IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 591/06**

In the matter between:

CYPRIAN MABUZA **APPLICANT**

And

CARITAS SWAZILAND **RESPONDENT**

CORAM:

NKOSINATHI NKONYANE

DAN MANGO

GILBERT NDZINISA

FOR APPLICANT S. MAMBA

FOR RESPONDENT P. MAGAGULA

RULING ON POINT OF LAW

30.10.07

[1] The applicant has brought a Notice of application for an order;

"1. Directing the respondents to pay to the applicant the sum of E310 156.00 being in respect of arrear salary due to the applicant calculated from September 1999 to January 2006 and which is attached to the position of National Director.

2. Interest thereupon at the rate of 9% per annum taking into account the yearly cost of living adjustments and inflation rate.

3. Costs.

4. Further and or alternative relief"

The application is opposed by the respondent and an Answering Affidavit has been duly filed on its behalf. The applicant has also filed a Replying Affidavit.

In its Answering Affidavit the respondent has raised a point of law to the effect that the applicant is not entitled to pursue the matter as it is time barred having arisen on 13 th September 2001 which is more than eighteen months taking into account that the dispute was only reported in 2006.

The brief facts of this application are that the applicant was in September 1999 appointed National Director of the respondent. He held this position until 31st January 2006 when he was dismissed. When the applicant was appointed the National Director he was already in the employ of the respondent and was serving as the C-ordinator of the Refugee Section. On 13

September 2001 the applicant wrote a letter to the respondent asking to be paid an allowance for the job that he was doing for the respondent in his capacity as the National Director. The applicant only got a written response in 2006 by letter dated

20th January where he was told that the use of the respondent's motor vehicle was compensation for the work that he was doing as the National Director. The applicant did not like this and he reported a dispute.

At CMAC the respondent raised the issue of the matter being time barred. The applicant denied that the matter was time barred. The Commissioner then issued a certificate of unresolved dispute.

On behalf of the respondent it was also argued that since this point was raised before the Commissioner at CMAC, the Commissioner was, in terms of Section 81 (2)(b) of the Industrial Relations Act, 2000 (as amended), supposed to conduct a fact finding exercise and make a ruling on the matter. The respondent's attorney submitted therefore that the application should be dismissed and the matter referred back to the Commissioner to make a ruling.

We do not agree with the respondent's counsel. A Commissioner in the process of conciliation only has a duty to manage the process and is not an arbitrator or a judge. During conciliation the Commissioner's duty is to help the parties to reach an agreement on a particular issue and not to make a ruling. If the parties do not agree, the Commissioner must simply issue a certificate of unresolved dispute.

The question for the court to decide is whether the dispute was reported within eighteen months since the issue giving rise to the dispute first arose. Section 76(2) of Industrial Relations Act states that:-

"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."** (my emphasis).

The operative phrase of this section is **"since the issue giving rise to the dispute arose."** The issue giving rise to the present application is the non-payment of an allowance or salary to the applicant for the period that he performed the duties of National Director of the respondent from September 1999.

During the month-end of September or October 1999, the applicant must have realised that he was not being financially compensated for his duties in the new position. He did not however raise an issue about that until 13th September 2001 when he wrote annexure "A" being the letter by which he asked for an allowance for the extra work that he was doing in his capacity as the National director.

The applicant got a written response by a letter dated 20 January 2006 advising him that his allowance or compensation was the fact that he was enjoying the use of the respondent's motor vehicle for personal needs.

It was argued on behalf of the applicant that before the applicant got the letter dated 20th January 2006, there was no dispute yet, but only a grievance. It was argued on behalf of the applicant that the dispute arose on 20th January 2006 when the applicant got the information that the respondent was not prepared to financially compensate him for the duties of being the National Director.

There is no definition of a grievance in both the Industrial Relations Act and the Employment Act. There is however a definition of a dispute in both Acts. In both Acts a dispute is described as including a grievance as follows;

""dispute" includes a grievance...."

Ordinarily the word grievance means^a real or fancied cause for complaint."- **See the Concise Oxford Dictionary 9th edition.**

The applicant's attorney's argument therefore that the court should view or consider the words grievance and dispute separately cannot be accepted in the light of the definition in the two Acts which state that a dispute includes a grievance.

[14] In this case however the applicant argued that the delay in reporting the dispute was caused by the respondent's conduct. He said after raising the issue with the respondent by the letter dated 13 th September 2001, the respondent through Bishop Ncamiso Ndlovu kept on promising him that the issue would be addressed and asked him to be patient. The applicant said that he had no reason not to believe the Bishop. I do not think that it would be just for the court to fault the applicant for taking the employer at his word. It is the policy of the law to encourage people to solve their problems amicably and not to rush to court. I do not think that the applicant should be punished for first engaging his employer on the issue before going to CMAC to report a dispute. It will therefore be unfair on the part of the applicant if the court were to throw out this application on the technical ground that the dispute was reported outside of the eighteen months period, when the cause of the delay Iwas the employer. For this reason, the court will dismiss the point of law raised.

There is no order as to costs. The members agree.

NKOSIKATHI NKONYANE
JUDGE - INDUSTRIAL COURT