

**IN THE INDUSTRIAL COURT OF SWAZILAND**

**HELD AT MBABANE**

**CASE NO. 92/2010**

In the matter between:

**HLENGIWE DLAMINI**

**1<sup>st</sup> APPLICANT**

**SICELO MTHETHWA**

**2<sup>nd</sup> APPLICANT**

and

**CARGO CARRIERS (PTY) LTD**

**RESPONDENT**

**CORAM:**

**D. MAZIBUKO;**

**JUDGE**

**A.M. NKAMBULE;**

**MEMBER**

**M. MTETWA;**

**MEMBER**

**FOR APPLICANT:**

**MR. T. SIMELANE**

**FOR RESPONDENT:**

**MR. S. SIMELANE**

**RULING 7<sup>th</sup> MAY 2010**

*Claim for prescription, late filing of claim in Court, what constitutes unreasonable delay, Act silent on time limits.*

[1] The 1<sup>st</sup> Applicant is Hlengiwe Dlamini an adult female Swazi of Hlatikulu in Swaziland.

[2] The 2<sup>nd</sup> Applicant is Sicelo Mthethwa an adult Swazi male of Siphofaneni in Swaziland.

[3] The Respondent is Cargo Carriers (Pty) Ltd a private limited liability company operating in Swaziland at Mhlume.

[4] The Applicants have filed a joint claim against the Respondent for compensation for unfair dismissal. Both Applicants claim to have been employed by Respondent on different dates but were dismissed the same day being 4<sup>th</sup> April 2006 on the same grounds. The Applicants claim to have been dismissed on allegations of dishonesty and attempted theft.

[5] The Applicants denied any wrong doing on their part and aver that their dismissal was substantively and procedurally unfair. A claim for unfair dismissal was reported at the Conciliation Mediation Arbitration Commission (CMAC) under section 76 (1) and (2) of the Industrial Relations Act 1/2000 (Act) by both Applicants. The matter remained unresolved. Thereafter a certificate of unresolved dispute was issued by CMAC to each of the Applicants. Copies of the certificates were attached to the Applicants' pleadings.

[6] The Respondent has filed a reply in response to the Applicant's claim. The Respondent has raised a point ***in limine*** and has also pleaded over on the merits. The point ***in limine*** reads as follows;

*'The Applicant's claim has prescribed due to lapse of a period of time exceeding three years before being brought to the above Honourable Court for expedient*

*determination".*

[7] The matter before Court concerns the point *in limine* i.e. whether or not the Applicants' claims have become prescribed due to the lapse of a period exceeding three (3) years before being brought to Court for adjudication.

[8] The 1<sup>st</sup> Applicant was issued a certificate of unresolved dispute dated 17<sup>th</sup> October 2006. The 2<sup>nd</sup> Applicant was issued a certificate of unresolved dispute dated 18<sup>th</sup> October 2006. Both Applicants filed their claim in Court for the first time on the 3<sup>rd</sup> March 2010. The Respondent took the point that there was unreasonable delay on the part of the Applicants in filing their claims in Court from the time the certificates of unresolved dispute were issued being 17<sup>th</sup> and 18<sup>th</sup> October 2006 to 3<sup>rd</sup> March 2010, the latter being the date the claims were filed in Court. The Respondent avers that the Applicants have delayed in filing their claims in Court for a period of about 3 (three) years 5 (five) months. This delay, according to Respondent is unreasonable and inexcusable. As a result thereof the Court must declare the Applicants' claims to have prescribed.

[9] It is common cause that the Applicants become entitled to file their claims in Court from the date the certificates of unresolved dispute were issued by CMAC. The issue before Court is whether or not there was delay on the part of the Applicants in filing their claims in Court 3 (three) years 5 (five) months from the date the certificates were issued. If there was a delay, whether it was unreasonable. If there was unreasonable delay whether it renders the Applicants' claims prescribed.

[10] The Industrial Relations Act No. 1/2000 came into effect on the 6<sup>th</sup> June 2000. The Industrial Relations (Amendment) Act

No.3/2005 came into effect on the 16<sup>th</sup> March 2005. It is common cause that both the Act and the Amendment do not state the period of time within which the party to whom a certificate of unresolved dispute has been issued should file a claim in Court. Both parties have asked the Court to look at what is reasonable in the circumstances.

[11] The Respondent has argued that a delay of 3 (three) years 5 (five) months is unreasonable in the circumstances. The Court was referred to Section 21 of the Constitution of the kingdom of Swaziland Act No. 1/2005 which reads as follows;

*"21. (i) In the determination of civil rights and obligations... a person shall be given a fair and speedy public hearing within a reasonable time by... Court established by law."*

The Respondent argues that the delay by Applicant in filing their claims in Court has denied her a **speedy** trial within a **reasonable time**. The Respondent argues further that the delay has denied her, her constitutional right. As a result the Court should declare that the claims have prescribed by unreasonable delay.

[12] The Applicants aver that there is no stipulated time in the Act or Amendment within which the Applicants are to file their claims. The Act and the subsequent amendment authorise the Applicants to file their claims in Court only after a certificate of unresolved dispute has been issued by CMAC without stating time limits within which to do so. In the absence of time limits the Applicants can still file their claims 3 (three) years 5 (five) months after the certificates have been issued. The Applicants have referred the Court to Section 33 (i) of the Constitution which reads as follows;

*"33 (i) A person appearing before any administrative authority has a right to be heard and to be treated justly and fairly in accordance with the requirements imposed by law including the requirement of fundamental justice of fairness..."*

According to Applicants the intention of the legislature was not to close the door at the face of the Applicants who brought their claims to Court without being subjected to time constraints. The Applicants argue further that the period of 3 (three) years 5 (five) months is not unreasonable delay. The Applicants concede that an unreasonable delay can lead the Court to declare that a claim before Court has prescribed. However that does not apply in the present matter since the delay is not unreasonable.

[13] The Court accepts that there is a delay on the part of the Applicants in filing their claim in Court. Instituting a claim at Industrial for unfair dismissal should not normally take 3 (three) years 5 (five) months in the absence of special circumstances. At this stage the Court is not in a position to ascertain the reasons for the delay, the circumstances of the Applicants, the prejudice the Respondent might suffer due to the delay and any other relevant matter. The Court will only be able to examine these issues once the parties have filed full sets of affidavits before Court. The Court therefore directs that it will be fair to give the Applicants an opportunity to apply for condonation for late filing of their claims. An order is therefore made in the following terms;

- a) The Applicants are directed to file an application for condonation for late filing of their claim within 21 (twenty one) Court days from date of this order, failing which the

Respondent may bring this matter before Court for finalisation.

- b) Upon service of the application, the Respondent has 14 (fourteen) court days to file her answering affidavit or any appropriate set of papers.
- c) Upon service of the answering affidavit the Applicants have 7 (seven) Court days to file their replying affidavit, if any.
  - d) Upon compliance with the orders above stated the matter may be brought to the Court's attention.

The members agree.

**DUMSANI MAZIBUKO**  
**JUDGE OF THE INDUSTRIAL COURT**