IN THE INDUSTRIAL COURT OF ESWATINI

JUDGMENT

Case No. 70/18

In the matter between:

SENZO NSIBANDZE Applicant

And

FIDELITY SECURITY SERVICES (PTY) LTD Respondent

Neutral citation: Senzo Nsibandze v Fidelity Security Services *(70/18)* [2018] *SZIC 136 (04 February 2019)*

Coram: **S. NSIBANDE JP**
(Sitting with N.R. Manana and M.P. Dlamini Nominated Members of the Court)

Date Heard: 03 August 2018

Date Delivered: 04 February 2019

Summary: Applicant dismissed by Respondent on 13/06/2014 – Applicant launches application for determination of unresolved dispute in March 2018 about 4 years after issuance of certificate of unresolved dispute – Respondent raises point in limine that application be dismissed because of inordinate delay in prosecuting claim to its prejudice

Held – Appeal Court held 3 years delay to be unreasonable.

Held – Applicant delayed prosecuting his claim.

Held – Point in limine upheld and Application dismissed.

JUDGMENT

[1] The Applicant approached the Court for the determination of an unresolved dispute between himself and the Respondent in which he claims an amount of E26319.74 made up of his terminal benefits and compensation for unfair dismissal.

[2] The Respondent opposes the application and in its reply thereto raises a special plea to the claim. The special plea is set out as follows;

"The certificate of unresolved dispute having been issued on 28th July 2014, it is not open to the Applicant to seek determination of the unresolved dispute almost four (4) years later, in March 2018. The Respondent was entitled to assume, after a maximum period of three (3) years, that the Applicant had abandoned his claim. It would be incompetent of this Honourable Court to entertain such a delayed claim."

[3] It is common cause that the Certificate of Unresolved Dispute herein was issued on 28th July 2014 and that the application for determination of an unresolved dispute was launched on 9th March 2018. It is common cause also that the Applicant was dismissed by the Respondent on 13th June 2014 and that by 9th July 2014 he had reported a dispute arising from his dismissal with the Conciliation, Mediation and Arbitration Commission.

[4] When the point raised was argued, the Respondent's attorney readily accepted that there is no statutory limit within which a party is expected to launch an application for the determination of an unresolved dispute after the issuance of a certificate of an unresolved dispute. The Respondent argued that other legislation could be used to provide guidance to the Court on what may constitute a reasonable time within which to launch an application following the issuance of a certificate. To this end the Court was referred to **Section 151 of the Employment Act 1980** which calls upon every employer to keep records and registers of all its employees in which personal information including date of employment, leave days taken and dates on which written warnings, if any, were issued. In terms of **Section 151(2) (b)** such records and registers are expected to *"be kept by the employer for a period of three (3) years from the date of the last entry therein."*

[5] The Respondent's submission was that because an employer is expected to keep records of its employees for a period of three (3) years, in terms of the **Employment Act 1980**, it was fair and reasonable to assume that the Applicant had abandoned his claim when he had not filed an application before Court, three (3) years after his dismissal or at the latest, three (3) years after the issuance of the Certificate of an Unresolved Dispute. It was submitted that having failed to launch an application before Court within three years of receipt of the certificate, his failure to do so could reasonably be constituted as an abandonment of his claim.

[6] The documents filed in Court indicate that the Applicant having been dismissed on 13th June 2014 reported a dispute, arising from the dismissal, with the Conciliation Mediation and Arbitration Commission in early July 2014. The indication is that the dispute was reported and conciliated upon within a month and a half of the applicant's dismissal and that the Certificate of Unresolved Dispute was issued within that time frame.

[7] After the issuance of the Certificate of Unresolved Dispute on 28th July 2014, it took the Applicant three (3) years and seven (7) months to launch his application before the Court. It is this 3 year seven months period that the Respondent complains of. Despite that the Respondent, in its Reply,

raised issue with the applicant's delay in launching his application the applicant failed to replicate thus passing up an opportunity to explain to the Court why he delayed prosecuting his claim. In his submissions before Court the Applicant was content to say only that the delay may have been because of a lack of funds. It was further submitted on his behalf that once the applicant had met the threshold of reporting the dispute within 18 months of the dispute arising there was nothing in terms of the country's labour laws that compelled him to file/launch his application in Court within a specific period.

[8] While it is correct that there is no specific legislation dealing with prescription of labour disputes, our Courts have had occasion to deal with similar points of law raised by respondents who complained of the inordinate delays in applicant prosecuting their claims. In this regard see **Thomas Themba Motsa v Usuthu Pulp Company Ltd Case No. 337/2005; Fanana Bongani Simon Bhembe v Ubombo Sugar Limited Case No. 423/2010, Jotham Masilela v Crane Feeds (Pty) Ltd Case No. 538/2010**. This Court in the matter of **Tokyo P.N. Ntshangase v Swaziland National Provident Fund IC case No. 195/2006** aligned itself with the remarks of **Ngcobo J in the case of Nehawu v University of Cape Town**

2003 (2) BCLR 154 (KH), referred to by Ebeisohn AJA in Usuthu Pulp Company (Pty) Ltd v Jacob Seyama and 4 Others ICA Case No. 1/2004:

> *"By their very nature labour disputes must be resolved expeditiously and be brought to finality so that the parties can organise their affairs accordingly."*

[9] These remarks resonate with those made in **UPMW v Stadsraad van Pretoria 1992 ICJ 1563 (NH)** at 1569 A.C (referred to by Nkonyane J in Tokyo P.N. Ntshangase v Swaziland National Provident Fund supra), where the Court held that,

> *"Fairness, however, dictates that disciplinary steps must be taken promptly. Both the staff regulation and the recognition agreement echo the need for prompt action as all time limits must be adhered to strictly ..."*

[10] In the Ntshangase case (supra) having considered the Courts observations and dicta in the **Usuthu Pulp Company v Jacob Seyama** (supra) and the cases referred to therein concluded that in fairness, it is expected that where there are time lines within which an employer must prefer disciplinary charges against an employee, there must be time lines within which an employee who has been dismissed must institute his claim for unfair

dismissal; and that *"since there is no specific labour legislation dealing with prescription of labour disputes, the Court will have to be guided by what is reasonable in the circumstances of each particular case."*

[11] The Court further took the fact that the legislature limited the period within which one can report a dispute to the CMAC to eighteen (18) months from the time the issue giving rise to the dispute arose, in terms of **Section 76 of the Industrial Relations Act 2000 as amended**, as an indication that the legislature was **"setting"** the pace and **"showing the trend which must be followed in dealing with labour disputes, both at the reporting stage and the prosecuting stage."** The legislature was taken to have shown the intention that labour disputes should keep in touch with the increasing pace of modern life and activities in the labour market, thus have labour disputes resolved expeditiously.

[12] The particular circumstances of this matter are that the Applicant launched his application before Court some 3 years seven months after the issuance of the Certificate of Unresolved dispute. In terms of the **Usuthu Pulp Company Ltd v Jacob Seyama and 4 Others**, (supra) that time frame constitutes unreasonable for delay in prosecuting one's claim. The Respondent complains that the period between the issuance of the

certificate of unresolved dispute and the launching of the Court action was inordinate and that Applicant should not be allowed to prosecute his claim. The Respondent does not say in its objection to the claim how the Applicant's delay in prosecuting his claim has prejudiced it except to say that it is obliged to keep records of employees for a period of three (3) years.

In the matter of **Vusi Sikelela Dlamini v Eagles Nest Pty Ltd IC Case No. 150/2010**, the Court, having found that the Applicant's claim against the Respondent was unreasonably late (the Applicant having taken 8 years to file an application before Court, after the issuance of a certificate of unresolved dispute) in filing his application, granted the Applicant an opportunity to apply for condonation for late filing of his application. In granting that opportunity the Court was motivated by the Applicant's attempt to explain the cause of his delay in filing his claim in Court. The Applicant had indicated his intention to apply for condonation for the late filing in the event the Court found that the application had been unduly delayed.

[13] In the current matter, the Applicant has not made any intention to apply for condonation known to the Court nor has he attempted to explain the delay

in filing the application before Court despite that Respondent made it an issue. Although the Applicant is not in breach of any statutory duty, the Court have pronounced that it is unreasonable to launch an application for the determination of unresolved dispute three years after the issuance of a certificate of unresolved dispute (See **Usuthu Pulp Company Ltd v Jacob Seyama and 4 Others**, (supra).)

[14] Taking into account the circumstances of this matter we come to the conclusion that the Applicant has inordinately delayed the prosecution of his claim and that the Respondent would be prejudiced if the Applicant were to be allowed to prosecute his claim at this point. The Respondent's point of law is therefore upheld.

There is no order as to costs.

The Members agree

S. NSIBANDE
PRESIDENT OF THE INDUSTRIAL COURT

For Applicant: Mr. E. Dlamini

For Respondent: Mr. S. Dlamini