IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE CASE NO. 205/04

In the matter between:

AUTO DLAMINI **APPLICANT**

and

SWAZILAND NATIONAL PROVIDENT FUND **1ST RESPONDENT**

COMMISSIONER OF LABOUR **2ND RESPONDENT**

CORAM:

NDERI NDUMA : PRESIDENT
JOSIAH YENDE : MEMBER
NICHOLAS MANANA : MEMBER

FOR APPLICANT : P. R. DUNSEITH
FOR RESPONDENT : Z. JELE

R U L I N G – 07/02/06

By way of Motion proceedings, the Applicant sought for an order couched in the following terms:

(a) Granting the Applicant an extension of time to enable the Applicant to report his dispute against the 1st Respondent.

(b) Costs in the event the application is opposed.

(c) Further and/or alternative relief.

The application is founded on the Affidavit of the Applicant Auto Dlamini. He deposed that he is an employee of the Applicant. That on the 15th March 2004 he applied for an extension of time to report a dispute in terms of a document of the same date annexed to the application and marked "A". In annexure "A" is detailed the facts leading to the report of dispute. The facts may be summarized as follows and are not in dispute.

In July 1999, the Applicant was appointed Acting Finance Manager of the Respondent pending appointment of a substantive holder of the position. Whilst he was acting, the Applicant received an acting allowance comprising of the difference between his basic salary and the former incumbent's basic salary. He was however not paid any allowances enjoyed by the former incumbent. The Acting appointment was terminated in May 2002 when the new Finance Manager was employed.

On May 13th 2002, the Applicant wrote to the Respondent requesting them to pay him the outstanding allowances as per the rules of respondent. The response dated the 5th June 2002 was to the effect that the Respondent was still consulting on the issue to establish if the Applicant should be paid the allowances.

These consultation unfortunately continued for unduly long period inspite of several letters by the Applicant requesting payment. The Applicant was meanwhile requested to be patient until the matter was resolved.

His patience apparently ran out and on the 2nd March 2004, he wrote to the Chief Executive Officer (CEO) of the respondent informing him that he intended reporting a dispute to the department of Labour.

On the 15th March 2004, he sought extension of time to report the dispute because in terms of Section 76 (4) of the Industrial Relations Act No. 1 of 2000, 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 arose.

The provision gives the Commissioner of Labour power subject to subsection 5, where justice requires, to extend the time during which a dispute may be reported.

Subsection 5 states that :

" the Commissioner of Labour shall not have the power to extend the time in which a dispute may be reported where a period of thirty six (36) months has elapsed since the dispute first arose".

The Commissioner of Labour considered the application and wrote to the Applicant on the 4th may 2004 to the effect that the dispute was found to have been more than thirty six (36) months since the issue giving rise to it first arose. The Applicant has since approached the court to grant such extension in terms of Section 76 (6) which reads as follows:

"Any person aggrieved by the decision of the Commissioner of Labour under sub-section (4) may apply to the court and the court shall

determine the issue taking into account any prejudice that may be suffered by any one of the parties to the dispute."

ARGUMENTS

It was argued by Mr. Dunseith for the Applicant that the Commissioner of Labour misdirected himself on two issues:

(a) Firstly in that sub-section 5 talks about "*a period of thirty six (36) months has elapsed since the dispute first arose*." (emphasis mine). As opposed to "*since the issue giving rise to the dispute first arose"* used in subsection (4).

Secondly because on the Commissioner's version, the dispute arose in July 1999 whereas the Industrial Relations Act No. 1 of 2000 came into effect in June 2000. That he could therefore not apply the provisions of the 2000 Act retrospectively to the issue at hand because it dealt with a substantive right namely, a vested right to allowance by the Applicant. Accordingly, the Commissioner ought to have applied the provisions of the Industrial Relation Act No. 1 of 1996 that had no limitation period for extension by the Minister. See Section 57 and 58 of the 1996 Act.

Furthermore so the argument went, the dispute first arose on the 15th march 2004 when it was reported even though the issue giving rise to the dispute arose in August 1999, when the allowance fell due and owing but was not paid.

The court does not agree with the arguments by Mr. Dunseith that the dispute first arose when it was reported. Both the 1996 and 2000 Act define a dispute as a grievance. This implies a discontentment by an employee with regard to the terms and conditions of employment. The dispute arises when that discontentment is expressed, either verbally or in writing to the employer. Before such expressions, it purely

remains an issue with potential to lead to a dispute or a grievance. This becomes the cause of action when the matter is brought before court eventually.

With respect to the case in casu, the dispute first arose on the 13th May 2002 when the Applicant wrote a letter requesting the Respondent to pay him the outstanding allowances as per the rules. The response by the Respondent was contained in a letter dated the 5th June 2002, stating that it was looking into the issue with a view to confirm whether the Applicant should be paid or not.

It goes without saying therefore that by the time the Applicant reported the dispute on the 15th March 2004, thirty six (36) months had not elapsed since the dispute first arose. The Commissioner of Labour could have lawfully extended the time to report the dispute in terms of Section 76 (5) of the Industrial Relations Act 2000.

Granted that the dispute first arose on the 13th May 2002, then the 36 months period expired on the 13th May 2005.

At the time of the said expiry the application serving before court was still pending. For reasons not clear to the court, the matter was not allocated a date of hearing timeously.

It has been argued by Mr. Jele for the Respondent that since the period of 36 months has elapsed since the dispute first arose, the court has no jurisdiction to grant the extension because it could only do so in terms of Section 76 (6) and (7) of the Industrial relations Act 2000.

Indeed Section 76 has since been amended by the Industrial Relations Act No. 3 of 2005 as follows:

"76 (2) 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."

Neither of the parties, argued that the 2005 amendment is applicable to the matter at hand. As was argued by Mr. Dunseith for the Applicant, the amendment could not operate retrospectively whilst the application was pending before court. See the case of Swanepoel v Johannesburg City Council 1994 (1) SA 469, wherein ELOFF JP citing the Appellate Division decision in Protea International (Pty) Ltd versus Peat Marwick Mitchel & Co. 1990 (2) SA 566 (a) at 570 – B

"As a general rule of construction based on code 1.14.7, the operation of a statute is prospective to apply only after its enactment (in futuro),unless the legislator clearly expresses a contrary intention that the operation should be retrospective to apply prior to its enactment (in praetirito).

There was no expressed intention in the 2005 amendment to apply retrospectively to pending matters.

Mr. Dunseith argued further that, if we were to follow the Respondent's version that the dispute first arose at the end of July 1999 when the allowance first became due and payable, then it follows that the Industrial Relations Act No. 1 of 2000 which came into effect in June 2000 cannot apply retrospectively to the dispute.

It is unnecessary to consider the issue having already found that the

dispute in casu crystallized upon demand by the Applicant to be paid on the 13th May 2000. The court however observes that the application before court having been filed on the 1st July 2004, falls to be determined in terms of the law that existed at the time of the filing; that is, the 2000 Act but not the 1996 Act.

In the matter of Curtis v Johannesburg Municipality 1906 TS 308; the plaintiff had a cause of action against the defendant based on delict. After his cause of action arose a statute of limitation was passed requiring a plaintiff to sue within six months from the time the cause of action arose. Innes CJ held at 312;

"that statutes of limitations baring the remedy are portion of the law of procedure, and that '…… every alteration in procedure applies to every case subsequently tried, no matter when such case began or when the cause of action arose'. But found the court according to common law writers, When the law regarding procedure is altered after a cause of action arose, the date of coming into effect of the change in the law will be the time from which the new procedure is applied, from which date the new period of prescription commences to run.

The judge expressed doubt on the existence of such a principle, I must state however that the principle augurs well with common sense. This is a moot point in the circumstances of this case in that the Applicant was within time when he sought extension of time from the Commissioner of Labour. The Commissioner unlawfully denied the Applicant the extension of time and with that denied him the right to have his matter conciliated upon and/or adjudicated upon by the court.

This is not a case where the Respondent alleges that the delay by the

Applicant was so inordinate that the respondent was incapable of preparing a defence to the claim. Indeed, the matter was still fresh and under consideration by the Respondent when the extension of time was refused by the Commissioner of Labour.

The court stands in the same position as the Commissioner of Labour was on the 4th May 2004 when he denied the Applicant extension. The Applicant has approached the court to grant him that right that he was unlawfully denied as at the date of the said refusal. That right has not abated by exfflusion of time from the date of the refusal.

Accordingly we reject the argument by Mr. Jele that the court has no jurisdiction to grant the extension of time to the Applicant to exercise his right having made the application for extension within the 36 months period.

The court has looked at the decision of Nduma JP in the matter of Jameson Thwala and Neopak (Swaziland) Ltd case No. 18/98 and that of Banda JP in the case of Jabulani M. Masilela and Standard Bank Ltd (Swaziland) Case No. 81/95 and found the same distinguishable on facts and law applicable from the matter at hand.

Accordingly, the Applicant is granted an extension of six (6) months from to- date within which to report his dispute to the Conciliation Mediation and Arbitration Commission (CMAC).

No order as to costs.

The members agree.

NDERI NDUMA

JUDGE PRESIDENT – INDUSTRIAL COURT