IN THE INDUSTRIAL COURT OF APPEAL OF ESWATINI

JUDGMENT

Case No. 18/2021

In the matter between:

NHLANGANO TOWN COUNCIL Appellant

And

JEREMIAH KUHLASE & 4 OTHERS Respondents

Neutral citation: Nhlangano Town Council v. Jeremiah Kuhlase & 4 Others (18/2021) [2023] SZICA 01 (17 February 2023)

Date Heard: 14 November 2022

Date Delivered: 17 February 2023

CORAM: **S. NSIBANDE J.P., N. NKONYANE JA AND A. M. LUKHELE JA**

SUMMARY

Labour Law – Unfair dismissal application for determination of an unresolved dispute – Certificate of unresolved dispute issued and application timeously filed at Court in accordance with Section 81 (2) of The Industrial Relations Act 2000 – Delay of thirteen years in serving application on Respondent and prosecuting claim.

In the Court a quo Appellant raised points in limine arguing that claim has prescribed and is time barred in terms of Section 76 (2) of The Industrial Relations Act (as amended) on account of undue delay in prosecuting claims and Appellant had been seriously prejudiced thereby – Appellant invited Court to infer waiver from delay of 13 years – Point in limine dismissed by Court a quo – The appeal is against ruling of Court a quo, with leave of this Court – Appeal dismissed with costs.

JUDGMENT

INTRODUCTION

[1] This is an appeal against a ruling of Industrial Court delivered on the 16th September, 2021. The Court a quo dismissed points *in limine* that had been raised by the Appellant arguing that Respondents' claim was time barred and stood to be dismissed. This appeal is with leave of this Court.

BACKGROUND

[2] The parties in the appeal are an Employer and his former employees who are the Respondents in this appeal. The Respondents had applied to the Industrial Court for the determination of an unresolved dispute that arose as a result of the Respondents dismissal and termination of their services by the Appellant. In their application filed in the Court *a quo*, the Respondents averred that they were dismissed by their employer and that the dispute arising from their dismissal was reported to C.M.A.C in

October 2007 and was certified as unresolved on the 19th November, 2007 with the issuance of a Certificate of unresolved dispute.

PROCEEDINGS IN THE COURT A QUO

[3] In the Court a quo it was common cause that the Respondents were dismissed on the 20th June, 2007 and that:-

3.1. the Respondents reported a dispute to C.M.A.C timeously in October 2007 in terms of **Section 76 and 77 of the Industrial Relations Act 2000 (as amended)**; and

3.2. the dispute was conciliated upon in accordance with the provisions of the applicable sections, was unresolved and a Certificate of an unresolved dispute issued on the 19th November 2007.

[4] There was then a dispute between the parties as to what action was taken by the Respondents after the Certificate of unresolved dispute had been issued. The Respondents alleged that after receipt of the Certificate of unresolved dispute they issued and sued out of the Industrial Court their application for the determination of an unresolved dispute which they served on the Appellants, but due to lack of funds they could not prosecute their claim up until May 2021 when they had secured the funds. On the other hand, the Appellants alleged that upon the issuance of the Certificate of unresolved dispute the Respondents took no action in prosecuting and finalising their claim until May 2021.

[5] In the Court *a quo* on the basis of the outlined facts the Appellant raised a number of points *in limine* alleging that on account of the long delay in the number of years which took the Respondents to prosecute their claim, it considered that Respondents had waived their rights to pursue the claim

and the claim stood to be dismissed as the Appellant would seriously be prejudiced by the continued prosecution of their claim.

[6] After hearing the matter, the Court *a quo* dismissed the points *in limine* that had been raised by the Appellants. The Court ordered the matter to proceed to trial.

[7] In its reasons for dismissing the points *in limine* the Court *a quo* stated its reasons as follows:-

> ***"[6] This case stands at a different footing compared to the Usutu Pulp case referred to below. In the Usutu Pulp case, the former employees did not file a claim of unfair dismissal for about 18 years and they only reported their claim to the Commissioner of Labour 18 years after their dismissal. However, in this present case the Applicants did commence proceedings in April 2008, five months after their unfair dismissal dispute was declared as unresolved at C.M.A.C. We have no doubt that in their minds, they had a settled intention of challenging the fairness or otherwise of their dismissals. It appears as if there was no communication between the Applicants and their Attorneys for all the 13 years which gave rise to the inordinate delay. However, can it be fair, reasonable and equitable to dismiss the whole application and deny the Applicants the well settled right to access to justice and fairness? We do not believe so more especially because the Respondents have now filed its Reply, the Applicants have filed their Replication and the matter is very close to close of pleadings stage. The only two steps remaining now are firstly the discovery of exhibits stage and lastly the pre-trial conference stage. It will be fair to allow the application for determination of the unresolved***

dispute to be tried on its merits and in that way the parties' dispute will be fully and finally determined and both parties will have closure.

[7] The purpose of the Industrial Relations Act 2000 is, inter alia, to promote fairness and equity in labour relations. One of the fundamental duties of this Court is to ensure that the purposes of the Act, as set out in Section 4 thereof, are promoted and are complied with. It can be contrary to the spirit and provisions of Section 4 (1) (b) of the Industrial Relations Act 2000 to simply dismiss the application and close the doors of this Court on the face of the Applicants. We have read some judgments of this Court wherein this Court directed Applicants to file formal applications for condonation. (See Vusi Sikelela Dlamini v. Eagles Nest (Pty) Limited SZIC Case No. 150/2010). In the present case we do not think that it is even necessary to direct either of the parties to file an application for condonation because doing so will be cumbersome both in terms of finances and also in terms of extra delays. Also, both parties have exchanged their most important pleadings in casu, hence applying for condonation will serve no useful purposes at this stage."

GROUNDS OF APPEAL

[8] The Appellant has now appealed against the ruling of the Court *a quo* dismissing the point in limine. The grounds of appeal filed by the Appellant are that:-

"1. The Court a quo erred in law and misdirected itself finding that the Respondents had not abandoned and/or waived their right to pursue the unfair dismissal case. The Court a

quo having found that there had been unreasonable delay in the prosecution of the claim by Respondents and there being no proof of service of the application in 2008 the Court ought to have found that the Respondents had unreasonably delayed in prosecuting their claim against the Appellant.

2. *The Court a quo erred in law and misdirected itself in finding that there was no real prejudice the Appellant stood to suffer for it had filed its reply. Evidence and pleadings are different. It being an indubitable fact that the incident giving rise to the application in Court occurred some thirteen years ago, the Court a quo ought to have found that the Respondent would be substantially prejudiced in the presentation of its defence taking into account the provisions of Section 151 (2) (b) of The Employment Act.*

3. *The Court a quo erred in law and misdirected itself in holding that the Respondents were not obligated to file a condonation application in the circumstances. The Court having found that there had been inordinate delay in the prosecution of Respondents claim in the absence of condonation application ought to have dismissed the Respondent's claim."*

[9] Before dealing with the grounds of appeal raised in this matter, it bears re-stating that an appeal to this Court lies on a question of law only and not on the facts. The Appellants powers of this Court are

derived from **Section 19 (1) of the Industrial Relations Act 2000 (as amended)** which states that:-

"19(1) There shall be right of appeal against the decision of the Court on a question of law to the Industrial Court of Appeal."

[10] In this matter, it is important to state that from the record of proceedings filed before this Court the Respondents were dismissed in October 2007 and there is no doubt that they timeously reported their dispute to C.M.A.C. in terms **of Section 76 (4) of The Industrial Relations Act 2000 (as amended)** which provides that:-

"76 Reporting of disputes

1. ***A dispute may only be reported to the Commission by: -***
    - ***a) an employer;***
    - ***b) an employee;***
    - ***c) an applicant form employment in respect of a dispute concerning unfair discrimination under the Employment Act;***
    - ***d) an organisation which has been recognised in accordance with Section 42.***
2. ***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."***

[11] **Ebersohn AJA** in **Usutu Pulp Company (Pty) Limited v. Jacob Seyama and 4 Others ICA (1/2004) at Page 2 para 5** stated that:-

> ***"5. The Kingdom of Swaziland has no general statute of prescription of various causes of action and the common law restriction on civil cases based on contract is 30 years."***

[12] At paragraph 16 the Learned Judge continued to state that:-

> ***"Although the Kingdom of Eswatini has no general Act regulating prescription. Section 76 of the Industrial Relations Act 2000 seemed to have cured this problem with regard to present disputes in the labour place."***

[13] The grounds of appeal as raised are now dealt with.

WAIVER

[15] In this appeal the first ground raised is that of waiver. Blacks Law Dictionary describes waiver as:-

> ***"1. The voluntary relinquishment or abandonment – express or implied – of a legal right or advantage – the party alleged to have waived a right must have had both knowledge of the existing right and the intention of foregoing it."***

[16] **Innes C.J. In Law v. Rutherfurd 1924 AD 261 at 263** states that:-

> ***"The onus is strictly on the Appellant. He must show that the Respondent with full knowledge of her right decided to abandon***

it, whether expressly or by conduct plainly inconsistent with an intention to enforce it."

[17] Waiver is said to be a question of fact and usually difficult to establish, **Nkonyane J.** (as he then was) in **Irene Shongwe v. Swaziland Posts and Telecommunications Corporation (246/14) SZIC 42 (September 2015) cited with approval the case of MacFarlane v. Crooke 1951 (1) SA 255 which states that:-**

> *"A waiver is never presumed and must be clearly proved. The onus is strictly on the Appellant. He must show that the Respondent with full knowledge of her right decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it. Waiver is a question of fact depending on the circumstances.*

[18] In **Lufuno Mphaphali and Associates (Pty) Limited v. Andrews and Another 2009 (4) ZACC 529 Kroon A.J. had this to say:-**

> *"81. The conclusion reached in paragraph 79 is in accordance with common law principles regarding waiver of rights. Waiver is first intention to waive is objective, the alleged intention being judged by its outward manifestations adjudicated from the perspective of the other party, as a reasonable person. Our Courts take cognisance of the fact that persons do not as a rule lightly to abandon their rights. Waiver is not presumed; it must be alleged and proved; not only must the acts allegedly constituting the waiver be shown to have occurred, but it must also appear clearly and unequivocally from those facts or otherwise that there was an*

intention to waive. The onus is strictly on the party asserting waiver it must be shown that the other party with full knowledge of the right decided to abandon it, whether expressly or by conduct plainly inconsistent with the intention to enforce it. Waiver is a question of fact and is difficult to establish."

[19] The Appellants argument is that the Respondents' delay in the prosecuting their claim indicates that Respondents had waived their rights to pursue the unfair dismissal claim. This argument is denied by the Respondents.

[20] In the present case the Respondents timeously reported their claim to C.M.A.C and timeously launched it at Court but took 13 years to prosecute the claim. It was argued on behalf of the Respondents that the delay was due to lack of funds to engage Attorneys following their dismissal from their employment. They explain that the Attorney they had instructed to assist with the claim demanded money they did not have to assist in prosecuting the claim. As they did not have the required funds, they could not prosecute the claim. It was argued that the inaction was not as a result of not caring about the claim.

[21] On the question of waiver there is nothing in the record that show that the Respondents waived any of their rights with regard to the unfair dismissal claim. Accordingly, the first ground of appeal should fall.

UNDUE DELAY

The next ground raised is that of delay

[22] In law an inordinate or unreasonable delay in prosecuting an action may constitute an abuse of process and may warrant the dismissal of that action ***(See Mlala v. Minister of Law and Order 1993 9(1) SA WLD 676 and Mkhwanazi v. Minister of Agriculture and Forestry KwaZulu Natal 1990 (4) SA 673).***

[23] In **Gideon Mhlongo v. Vusi Ginindza and Others 3194/2001 (2018) SZHC 72 – (13 April 2018) N.J. Hlophe J.** stated that:-

> ***"23. With reference to Cases like Schoeman en Andree vs. Van Tonder 1979 (1) SA 301 and Kuper and Others vs. Benson 1984 (1) SA 474 (W) on the case of abuse of the Court process through not prosecuting a ripe case by a party and the contention that those cases support the position that where a party unduly delays the hearing and finalisation of a matter such may be construed against him as an abuse of process which may lead to a dismissal of the matter, there can be no doubt in my mind about the competence of such a principle in our law."***

[24] **Nsibande S. JP** (as he then was), citing with approval the case of **Wolgroeirs Afslaers (EDMS) (BPK) v. Munisipaliteit van Kaapstaad 1978 (1) SA 13 (A)** which stated that in an application to review a decision of a public body there can be no such specific time limits for such an application but the Court must decide (a) whether the proceedings were in fact instituted after the passing time and (b) if so, whether the unreasonable delay ought to be overlooked.

This means for an application to dismiss an action to be successfully moved, facts must be placed before the Court for a Court to make a just decision.

[25] In the instant case the Respondents timeously reported the dispute to C.M.A.C and within a reasonable time launched the necessary application at the Industrial Court but took a period of 13 years to prosecute and finalise their claim. The Respondents explanation for the delay in not prosecuting their claim from 2007 to 2021 is that they lacked the funds to finance the litigation costs that had been demanded by their Attorneys. Such reasons, i.e., reason for lack of funds are quite common in labour litigation as litigants would have lost their only source of income when their services are terminated.

[26] At this stage the question that this Court must answer is whether a period of 13 years constitutes unreasonable delay. The crisp issue is whether on account of delay, Respondents claim stands to be dismissed. On the issue of delay in **Sibusiso Kukuza Dlamini v. Rex (18/2019) [2022] SZHC15 (24 May 2022) Manzini AJA** recently had this to say:-

> ***"The inordinate delay can hardly be said to be in line with the age-old adage that justice delayed is justice denied, particularly for the relatives of the deceased. We are not aware of the reasons for the long delay, but it is not acceptable."***

[27] Accepting that the Learned Judge's sentiments were made in relation to a criminal matter, my view, is that these sentiments remain relevant in all matters that come before the Courts of the land and

are relevant for the present matter. At the core of these sentiments is that any unjustified delay in prosecuting and finalising a matter is not acceptable in our law as it impacts our justice system.

[28] In this jurisdiction our Labour Courts have had occasion to deal with the issue of whether a claim has prescribed on account of delay either in reporting a claim or prosecuting a claim. ***(See Mabuza v. Caritas (SD) (591/2000) 2007 SZIC 117 30/10/2007; Mnisi v. Asikhutulisane Savings and Credit Cooperative (400/2007) SZIC 118 (1st November 2007); Bhembe v. Palfridge Limited (171/2015) [2021] SZIC 3 (11/02/2021; Thabo Mgadlela Dlamini v. Civil Service Commission and 3 others (98/2019) SZIC 41 (30/04/2019; Obed Maziya v. First National Bank (12/2020) [2021] SZIC 31 (12/2020) [2021] SZIC 31 (06/05/2021); and Gideon Mhlanga v. Vusi Ginindza and 2 others (3194/2001) [2018] SZHC 72 (13/04/2018); Usutu Pulp Company Limited v. Jacob Seyama and 4 others (1/2004); Bheki Tsabedze vs. Robs Electrical (Pty) Limited (299/2018) SZIC 141 (12/12/2018); Tokyo P.N. Ntshangase v. S.N.P.F (195/06) [2012] SZIC 2 (09 March 2012); and Senzo Nsibande v. Fidelity Security Services (70/18) [2018] SZIC 136 (4/2/2019).***

[29] In the present matter these is no doubt that there has been an unreasonable delay in prosecuting the claim.

[30] **In Usutu Pulp Company Limited v. Jacob Seyama and Others (supra) Ebersohn A.J.A.** at Page 8 stated that:-

> ***"I am in agreement with cases laying down the law that disputes must be drawn to the attention of the authorities***

and the Industrial Court without undue delay. In any case a period of 4 years in which to bring a labour dispute to the attention of the authorities and the Industrial Court after it arose is a fair period in my opinion in so far as there still may be disputes outstanding which are not regulated by Section 76 of the Industrial Relations Act of 2000."

The Judge's sentiments should in my view be a guidance in all labour matters.

REASONS FOR THE DELAY

[31] I turn now to consider whether the delay in prosecuting the claim can be overlooked and whether the Court *a quo* was correct in dismissing the points *in limine*. In my view, the reasons advanced for how the delay came about are hardly convincing. This is in view of the fact that there were several of the Applicants in the matter and no explanation was given on what efforts were made to solve the problem of lack of funds in the thirteen years.

[32] In coming to a decision on whether the Appellant was in the Court *a quo* entitled to the remedy that it was seeking, i.e., upholding the point in limine, effectively closing the door to the Respondents from prosecuting their claim fairness dictates that the interests of both parties be considered.

[33] **Innes CJ** in **Western Assurance Co. v. Caldwells Trustee 1918 AD 262 at 274** expressed his view as follows:-

"Now it is needless to say that strong grounds must be shown to justify a Court of Justice in staying the hearing of an action. The Courts of law are open to all, and it is only in every exceptional circumstance that the doors will be closed upon anyone who desires to prosecute an action."

"....in my view, the power to strike out the claim will be used only in exceptional cases, as stated in the cases referred to above, and then only where there has been a clear abuse of the process of Court."

[34] In *casu,* the Appellants have argued that the inordinate delay cannot be overlooked for the reason that its records relating to the employment of the Respondents might have been lost. In my view, proper facts will be placed before the Court hearing the matter. In view of the fact that the Respondents timeously reported their dispute, this is a proper matter where the delay in prosecution should be overlooked.

[35] The last point raised in argument is the one relating to condonation. It is accepted that in our law a party who failed to timeously to comply with a rule or step may move an application for condonation to explain either failure or delay. In our law a litigant upon realising that, he has not complied with a step or section or rule can apply for condonation without delay to remedy his fault (**Dr Sifiso Barrow vs. Dr Priscilla Dlamini – Civil Case No. 9/2014 [2015] SZSC 209 and Floyd Mlotshwa and Another v. Chairperson Election and Boundaries Commission and Others (96/2018) [2019] SZSC 3) – 01.03.2019.**

[36] In *casu,* no condonation application was made in this matter, neither was the Court addressed on this point in argument. For purposes of this matter, it is therefore unnecessary to determine this point.

CONCLUSION

[37] In the present matter, while I consider that the Respondents unduly delayed in prosecuting their claims, I am unable to say that their action is so tainted as to amount to an abuse of Court process. Despite the delays, Respondents had consulted an Attorney, launched the application at Court timeously but for the reasons of lack of funds were unable to prosecute their claim. I do not consider that the doors of the Court and to justice should at this stage be closed to them. I have no doubt that as the case proceeds the Court hearing the matter will be in the best position to take all relevant facts, including that of prejudice to the Appellants arising out of the loss of records.

[38] In **John Kunene v. The Teaching Service Commission and 2 Others (16/2020) SZICA 08 (14th October 2016) MCB Maphalala CJ** had this to say:-

> *"37. The Court or Arbitrator retains the jurisdiction to entertain the dispute as long as the Certificate of unresolved dispute has not been set aside. It is common cause that in this matter the certificate was lawfully issued, and it has not been set aside, until the certificate is set aside the Court retains jurisdiction to hear and determine the dispute."*

[39] It is a trite principle of law that the institution of legal proceedings by a party against the other has the effect of staying the running of prescription.

[40] In the case of **Tsakatsi v Arbitrator (DDPR and Another [2009] LSLC 05 at Para 9 and 20)** the Court held as follows:-

> ***"There is however a further ground on which the Learned Arbitrator's award fails to be reviewed and that is the Learned Arbitrator's failure to apply his mind to the fact and the principles of the common law which makes his award fail the test of rationality. In Paragraph 7 of his award, the Learned Arbitrator correctly observed that under the common law, appeal stays execution. Having said that he failed to connect the principle of stay of execution with its equivalent in cases of prescription and that is the principle of interruption or suspension of the running of the period of prescription. In the case of Volkas BPK v. The Master and others 1975 (1) SA 69 at & D-E Margo J held that "under the common law the two chief causes of interruption of prescription are acknowledgement of liability by the debtor (recognises) and the institution of legal proceedings against the debtor (interpellation)..... In the case the Applicant did not just seat back and do nothing after his purported dismissal. He instituted legal proceedings by way of an internal appeal to challenge the dismissal. This is a proper case where prescription can be said to have been interrupted and the Learned Arbitrator said as much when he***

recognised that appeal stays execution. In the same manner the running of prescription as it interrupts its operation."

[41] For these reasons I find that the point with regard to undue delay was not a good point. The dismissal of the point *in limine* was in my view justified. Consequently, the appeal should be dismissed. This Court is also mindful that the Court *a quo* exercised a discretion in the matter, such a discretion cannot be faulted. There are no reasons for this Court to tamper with the discretion of the Court *a quo.* In the circumstances of this case such a discretion was judicially exercised.

[42] On the issue of costs, the Court a quo made no order as to costs. It will also be just and equitable to the parties that no order with regard to costs is made in the appeal.

[43] **In the result the Court makes the following orders:-**

1. **The appeal is hereby dismissed and the ruling of the Court *a quo* is upheld.**
2. **There is no order as to costs.**

A.M. LUKHELE
JUSTICE OF APPEAL

I agree

S. NSIBANDE
JUDGE PRESIDENT

I agree

N. NKONYANE
JUSTICE OF APPEAL

For Appellant:	Mr. K. Shabangu (Robinson Bertram)
For Respondents:	Mr. Dlamini (B.S. Dlamini and Associates)