IN THE INDUSTRIAL COURT OF SWAZILAND

JUDGMENT

Case NO195/2006

In the matter between:

TOKYO P.N. NTSHANGASE **Applicant**

and

SWAZILAND NATIONAL PROVIDENT FUND **Respondent**

Neutral citation: *Tokyo P.N. Ntshangase & Swaziland National Provident Fund (195/06 [2012]* SZIC 2 (**MARCH 2012)**

Coram: NKONYANE J,
(Sitting with G. Ndzinisa & S. Mvubu Nominated Members of the Court)

Heard: **27 FEBRUARY 2012**

Delivered: **09 MARCH 2012**

Summary:

Applicant dismissed by Respondent in November 1998 after having been found guilty of dishonesty—Applicant launches Court proceedings in May 2006 about eight years later—Respondent raises a point in limine that the Applicant's application be dismissed as the Applicant has unreasonably delayed in prosecution of his claim to the prejudice of the Respondent--Court finds that the Applicant has

inordinately delayed in prosecuting his claim and upholds the point in limine raised by the Respondent and the application dismissed.

RULING ON POINT IN LIMINE
09.03.12

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1. This is an application for determination of an unresolved dispute brought by the Applicant against the Respondent. The applicant is a Swazi male adult of Manzini and a former employee of the Respondent. The Respondent is a public corporation having its principal place of business at Lidlelantfongeni Building in Manzini.

2. The Applicant was employed by the Respondent on 17.09.1988 and was in the continuous employment of the Respondent until 16.11.1998.

3. The Applicant was dismissed by the Respondent after he was found guilty of dishonesty after a disciplinary hearing.

4. In its Replying papers the Respondent raised a point of law, namely that a period of eight (8) years has lapsed since the dismissal took place and that the Applicant has unreasonably delayed in the prosecution of the matter. The Respondent accordingly asked the court to dismiss the Applicant's application.

5. The court is therefore presently being called upon to make a ruling on the point of law raised by the Respondent.

6. The parties' representatives filed heads of argument and asked the court to make its ruling based on the written arguments.

7. The evidence before the court revealed that the Applicant was dismissed by the Respondent on 16.11.1998. The Applicant did not immediately report a dispute to the Department of Labour after his dismissal. He only reported the dispute on 14.03.2000, about one year and four months later. The Applicant launched its application in court on 09.05.2006, about six years later after the dispute was reported to the Commissioner of Labour in terms of **Section 41(3) of the Employment Act No.5 of 1980.** In total therefore, the Applicant filed his application in Court after the passage of about eight years from the date of his dismissal.

8. From the evidence before the court there was clearly an inordinate delay on both occasions, that is, there was an unexplained delay in reporting the dispute and also a delay in launching the application in Court.

9. The intentions of the Respondent were made clear in its Reply dated 01.06.2006 by raising the *point in limine* that the matter was not properly before the court and that it ought to be dismissed because the Applicant has unreasonably delayed in prosecuting his claim.

10. Despite being made aware of the Respondent's intentions, the Applicant did not file a Replication wherein he could respond to the *point in limine* and explain the reasons behind the delays, if any.

11. This court has on past occasions dealt with a similar point of law. 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 (IC).** In all these cases the point of law raised that the Applicants had inordinately delayed in prosecuting their claims was upheld by the Court.

12. The Industrial Court of Appeal of Swaziland also had occasion to deal with a similar point of law in the case of **Usuthu Pulp Company (Pty) Ltd v. Jacob Seyama & 4 Others case No. 01/2004 (ICA).** The Industrial Court of Appeal in that case had the occasion to analyze the common law principles with regard to a delay in prosecuting a labour dispute. The Industrial Court of Appeal observed that initially the courts were reluctant to find a waiver on the part of the employee who delayed in bringing his dispute to court. The Industrial Court of Appeal went on to hold that the position has however now changed. In paragraph **[11] Ebersohn AJA** (as he then was) held that;

> "**With the passage of time, however, obviously due to the increasing pace of modern life and activities in the labour place the pendulum swung back in favour of the employer….**"

13. In the paragraph [14] of that case, the Industrial Court of Appeal referred to the case of **Nehawu v. University of Cape Town 2003 (2) BCLR 154/KH) by Ngcobo JA** who was quoted as saying;

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

14. I align myself fully with the observations of **Ebersohn AJA and Ngcobo JA** in the above cited cases.

15. The remarks of the Court in the case of **UPMW v. Stadsraad van Pretoria 1992 ILJ 1563 (NH) at 1569 A-C** are also instructive**.** The court held in that case that;

> **"Fairness, however, dictates that disciplinary steps must be taken promptly. Both the staff regulations and the recognition agreement echo the need for prompt action as all time-limits must be adhered to strictly and time-limits are provided for in paras 5.2.5 and 5.3.1."**

16. The essence of the above observations by the Court is that if there are time limits within which the employer must prefer disciplinary charges against an accused employee, there must also be a time limit within which a dismissed employee must institute proceedings for unfair dismissal. Since there is no specific labour legislation dealing with prescription of labour disputes, the Court will have to be guided by what is a reasonable period in the circumstances of each particular case.

17. In the present case there was delay both in the initial stages of reporting the dispute and also in the prosecution of the claim. It took the Applicant about one year and four months just to report the dispute. His conduct was

clearly not consistent with that of an employee who was aggrieved by the conduct of the employer. It is a notorious fact that the Respondent's premises where the Applicant was employed are situated in Manzini City. It is also a notorious fact that the offices of the Department of Labour where the dispute was reported are also situated in Manzini City. After the report of the dispute was compiled by the Department of Labour, it took the Applicant about six years to launch the application before the court.

18. As already pointed out in the preceding paragraphs, there is no specific legislation in place prescribing the time frames within which to prosecute a labour dispute before the Industrial Court. This is not for the court to do, but it is the Legislature that must do so in keeping with the principle of separation of powers. The court can however seek guidance from the Industrial Relations Act which stipulates a specific time within which a labour dispute may be reported to the Commission (CMAC). In terms of the **Industrial Relations (Amendment) Act No.3 of 2005** a dispute may not be reported to the Commission if a period of more than eighteen months has elapsed since the issue giving rise to the dispute arose. In terms of the amended Act, the Industrial Relations Act No.1 of 2000, the Commissioner of Labour was granted the power to extend the time within which the dispute could be reported. Such extension was however not to exceed a period of thirty six months.

19. The amended section in the **Industrial Relations (Amendment) Act No.3 of 2005** provides 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."**

In the new **Section 76** there is no provision for the extension of the period of eighteen months. The exclusion of the extension of the period can be interpreted in no other way other than that the Legislature intended that labour disputes should keep in touch with the increasing pace of modern life and activities in the labour market. In other words, 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 prosecution stage.

20. Taking into account all the aforegoing observations, the court will come to the conclusion that a delay of about eight years is a long time. In its heads of argument the Respondent pointed out that the complainant in the disciplinary hearing has since passed on. Other employees of the Respondent who were involved in the disciplinary hearing have now left the organization. The Respondent also pointed out that it is required by law to keep its employment records for a period of three years and that it will be prejudiced if the Applicant were allowed to prosecute his claim as it no longer has the requisite records to help it prepare its defence.

21. Taking into account all the papers filed of record and also all the circumstances of this case, the court comes to the conclusion that the Applicant inordinately delayed in prosecuting his claim and the court is satisfied that the Respondent would be prejudiced if the Applicant were to be allowed to prosecute his claim after such along period of time. The point of law raised by the Respondent will therefore be upheld.

22. The court will accordingly make the following order;

a) The point of law raised is upheld and the application is therefore dismissed.

b) There is no order as to costs.

The members agree.

NKONYANE J