## IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE CASE NO. 18/98

In the matter between;

JAMESON THWALA	APPLICANT
And	
NEOPAC (SWAZILAND) LIMITED	RESPONDENT
NDERI NDUMA	: PRESIDENT
JOSIAH YENDE	: MEMBER
NICHOLAS MANANA	: MEMBER
FOR APPLICANT	: MR. P.R. DUNSEITH
FOR THE RESPONDENT	: MR. M. SIBANDZE

RULING (11. 02. 99)

The Respondent herein seeks an order dismissing the Applicant's claim for back pay on the grounds that it has prescribed in terms of Section 57 (3) of the Industrial Relations Act of 1996.

The Respondent contends that the Applicant did not report the back pay claim to the Labour Commissioner within six months of the date upon which it first arose in 1990, and therefore that claim for the arrear wages is accordingly time barred and this Court has no jurisdiction to entertain it.

The Applicant concedes that the portion of the claim falling out of the six month period has prescribed but contends that arrears that fell due and owing within six months of the date the dispute was reported are not time barred. Accordingly, the

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Applicant abandoned the claim for arrears prior to the 2nd of October, 1994 and continued to claim arrears falling due between the 2nd October, 1994 and the 20th February. 1996.

Section 57 (3) of the Industrial Relations Act reads as follows :

"(3) A dispute may not be reported to the Commissioner of Labour if more than six months have elapsed since the issue giving rise to the dispute first arose,......"

From a plain reading of this provision, a distinction is made between the dispute itself and the issue giving rise to the dispute. We agree with the submission by Mr. Dunseith that the term "issue giving rise to the dispute" bears the same meaning in a legal context as the term "cause of action".

The term "cause of action" has been defined and analysed in numerous English and South African cases. We were referred to the definition by Lord Esher in READ v BRAWN as follows

" cause of action" means "every fact which it would be necessary for the Plaintiff to prove if traversed in order to support his right to the judgement of the Court It does not comprise every piece of evidence which is necessary to prove each fact but every fact which is necessary to be proved".

In this case the Applicant alleges that he was promoted to the position of a supervisor in 1990 and continued to work in that capacity until when his services were terminated on the 20th February 1996. On his promotion to this supervisory position, he was entitled to a statutory salary increment of 25 % above the wage of the highest paid employee under his direct supervision. This payment was not

made and forms the basis of the claim for under payments.

It was argued for the Applicant that the issue giving rise to the claim for underpayments is not the fact of his promotion to the position of supervisor, but that every end of the month when the payment fell due and was not made constituted a separate cause of action. Following this argument Mr. Dunseith submitted that all the underpayments falling due within six months of the date the Applicant made his report of the dispute to the Commissioner are not time barred in terms of Section 57 (3).

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In applying the definition of Lord Esher to this case, for the Applicant to establish a case for underpayments all that he needs to show is that:

- (a) He was promoted to the position of a supervisor in 1990.
- (b) That in terms of the law he was entitled to a 25% raise above the salary of the highest paid employee under his direct supervision.
- (c) That when the first salary after the promotion fell due, the Respondent did not pay the 25% statutory entitlement.

The dispute arose when after the promotion he did not receive the 25% statutory raise the month immediately following his promotion. It is not clear on which particular month of 1990 the Applicant was promoted, but as was submitted by Mr. Sibandze assuming that this happened on the month of December 1990, then the dispute itself arose on the month of January 1991 when the first salary after the said promotion fell due. Subsequent non payments, up to the time of his dismissal constitute a concatenation of that dispute and in our view each act of non payment does not comprise a separate "issue giving rise to the dispute" in terms of Section 57 (3) of the Act

The decision of the President of the Industrial Court Mr. Martin Banda (as he then was) in Case No. 122/94 PHILEMON MATSE v UNITRANS SWAZILAND LIMITED which is on all fours with this case supports our finding in this matter.

Accordingly, the Respondent's point in Limine is upheld with no order as to costs.

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