IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 44/07**

In the matter between:

NOLUTHANDO NHLENGETFWA **APPLICANT**

And

SWAZILAND DEVELOPMENT AND SAVINGS BANK **RESPONDENT**

CORAM

NKOSINATHI NKONYANE: **JUDGE**

DAN MANGO: **MEMBER**

GILBERT NDZINISA: **MEMBER**

FOR APPLICANT: **C. BHEMBE**

FOR RESPONDENT: **M. SIBANDZE**

RULING ON POINT IN LIMINE
19.05.08

1. The applicant instituted the present proceedings for determination of an unresolved dispute. The application is accordingly supported by a certificate of unresolved dispute dated 16th February 2006.

[2] The application is opposed by the respondent. In its reply the respondent

also raised two points *in limine.* The respondent abandoned the first point but only pursued the second point. The court is therefore presently asked to make a ruling on the point *in limine* raised by the respondent namely that the applicant's claim has prescribed and that it is therefore not properly before the court.

[3] The facts which are not in dispute are that the dispute arose on 22nd January 2005. The dispute was however reported on 13th October 2005, almost nine months later.

[4] When the dispute arose on 22nd January 2005, Section 76 (4) of the Industrial Relations Act No.1 of 2000 was applicable. The Industrial Relations (Amendment) Act No.3 of 2005 was not yet in place as it came into operation on 1st September 2005. Under the 2000 Act a dispute was reported to the Commissioner of Labour within a period of six months. That section provided that;

> *"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, but the Commissioner of Labour may, subject to subsection (5), in any case where justice requires, extend the time during which a dispute may be reported."*

[5] The respondent's attorney argued that the applicant's claim has prescribed

since she failed to report it within the six months' period as provided in the then applicable provisions of Act No. 1 of 2000. The applicant's attorney argued to the contrary that the applicant was entitled to report the dispute even though six months had elapsed because **SECTION 76(2) OF THE INDUSTRIAL RELATIONS (AMENDMENT) ACT** has since extended the period to eighteen months within which a dispute may be reported.

[6] The court was referred to the case of **HAPPINESS GININDZA V. PEAK TIMBERS LIMITED CASE NO. 80/2007 (I.C.).** In that case a similar question had to be answered by the court. The facts of that case showed that the dispute arose on 9th December 2004 but was only reported on 6th January 2006, thirteen months later. The court in that case referred to the case of **BARTMAN V. DEMPETS 1952 (2) S.A. 577 (A)** at **p.580 B-C** where the following appears;

"There is a well-known rule of construction that no statute is to be construed so as to have a retrospective operation, in the sense of taking away or impairing a vested right acquired under existing laws unless the legislature clearly intended the statute to have that effect."

[7] Further, **LOURENS M. DU PLESSIS** in his book **<u>"THE INTERPRETATION OF STATUTES"</u> (1986) BUTTERWOTHS** at p.98 stated that;

> *"This presumption, which can also be framed positively (i.e. statutes*

are presumed to obtain prospectively), has on various occasions been recognized by our courts, the usual explanation for its existence being that a "fear of injustice" necessitates the assumption that the legislature will not lightly interfere with vested rights."

[8] Under the repealed **SECTION 76(4)** both parties had acquired vested rights. The respondent had the right to plead prescription if the applicant were not to report the dispute within six months. Similarly, the applicant had a right to apply to the Commissioner of Labour for an extension of time within which to report the dispute. As it was held in the **HAPPINESS GININDZA** case (supra at p. 5) "the rights of both the applicant and the respondent survived the repeal of Section **76(4)."** The applicant had not .however, applied for the extension of time when she reported the dispute nine months later which was clearly outside the six months period.

[9] The dispute having arisen when **SECTION 76 (4)** of the **INDUSTRIAL RELATIONS ACT OF 2000** was in force, all the rights and duties of the parties fall to be guided by that section. Under that section a dispute could be reported within a period of six months failing which one would have to first apply for an extension of the time period to the Commissioner of Labour. The applicant did not do that. The dispute is therefore time-barred as it was reported nine months later. There is nothing in the amendment act of 2005 which suggest that the new Section 76 shall have the effect of breathing life

into disputes that were time-barred.

[10] For the above reasons, the point in *limine* raised by the respondent is upheld and the application is dismissed with no order for costs.

The members agree.

NKOSINATHI NKONYANE

JUDGE- INDUSTRIAL COURT