

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 469/05

In the matter between:

SUSAN NSIBANDE

Applicant

and

**ROYAL SWAZILAND SUGAR
CORPORATION**

Respondent

CORAM:

**P. R. DUNSEITH JOSIAH YENDE
NICHOLAS MANANA**

**PRESIDENT
MEMBER
MEMBER**

**S. ZIKALALA V. DLAMINI
FOR APPLICANT FOR**

RESPONDENT

JUDGEMENT ON SPECIAL PLEA - 12/03/09

1. The Applicant has applied to the Industrial Court for determination of an unresolved dispute arising out of the termination of her services by the Respondent. In her particulars of claim the Applicant alleges that her employment terminated on 12th January 2004.

Attached to the Applicant's particulars of claim is a "certificate of unresolved dispute as amended" issued by CMAC in terms of section 85 (1) of the Industrial Relations Act of 2000.

The Respondent has filed a Reply which contains a "Special Plea in Limine." This Special Plea raises the following special defence:

"Respondent states that Applicant's services were terminated on the 22nd July 2002 and the Respondent further states that the Applicant's Report of Dispute was only made on or about the 10th December 2004. In the premises the matter was not reported within the time allowed by the Industrial Relations Act No. 1/2000 and the court may not take cognizance of it.

WHEREFORE Respondent prays that Applicant's application be dismissed."

The Applicant replicated to the Special Plea in the following terms:

"Applicant reiterates that she was dismissed on 12th January 2004 when her final appeal to the Managing Director was finalized. The dispute was therefore reported timeously and the court must take cognizance of same."

Section 76 (4) of the Act provides:

"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."

13. On the pleadings there is a clear dispute of fact as to whether the Applicant's employment terminated on the 12th January 2004, as she alleges, or on the 22nd July 2002, as alleged by the Respondent. There is also a dispute of fact and law as to whether the unfair dismissal dispute was reported timeously in terms of the provisions of section 76 of the Industrial Relations Act of 2000.
14. A Special Plea is one which, apart from the merits, raises some special defence, not apparent ex facie the declaration for in that case it would be taken by exception - which either destroys or postpones the operation of the cause of action" - **per Innes C. J. in Brown v Vlok 1925 AD at 58.** When a preliminary

defence is raised on exception, the defence must appear from the declaration (the particulars of claim) itself. The allegations in the declaration are accepted as true for the purpose of arguing the exception. Special pleas, on the other hand, do not appear *ex facie* the declaration. They have to be established by the introduction of fresh facts from outside the circumference of the declaration, and these facts have to be established by evidence in the usual way.

Herbstein & Van Winsen: The Civil Practice of the Superior Courts in South Africa (2nd Ed) at 307 B.

8. The Applicant has come to court armed with a certificate of unresolved dispute, which constitutes *prima facie* proof that the procedures set out in part V111 of the Act have been properly observed. The maxim *omnia praesumuntur rite esse acta* applies.

Swaziland Fruit Cannery (Pty) Ltd v Vilakati & Another SLR 1987-1995 (2) 80 at 81-82.

The Respondent has challenged the presumption of regularity, and in our view it bears the evidentiary onus of proving that the dispute was reported out of time.

15. The Special Plea was duly set down for hearing, but the Respondent did not lead any evidence in support thereof. Its representative relied upon the pleadings which, as we have pointed out, contain disputes of fact with regard to the material issues, namely the date upon which the Applicant's employment terminated, and the date upon which the dispute was reported to the Commissioner of Labour.
16. With regard to the disputed date of dismissal, Mr. Dlamini for the Respondent stated that he would accept for the purpose of his argument that the Applicant's employment terminated on the 12th January 2004, as alleged by the Applicant. With regard to the date the dispute was reported, he relied upon the certificate of unresolved dispute, which states that the CMAC Commissioner was appointed to conciliate the dispute on 10th December 2004.
17. The date of appointment of the CMAC Commissioner does not assist the court in arriving at the date upon which the dispute was reported to the

Commissioner of Labour. Mr. Dlamini urged the court to infer the date of reporting from the statutory time limits which govern the conciliation process, but there is no evidence before us that the Labour Commissioner or CMAC observed these time limits. On the contrary, the certificate itself was issued some 5 months outside the time prescribed by the Act.

18. The Respondent has failed to prove the date upon which the dispute was reported, and the court is not prepared to indulge in speculation on so important an issue. The Respondent could have handed in the report of dispute under the authority of section 11 of the Act, or called the Labour Commissioner to testify as to the date the dispute was reported. It failed to do so, or to call any other evidence. As matters stand, no evidence is before the court which establishes that the dispute was reported out of time.
19. The court invited the Applicant's representative to produce the report of dispute for the scrutiny of the court, but it transpired that he had two conflicting reports in his file and he was not aware whether either were true copies of the report actually delivered to the Labour Commissioner. There is no evidentiary burden on the Applicant in any event.
20. At a late stage during the submissions of the Applicant's representative, the Respondent applied for a postponement of the hearing to enable it to produce evidence in support of its Special Plea. This application was opposed by the Applicant. In our view no good reason was advanced for a postponement, other than the realization by the Respondent that it had failed to make out its case.
21. In the result, the Respondent's Special Plea is dismissed, with no order as to costs. The matter is referred to the Registrar for allocation of dates for trial on the merits.

DUNSEITH PRESIDENT OF THE INDUSTRIAL COURT