

**IN THE INDUSTRIAL COURT OF SWAZILAND**

**HELD AT MBABANE**

**CASE NO. 400/2007**

In the matter between:

**STEVEN MNISI**

**Applicant**

and

**ASIKHUTULISANE SAVINGS AND  
CREDIT CO-OPERATIVES**

**Respondent**

**CORAM:**

**P. R. DUNSEITH:           PRESIDENT**

**JOSIAH YENDE:           MEMBER**

**NICHOLAS MANANA:      MEMBER**

**FOR APPLICANT:          S. MNISI**

**FOR RESPONDENT:         D. MSIBI**

**J U D G E M E N T - 01/11/2007**

1. The Applicant applied to the Industrial Court for determination of an unresolved dispute arising from the termination of his employment by the Respondent.

2. In his particulars of claim the Applicant avers that the dispute was reported to the Conciliation, Mediation and Arbitration Commission but it could not be resolved and was certified unresolved. A copy of the certificate of unresolved dispute issued by the Commission is annexed. The certificate is dated 17 August 2007.

3. The Respondent in its Reply has raised as a preliminary point of law that the dispute was not timeously reported in terms of the prevailing legislation and the court may not take cognizance of the dispute.

4. It is common cause that the following sequence of events occurred in relation to the reporting of the dispute:

4.1. the Applicant was dismissed on the 3<sup>rd</sup> September 2004;

4.2. the Applicant purported to report a dispute to the Labour Commissioner on the 9<sup>th</sup> May 2005 in terms of the provisions of section 76 and 77 of the Industrial Relations Act, 2000;

4.3. This report was out of time in terms of section 76 (4) of the Act, which provided that *"a dispute may not be reported to the Commissioner of Labour if more than 6 months have elapsed since the issue giving rise to the dispute first arose, but the Commissioner of Labour may .... in any case where justice requires, extend the time during which a dispute may be reported."*

4.4. The Applicant duly applied to the Commissioner of Labour for an extension of the time during which the dispute might be reported. On the 31<sup>s</sup> August 2005 the Commissioner issued a certificate in terms of which he extended the period during which the dispute might be reported by 26 months. The certificate states that *"the extension is effective from December 2003 to March 2006."*

4.5. On the 1<sup>st</sup> September 2005 the Industrial Relations (Amendment) Act, 2005 came into force. This Act deleted section 76 (4) of the Industrial Relations Act, 2000 and substituted the following provision:

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

The amendment also provides for disputes to be reported

directly to the Commission.

4.6. The Applicant delivered a new report of dispute to the Commission on or about the 30 September 2005.

4.7. Conciliation was unsuccessful, and the Commission issued a certificate of unresolved dispute on the 17 August 2007.

5. The Respondent alleges that:

5.1. the Commissioner of Labour granted the extension of time without giving the Respondent any opportunity to make representations, contrary to the rules of natural justice;

5.2. since the extension of time was improperly granted, the Applicant remained time-barred from reporting a dispute;

5.3. the amendment of the Act to permit reporting of disputes within a period of 18 months does not assist the Applicant, since he was already time-barred when the amendment came into effect, and the Amendment Act does not operate retroactively

6. The Applicant in replication avers that:

6.1. he appealed against termination of his services. The six months period for reporting the dispute only commenced on 23<sup>rd</sup> December 2004 when his appeal was dismissed. The first report of dispute was accordingly timeously delivered on the 9<sup>th</sup> May 2005;

6.2. the Labour Commissioner was under no obligation to call the Respondent to make representations on the question of the extension of time.

7. The Applicant's dispute concerns his alleged unfair dismissal. The issue giving rise to this dispute arose when his services were terminated on the 3<sup>rd</sup> September 2004, not when his appeal was dismissed on 23<sup>rd</sup> December 2004. I am satisfied that the report of dispute dated 9<sup>th</sup> May 2005 was a nullity because it was out of time in terms of section 76 (4) of the Act.

8. I also reject the submission that the Labour Commissioner was under no obligation to give the Respondent an opportunity to make representations before he granted an extension of time. Hannah C.J. dealt with this point in the case of **Swaziland Fruit**

**Canners v Philip Vilakati & Another (Industrial Court of Appeal Case No. 2/87)**

in the following manner"

*" In exercising the power conferred on him to grant an extension of time the Labour Commissioner is exercising a quasi-judicial power and, in my view, he is bound to observe the rules of natural justice. That includes the duty to give all parties who may be affected by the decision an opportunity to make representations to him. It may be, of course, that a party will choose not to avail himself of such opportunity and it may also be that, having regard to the background of the matter, the Labour Commissioner will have reason to believe that a party will not avail himself of the opportunity, but nonetheless the opportunity must be given, The Labour Commissioner must at all costs be fair."*

9. There is however no evidence before the court as to whether or not the Labour Commissioner gave the Respondent an opportunity to make representations. The Respondent avers in its Reply that no such opportunity was given, but pleadings do not constitute evidence. The Applicant cannot be expected to know how the matter was handled by the Labour Commissioner, so the court places no weight on the failure of the Applicant to expressly rebut the Respondent's averment in his replication.

10. The Respondent's representative Mr. Msibi urged the court to declare the Labour Commissioner to be an interested party and join him as a party to these proceedings, as suggested by Hannah C.J.

In the **Swaziland Fruit Canners** case (supra). I do not consider that this is a proper way of dealing with the matter. Section 76 (6) of the Act (prior to its amendment) prescribed the appropriate remedy:

*"76 (6) Any person aggrieved by the decision of the Commissioner of Labour under sub-section (4) may apply to the court and the court shall determine the issue taking into account any prejudice that may be suffered by one of the parties to the dispute."*

11. The amendment of the Industrial Relations Act, 2000 did not operate to deprive the Respondent of this remedy, which had accrued as of right on 31<sup>st</sup> August 2005 when the Labour Commissioner granted the extension of time. Nevertheless the

Respondent has not availed itself of this remedy.

12. It is noteworthy that this remedy was not available when the **Swaziland Fruit Cannery** judgement was delivered, hence Hannah C.J.'s suggestion that the Labour Commissioner be joined as an interested party. There was no reason why the Labour Commissioner should be joined once section 76 (6) conferred a clear remedy on a party aggrieved by the decision of the Commissioner.

13. The Applicant has produced a certificate of extension of time and a certificate of unresolved dispute which are regular and valid on their faces. The court is entitled to assume that the procedures set out in Part V111 of the Act have been properly observed. The maxim is "*Omnia praesumuntur rite esse acta*" (everything is presumed to be rightly done).

14. The Respondent has not challenged the certificate of extension of time in the proper manner prescribed by law. There is no indication on the certificate of unresolved dispute that the Respondent registered any objection to the conciliation process due to any time-bar. The Respondent has raised a legal point in limine and argued the point on the pleadings, in the absence of any evidence of an irregularity being before the court.

15. I do not consider that anything turns on the extension being granted for 26 months from December 2003 instead of from 3 September 2004. This was a technical error of the Commissioner, but the dispute was nevertheless reported within the 26 months extension period. Likewise I do not consider that any material defect exists because the second report of dispute was directed to the Commission instead of the Commissioner. The amendment was in force by the time the new report was delivered on the 30<sup>th</sup> September 2005, and the amended section 76 provided for delivery directly to the Commission.

16. In all the circumstances, the Respondent's points in limine are dismissed, and the application is referred to the Registrar for the allocation of trial dates.

There is no order as to costs

The members agree

**PETER R. DUNSEITH  
PRESIDENT OF THE INDUSTRIAL COURT**