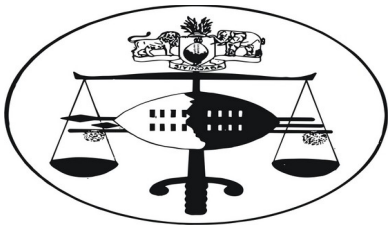

IN THE INDUSTRIAL COURT OF SWAZILAND

RULING ON POINT OF LAW

Held at Mbabane Case No317/2007

In the matter between:

JOHN KUNENE **Applicant**

And

THE TEACHING SERVICE COMMISSION **1st Respondent**

ATTORNEY GENERAL **2nd Respondent**

Neutral citation: **John Kunene** v *The Teaching Service Commission & Another (317/07) SZIC* 08 (February 26 / 2016**)**

Coram: NKONYANE J,
(Sitting with G. Ndzinisa & S. Mvubu Nominated Members of the Court)

Heard: **23/10/15**

Delivered: **26/02/16**

Summary : The Applicant is a former science teacher. He was dismissed by the 1st Respondent on 13th April 2005 after the 1st Respondent held a disciplinary enquiry and found him guilty of immoral conduct involving a school pupil. The Applicant thereafter filed review proceedings at the High Court seeking an order setting aside the dismissal. The application was dismissed with costs. He appealed. The appeal was also dismissed with costs. He then filed the present application for determination of an unresolved dispute before this Court. The 1st Respondent raised a point of law that the dispute was reported out of time and that it was therefore not properly before the Court which has no jurisdiction to entertain it.

Held---The applicable legislation is the Industrial Relations Act of 2000---In terms of Section 76 (4) of this Act 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---The dispute in casu was reported after the lapse of sixmonths---There was no application filed by the Applicant for the extension of time as provided for by sub-section (5)---Point of law accordingly upheld and application dismissed.

RULING ON POINT OF LAW

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1. The Applicant is a former teacher. He was first employed by the 1st Respondent in March 1995. He was in the continuous employment of the 1st Respondent until 16th March 2005 when he was dismissed after a disciplinary hearing was held against him and found guilty of misconduct. The letter of dismissal was dated 13th April 2005.

2. The Applicant thereafter instituted review proceedings at the High Court in terms of which he sought an order "*reviewing and setting aside the 1st Respondent's letter of dismissal from service dated 13 April 2005 as irregular, ultra vires and of no force or effect.*" He also sought an order re-instating him to his post of teacher at Mbabane Central High school.

3. The application was however dismissed with costs by the High Court. The Applicant launched appeal proceedings against the High Court judgment before the Court of Appeal. The appeal was also dismissed with costs.

4. The Applicant has now come back to the Industrial Court and has filed an application for the determination of the unresolved between him and the 1st Respondent in line with the provisions of Section 85 (2) of the Industrial Relations Act, 2000 as amended.

5. From the evidence before the Court, in particular the Certificate of unresolved dispute, **Annexure A** of the Applicant's application, the dispute was reported after the two failed bids by the Applicant at the High Court and the Court of Appeal. This led to the 1st Respondent raising certain points *in limine* in its Reply which it filed in opposition to the

Applicant's application. Further, the evidence shows that the Applicant launched the present legal proceedings in Court on 24th July 2007, two years and four months after his dismissal.

6. The 1st Respondent in its Reply accordingly raised the point of law that the Applicant was time barred from reporting the dispute at the Conciliation Mediation and Arbitration Commission (CMAC) and that CMAC acted ultra vires its powers in entertaining the dispute and that therefore the matter was not properly before the Court.

7. There is annexed to the Applicant's heads of argument the report of the dispute by the Applicant. This document shows that it was signed at Mbabane on 26th November 2006. It means therefore the dispute was reported after one year and eight months since the Applicant's dismissal on 16th March 2005.

8. The Applicant having been dismissed in March 2005, the applicable legislation therefore was the **Industrial Relations Act of 2000**. The **Industrial Relations (Amendment) Act of 2005** came into effect on 01st September 2005. This legislation is not therefore applicable as the Applicant was dismissed on 16th March 2005. The general principle is that legislation does not have retrospective application. The report of disputes

in terms of the applicable legislation (**Industrial Relations Act of 2000**) is governed by Section 76. In terms of Section 76 (4) the Act provides 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 Commissioner of Labour may, subject to subsection (5), in any case where justice requires, extend the time during which a dispute may be reported."

9. There is therefore clearly no doubt that the dispute was reported out of the time-frame envisaged by the Act. It was argued on behalf of the Applicant in paragraph 3.8 of the heads of argument that a period of eighteen months had not elapsed when the dispute was reported to CMAC. It was argued that the Applicant was dismissed on 13th April 2005 as that was the date on which the letter of dismissal was written. This argument has no merit taking into account that the applicable legislation clearly prescribes a period of six months within which to report a dispute.

10. Even if it were to be accepted that the Applicant was dismissed on 13th April 2005, still the dispute was reported outside the eighteen months' period suggested by the Applicant. The period from 13th April 2005 to 26th November 2006 is nineteen months and not eighteen months. Further, this

argument has no legal basis as the applicable legislation is not the **Industrial Relations (Amendment) Act of 2005** which provides that a dispute may be reported within the period of eighteen months. The Applicant's dispute is governed by the **Industrial Relations Act of 2000**. In terms of this legislation, the Applicant is entitled to apply to the Commissioner of Labour for an extension of time within which to report the dispute. The Applicant did not do that.

11. Dealing with a similar application this Court in the case of **Happiness Ginindza V. Peak Timbers Limited, case no. 80/2007 (I.C.)** held in paragraph 8 that;

"Upon the elapse of the statutory period of 6 months without any report of dispute having been filed, the Respondent was vested with immunity against the enforcement of the Applicant's claim and acquired a substantive defence to the Applicants claim namely that the reporting of the dispute was time barred."

Similarly, in this matter the dispute was not reported within the statutory period of six months and there was no application for the extension of

time within which to report the dispute. The dispute was clearly time barred.

12. It was further argued on behalf of the Applicant that even if the dispute was time barred, the 1st Respondent is estopped from raising this point of law before the Industrial Court. It was argued that the point of law should have been raised at CMAC. This Court had the occasion to address a similar argument in the case of **William Manana V Royal Swaziland Sugar Corporation LTD, case no. 160/06 (IC).** The Court in paragraph 11 pointed out that;

"Since the Respondent has raised an objection to the Court taking cognizance of the application on the grounds that the dispute was reported out of time, the Court is entitled and has a duty to go behind the certificate issued by CMAC to ascertain whether the provisions of Part VIII of the Act have been substantially complied with."

Similarly in this case, this Court is entitled to investigate or go behind the certificate of unresolved dispute issued by CMAC to ascertain whether the report of the dispute was reported within the time frame stated by the Act.

The evidence before the Court revealed that the report of the dispute was made outside the prescribed period.

13. The Applicant having been dismissed in 2005, the Industrial Court Rules of 1984 were applicable. The current Industrial Court Rules of 2007 came into effect on 14th December 2007. Rule 3 (2) of the Industrial Court Rules of 1984 provided that;

"The Court may not take cognizance of any dispute which has not been reported or dealt with in accordance with Part VIII of the Act."

Since the dispute was reported outside of the time frame prescribed by Part VIII of the Act, the Court is entitled not to take cognizance of the matter. The Applicant had the opportunity to apply for the extension of time within which to report the dispute in terms of Section 76 (4) of the Act. The Applicant elected not do that.

14. It was also argued on behalf of the Applicant that the failure by the 1st Respondent to raise the point of law at CMAC level means that the 1st Respondent waived its right to raise the objection. There is however no

evidence before the Court that the 1st Respondent's representative at CMAC was aware that the dispute had been reported out of time. There is no evidence before the Court that the 1st Respondent's representative at CMAC intended or was authorized to waive the 1st Respondent's right. In any event, the Applicant did not plead waiver in replication. In terms of the principles of our law, there is a presumption against waiver. The onus was on the Applicant to show that the 1st Respondent, with full knowledge of its right, it decided to abandon it.

(See: Laws V Rutherford 1924 AD 261 at 263;

Christie: <u>The Law of Contract</u> 4th edition, pp. 513-514).

15. The 1st Respondent applied that the point of law be upheld with costs. The question of costs is an issue wholly within the Court's discretion. The general rule is that costs will be granted to the successful party. In the present case however the Court did not deal with merits of the case. It only addressed the point of law raised. In the circumstances of this case the Court will order that each party should pay its own costs.

16. For the above stated reasons, the point *in limine* raised is upheld and the application is dismissed. There is no order as to costs.

N. NKONYANE
JUDGE OF THE INDUSTRIAL COURT.

For Applicant: Mr. B.S. Dlamini
(B S Dlamini & Associates)

For Respondents: Mr. N. Dlamini
(Attorney – General's Chambers)