule governing the disciplinary process.”***

19. This is what was stated in the **Nchabeleng vs. University of Venda & Others (2003) 24 ILJ 585 (LC)** case which the Judge President was in total agreement with:

***“An ingenuous contention advanced by the Applicant is that the dismissal visited on him on 28<sup>th</sup> May 2002 is automatically suspended because he noted an appeal against it. In this regard he relies on the common law rule that the noting of an appeal suspends an order of court. That such is the law in respect of the orders of courts of law is clear.... What the Applicant’s contention does not give due recognition to, is that this principle applies to orders of Court and does not, without more, apply to the decisions of other decision-makers in society...***

***In my view it is wholly misconceived to attempt to import the doctrine of the automatic suspension of an order of Court upon the noting of an appeal into the industrial relations environment...***

***In my view, the notion of the noting of an appeal suspending the effect of an order has no place whatsoever in the law of unfair dismissal.”***

20. Renowned labour law author and writer John Grogan in his work: “Workplace Law” (8<sup>th</sup> Edition) in support of the Nchabeleng’s judgment summarized the position of the law as follows (also quoted with approval in the Lwazi Mdziniso case):

***“Attempts by the parties to settle their dispute after the dismissal does not have the effect of extending the date of dismissal. Nor does the noting of an internal appeal.***

***When an employer takes a decision to dismiss after a disciplinary hearing and then affords the employee an opportunity to appeal, whether in terms of a disciplinary code or not, the date of dismissal is the time the employee was initially dismissed, not***

***the date that the appeal is rejected. A dismissal is not 'suspended' merely because an employee notes an appeal or refers a dispute to the CCMA or labour Court." (Page 118 to 119).***

21. The position of the law as to when does a dismissal dispute arises was articulated with clarity in the foregoing authorities and no ambiguities emanates there from. Consequently, it is hereby ruled that in this case the issue giving rise to the Applicant's dispute arose on the 25<sup>th</sup> June, 2010, that being the date of his dismissal. Eighteen months from that date expired on the 25<sup>th</sup> December, 2011. Therefore it is correct that by the time the Applicant lodged his dispute at CMAC on the 4<sup>th</sup> January 2012, he was already out of time.
22. The argument that a "month" excludes week-ends and public holidays is devoid of any legal backing. The CMAC Rules are clear that the exclusion of wee-ends and public holidays is only in reference to a period or time that is expressed in "days". A "month" refers to a calendar month, which incorporates week-ends and public holidays. Even the **Interpretation Act No. 21 of 1970** (Section 2 thereof) defines a month as a calendar month.
23. For the foregoing reasons, the point of law should be upheld.

### **Oder**

24. It is hereby ruled that CMAC does not have jurisdiction over this dispute, for being reported out of time.
25. This dispute is therefore rejected.



**DATED AT SITEKI THIS ..... DAY OF May, 2012.**

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**MTHUNZI SHABANGU  
COMMISSIONER - CMAC**