IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 29/2005**

In the matter between:

SYDNEY MKHABELA **Applicant**

and

MAXI-PREST TYRES **Respondent**

CORAM:

P. R. DUNSEITH: **PRESIDENT**
JOSIAH YENDE: **MEMBER**
NICHOLAS MANANA : **MEMBER**

FOR APPLICANT **S. DLAMINI**
FOR RESPONDENT **J. RODRIGUES**

R U L I N G

1. The Applicant applied to the Industrial Court on 26 January 2005 for determination of an unresolved dispute arising from the termination of his services on 28 May 2004. He alleges that his dismissal was automatically unfair because it was prompted by the Applicant raising a grievance against his Branch Manager. He is claiming payment of terminal benefits and 24 months wages as compensation for automatically unfair dismissal.

2. The Respondent filed a Reply on 16 February 2005 in which it denied that the Applicant was unfairly dismissed, whether automatically or otherwise, and avers that the Applicant's services were terminated on grounds of gross negligence and working against the interests of the company after the Applicant failed to attend a duly convened disciplinary hearing.

3. This dispute is awaiting allocation of a trial date. A pre-trial conference was held on the

15th March 2006.

4. The Applicant now applies for an order that the President of the Court refers the unresolved dispute to the Conciliation, Mediation and Arbitration Commission (CMAC) for arbitration in terms of powers vested in him by Section 85 (2) of the Industrial Relations Act No. 1 of 2000, as amended by the Industrial Relations (amendment) Act No. 3 of 2005.

The Respondent is opposing this application, and objects to the matter being determined by arbitration.

5. The reasons advanced by the Applicant for the referral to arbitration are that:

5.1. due to the backlog of cases in the Industrial Court, the Applicant can obtain a more expeditious hearing if the matter is referred to CMAC for arbitration;
5.2. arbitration before CMAC will be less of a "financial drain" on the Applicant's resources;
5.3. the issues to be determined are not complex and can be dealt with by an arbitrator appointed by CMAC.

6. Section 8 (8) of the amended Industrial Relations Act 2000 provides as follows:

"Notwithstanding the provisions of Section 85(2), the President of the Court may direct that any dispute referred to in terms of this or any other Act be determined by arbitration under the auspices of the Commission."

7. The amended section 85 (2) (a) of the Act provides:

"The President of the Industrial Court shall have the power upon receipt of an application, to decide whether such application should be heard by the court or an arbitrator appointed by the Commission:

Provided that the Minister may by notice published in the Government Gazette revoke and or nullify this power".

8. The amended Section 17(1) of the Act provides:

"In hearing and determining any matter referred to arbitration whether by the President of the Court in terms of section 8 (8) or of any other provisions of this act, an arbitrator shall have all the remedial powers of the Court referred to in section 16."

The amended Section 17(2) provides further:

"an arbitration award made under this Act shall be enforceable as if it was an order of the court."

9. The amended section 19(1) of the Act provides:

"There shall be a *right of appeal against a decision of the Industrial Court, or of an arbitrator appointed by the President of the Industrial Court under section 8 (8) on a question of law to the Industrial Court of Appeal,*

10. The wording of this latter section is unfortunate, since section 8(8) of the Act does not empower the Court President to "appoint" an arbitrator. He may only direct that a dispute be determined by arbitration under the auspices of the commission.

11. This section also flies in the face of the amended Section 24 (4) (b), which provides that if a matter is referred to arbitration, *"the arbitrator's determination is Final."* Nevertheless, reading the amended Act as a whole, it is clear that the intention of the Act is to make provision for a limited right of appeal on questions of law against a decision of an arbitrator where the President of the Industrial Court has directed that a dispute be determined by arbitration under the auspices of CMAC.

12. The sections of the amended Act cited above constitute a significant extension of the concept of compulsory arbitration in our labour dispute resolution legislation.

13. Prior to the promulgation of the Industrial Relations (Amendment) Act 2005, a party to an unresolved dispute could only be compelled to submit to arbitration without its consent where:

13.1. the dispute is a so-called dispute of interest; and
13.2. one of the parties to the dispute is engaged in an essential service.

(See section 96 (3) of the Act).

14. Compulsory arbitration in the context of parties who are engaged in an essential service, and thereby precluded from enforcing their demands by way of a strike or lockout, can be justified as a necessary mechanism for prompt resolution of labour conflict.

15. All persons have fundamental rights to a fair hearing, protected by Section 21 (1) of the Constitution of Swaziland, which reads as follows:

> *"In the determination of civil rights and obligations or any criminal charge a person shall be given a fair and speedy public hearing within a reasonable time by an independent and impartial court or adjudicating authority established by law."*

16. Assuming that CMAC is an "adjudicating authority established by law", it is noteworthy that the Act does not confer an outright jurisdiction on CMAC to arbitrate disputes but makes such jurisdiction conditional on either the consent of all the parties to the dispute (save with respect to a dispute of interest in an essential service) or the express direction of the President of the Industrial Court under Section 8 (8).

17. The obvious advantages of having a dispute determined by arbitration under the auspices of CMAC include cheap and easy access to an independent and impartial adjudication process; simplicity of procedure; and an expeditious outcome.

> This may be contrasted with dispute determination by the Industrial Court that is often protracted and delayed, costly and legalistic.

18. Nevertheless, judging from the number of cases which come to the Industrial Court, it appears that consensual arbitration may be the exception rather than the norm. Either the industrial Court enjoys a greater degree of legitimacy and confidence than arbitration under the auspices of CMAC, or -on a more cynical postulate - there are litigants who prefer to take advantage of the protracted, legalistic and costly nature of proceedings in the Industrial Court.

19. The laws of Swaziland do not require arbitration tribunals such as CMAC to afford to litigants all the rights which are allowed to litigants in a court of law. The law recognizes the need for flexibility and informality in such forums and does not impose on such bodies a duty to hold a formal trial-type hearing. What is required is a fair hearing in conformity with the requirements of natural justice and Section 21 of the Constitution.

20. CMAC Commissioners are not required by law to hold judicial qualifications, nor is it to be expected that a CMAC arbitrator shall offer the same degree of legitimacy and judicial authority as that of the Industrial court. A more robust and expedited justice is made available

under the auspices of CMAC.

21. This is all very well when parties submit voluntarily to CMAC arbitration, but different considerations arise when the President of the Court must exercise his discretion whether to compel a party to submit against its will to arbitration under the auspices of CMAC. In contrast to private, consensual arbitration, a party compelled to submit to arbitration in terms of Section 8 (8) of the Act has no say over the identity of the arbitrator; the arbitration procedures; and the time and place of the arbitration. There is no direct democratic control over the process as occurs in voluntary arbitration.

22. Private arbitration agreements often provide that the decision of the arbitrator shall be final, based on the high level of confidence reposed in the arbitrator chosen by mutual consent. It is very different to subject a litigant to adjudication by an arbitrator not of his choosing, and render the decision of such arbitrator final on all issues of fact.

23. The proponents of robust justice may argue that the common sense, simplicity and expedition of an arbitration hearing under the auspices of CMAC more than compensates for a comparatively lower standard of judicial process and reasoning. In the field of industrial relations, the need for a user- friendly process and a speedy outcome should override any claim of right to the benefits of formal court proceedings and judicial deliberation.

24. 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. The factors that will be considered include the complexity of the factual issues in dispute; the complexity and/or novelty of any legal issues requiring determination; the nature of the relief claimed; whether the matter lends itself to determination by the more flexible and simple process of arbitration; whether the matter can be determined more expeditiously by way of arbitration; and whether any party will be prejudiced, directly or indirectly, if the matter is referred to arbitration.

25. Each case will depend on its own peculiar circumstances, and in all but the most exceptional cases the President will require a full set of pleadings before his discretion can be exercised.

26. Where the dispute to be determined has minor consequences, for instance determining whether wages or terminal benefits have been correctly calculated and/or paid, fair proceedings may be very informal. Where the consequences are grave, then fairness may dictate greater formality. In cases involving dismissal, the question as to whether a person

has been unfairly dismissed and/or should be reinstated in his employment will in most cases be regarded as a serious matter of grave consequence to both parties, requiring a relatively formal procedure best suited to a court of law. *A fortiori* where a party is claiming that he has been automatically unfairly dismissed as defined in Section 2 of the Act.

27. Section 85(2) of the Act envisages the President *mero motu* exercising a discretion to refer a matter to arbitration. It is unlikely that the President would exercise his discretion without first giving affected parties an opportunity to be heard. Whether one party applies for or a referral to arbitration under the auspices of CMAC, or the issue is raised *mero motu* by the President, it must be established that the balance of equity favours the referral before an order for compulsory arbitration will be made, particularly if one of the parties objects to the matter being determined by arbitration.

28. Turning to the particular circumstances of the present matter, the amount claimed is quite substantial (E36,000.00) and is based upon an allegation of automatically unfair dismissal. Both the procedural and the substantive fairness of the dismissal is challenged. There are numerous disputes of fact. The matter can be better tried in the more formal structure of a court hearing. The Respondent opposes a referral to arbitration.

29. It is also apparent from the court file that the Applicant has not prosecuted his case with due expedition. The pre-trial conference was held some thirteen (13) months after filing of the reply. The Applicant cannot plead for a more expeditious hearing by way of arbitration when he has himself considerably delayed an expeditious hearing by the court.

30. For the above reasons, the application to refer the matter to arbitration in terms of Section 85 (2) of the Industrial Relations Act 2000 (as amended) is refused. There is no order as to costs.

P.R. DUNSETH

PRESIDENT OF THE INDUSTRIAL COURT