IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE Case No. 275/2022

In the matter between:

GABRIEL SITHOLE Applicant

And

ESWATINI SUGAR ASSOCIATION Respondent

Neutral Citation: Gabriel Sithole vs. Eswatini Sugar Association (275/2022) [2023] SZIC 31 (18 April 2023)

Coram: **V.Z. Dlamini – Judge**
(Sitting with Mr. D. Mncina and Mr. D.P.M. Mmango – Nominated Members of the Court)

LAST HEARD: 29 March 2023

DELIVERED: 18 April 2023

RULING

INTRODUCTION

[1] The Applicant, a liSwati male adult of Matsetsa area in the district of Lubombo, filed an application for condonation for late reporting of a dispute with the Conciliation, Mediation and Arbitration Commission (CMAC) on the 9th September 2022. Furthermore, the Applicant prays for an order directing CMAC to accept his report of dispute and enroll it for conciliation. The Respondent.

BACKGROUND FACTS

[2] It is common cause that the Applicant was dismissed by the Respondent on the **6th August 2009** following allegations of poor work performance and attempted theft. Prior to the Applicant's dismissal, the theft was reported to the Royal Eswatini Police and the Applicant was arrested on the 23rd July 2009 and released on bail on the 24th July 2009. He was suspended from work on the 28th July 2009 pending investigations into the theft, these culminated in disciplinary charges being preferred against him on the 31st July 2009. The disciplinary hearing was held on or about the 5th August 2009 and the Applicant was dismissed on the 6th August 2009.

[3] On the 14th August 2017, the Applicant was cleared of the criminal charges laid by the Police, which was eight (8) years after his dismissal by the Respondent. In **April 2019** he reported a complaint in respect of his dismissal

to the Commissioner of Labour in terms of **Section 41** of the **Employment Act, 1980.** When the Applicant attempted to report a dispute to CMAC in terms of **Section 76** of the **Industrial Relations Act, 2000 (as amended),** the Commission advised him that the dispute was time-barred due to his failure to report it within **eighteen (18) months** of his dismissal; consequently, he lodged the present application. Meanwhile, the Commissioner of Labour issued a Conciliation Report to the Court in terms of **Section 41 (3)** of the **Employment Act.**

BASIS OF APPLICATION

[4] The Applicant alleged the following grounds for the delay in reporting the dispute to the Commission:

- He was advised by the Commission a few weeks after his dismissal that he should defer reporting a dispute until he was cleared of the criminal charges and he adhered to that advice;
- The Commissioner of Labour delayed to issue the Conciliation Report;
- Lack of funds to pay for legal fees;
- Advent of the COVID-19 pandemic;
- Delay caused by erstwhile legal representative.

BASIS OF OPPOSITION

[5] The Respondent alleged the following grounds for opposing the application:

- **Rule 16** of the Court on condonation does not apply against non-compliance of the 18 months' prescription period for reporting disputes to the Commission provided by **Section 76 (2)** the **Industrial Relations Act;**
- Alleged advice by the Commission was inconsistent with established practice of the institution;
- In any event, pending criminal proceedings are not a bar for institution of disciplinary enquiry;
- Following the promulgation of the **Industrial Relations Act** and establishment of the Commission, the Commissioner of Labour no longer has any jurisdiction to conciliate unfair dismissal disputes; hence, the delay attributed to Commissioner of Labour was inexcusable;
- At any rate, the Conciliation Report by Commissioner of Labour was issued before the advent of COVID-19; and Commissioner of Labour referred the complaint to the Court for determination;
- Lack of funds does not justify the inordinate delay in reporting the dispute to the Commission and prosecuting the claim after the Commissioner of Labour had issued the report.

DEFERMENT OF DETERMINATION

[6] The parties' representative and attorneys filed comprehensive Heads of Argument, which were motivated on the aforesaid date of hearing. In the process of writing the judgment, our attention fell on the provisions of **Section 77 (3)** of the **Industrial Relations Act**, which was added to the Principal Act

by **Industrial Relations Amendment Act of 2005 (Act, 3 of 2005). Section 77 (3)** and **(4)** read as follows:

> *"If the dispute is a complaint filed under the Employment Act and reported by an employee, the Commission shall assist the employee in the completion of the report and service of a copy of the report to the other party or parties to the dispute.*
>
> *The Commission shall retain the original report of dispute for purposes of conciliation, mediation, arbitration or for any process recognized under this Act or any other law in relation to the settlement of industrial disputes."* [Underlining added].

[7] A comparison of the aforesaid section with the provisions of **Sections 41** and **76 (2)** of the **Employment Act** and the **Industrial Relations Act** respectively, is apposite. On the one hand **Section 41** reads:

> *"(1) Where an employee alleges that his services have been unfairly terminated, or that the conduct of his employer towards him has been such that he can no longer be expected to continue in his employment, the employee may file a complaint with the Labour Commissioner, whereupon the Labour Commissioner, using the powers accorded to him in Part II shall seek to settle the complaint by such means as may appear to be suitable to the circumstances of the case.*
>
> *(2) Where the Labour Commissioner succeeds in achieving a settlement of the complaint, the terms of the settlement shall be recorded in writing, signed by the employer and by the employee and witnessed by the Labour Commissioner: one copy of the settlement shall be given to the employer, one copy shall be given to the employee and the original shall be retained by the Labour Commissioner.*

(3) If the Labour Commissioner is unable to achieve a settlement of the complaint within twenty-one days of it being filed with him, the complaint shall be treated as an unresolved dispute and the Labour Commissioner shall forthwith submit a full report thereon to the Industrial Court which will then proceed to deal with the matter in accordance with the Industrial Relations Act".

[8] Conversely, **Section 76 (2)** provides as follows:

"A dispute may not be reported to the Commission if more than eighteen (18) months has elapsed since the issue giving rise to the dispute arose."

[9] The Respondent's attorney argued that the promulgation of **Section 76 (2)** is deemed to have repealed **Section 41** by implication because the former is a provision of a later statute and expressed the intention of Parliament to prescribe the time limit for reporting of labour disputes, but **Section 41**, which has no prescription is from an earlier legislation. Now, if Parliament through the Principal Act repealed **Section 41** in 2000, it did the opposite in 2005 through **Section 77 (3)** and **(4)** of **Act, 3 of 2005;** the legislature appears to have revived **Section 41** because it acknowledges its existence in the aforesaid amendment.

[10] Since the aforegoing question arose in the process of writing the judgment, the parties were not afforded the opportunity to address the Court on the import of **Section 77 (3)** in light of the Commission's stance to sometimes refuse disputes that originate from the Commissioner of Labour in terms of **Section 41** on the basis that those disputes were time-barred in terms of

Section 76 (2). Is there a conflict between **Sections 41, 76 (2)** and **77 (3)**? If so, how should the conflict be resolved?

[11] In our view, the question that has arisen is so fundamental because its resolution will have far reaching implications on the future exercise of the Commissioner of Labour's functions conferred by **Section 41** and employers and employees who have used and have been affected by CMAC's application of **Section 76 (2)** in dealing with complaints lodged in terms of **Section 41**. For that reason, the determination of the above issue requires the joinder of the Commission (CMAC) and the Attorney General in these proceeding to assist the Court on the proper interpretation of the three sections.

CONCLUSION

[12] In the Court's view, based on the above reasons, it is desirable and in the interest of justice that the determination of the application be stayed pending the filing supplementary Heads of Argument by the parties and Heads of Argument by the Commission and the Attorney General to answer the questions raised by the Court in paragraphs **9** and **10** above.

[13] In the premise, the Court orders as follows:

[a] The determination of the application is stayed pending the filing of supplementary Heads of Argument by the parties and Heads of Argument by the Commission and the Attorney General and hearing of

arguments to answer the questions raised by the Court in paragraphs **9** and **10** above.

[b] The parties are directed to make a formal application for joinder of the Commission and the Attorney General within ten (10) Court days of the date of issue of this order.

[c] The Registrar is directed to bring this ruling to the attention of the Commission (CMAC) and the Attorney General within ten (10) days of the date of its delivery.

[d] The matter is postponed to the **5th June 2023** for further direction of the Court.

The Members agree.

V.Z. DLAMINI

JUDGE OF THE INDUSTRIAL COURT

FOR APPLICANT : Mr. V. Magagula
(Labour Consultant)

FOR RESPONDENT : Mr. N. Thwala
(Thwala & Associates)