IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE **CASE NO. 299/18**

In the matter between:

BHEKI TSABEDZE APPLICANT

And

ROB'S ELECTRICAL RESPONDENT

Neutral citation : Bheki Tsabedze vs Rob's Electrical Pty Ltd *(299/18)* [2018] *SZIC 141 (12 December 2018)*

Coram **:** **B.W. MAGAGULA - ACTING JUDGE**
(*Sitting with N. Dlamini and D. Mmango Nominated Members of the Court)*

Heard **:** 26/11/2018

Delivered **:** 12/12/2018

SUMMARY - Applicant dismissed on the 18th January 2013. Allegedly for not wearing safety boots. Applicant alleges that he was not afforded a disciplinary hearing. The Certificate of Unresolvable Dispute was issued by CMAC on the 3rd July 2013 and the Applicant only lodged the application in September 2018, five years after the Certificate of Unresolved Dispute was issued. The Respondent has

raised point in *limine* that the applicant's claim has prescribed due to lapse of unreasonable and inordinate delay in filing the application before court. The delay to cause prejudice to the Respondent as the Respondent's Managing Director is now deceased. The court exercising its discretion in the circumstances of this case, grants the Applicant leave to lodge an application for condonation, where it will be afforded a forum to motivate his reasons for the delay.

RULING ON POINT OF LAW

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1. The Applicant is **BHEKI TSABEDZE**, a liSwati male adult of Mangwaneni in the District of Hhohho, Eswatini.

2. The Respondent is **ROB'S ELECTRICAL**, a company duly registered and incorporated with limited liability according to the company Laws of the Kingdom of Eswatini. Carrying on business at Sidwashini Industrial site, Mbabane in the district of Hhohho, Eswatini.

3. The applicant was employed by the Respondent on the 11th January 1990, until he was allegedly dismissed by the Respondent on the 18th January 2013.At the time of his termination of employment, he held the position of Electrician.

4. In its Reply, the Respondent has raised a point of law. It is captured as follows;

"The applicant's claim has prescribed, due to lapse of unreasonable an inordinate delay in filing the application and as such the above honorable

court cannot take cognisance of this matter and should dismiss it on this basis alone.

5. Both parties representatives filed heads of arguments and made oral arguments in open court. The court is indebted to both counsel.

6. During the arguments of this matter, Mr. Motsa who appeared for the Respondent, submitted that a Certificate of Unresolved Dispute was issued by the Conciliation Mediation and Arbitration Commission on the 3rd July 2013. The applicant did nothing, until five years later. Mr. Motsa alluded to the fact that there is a statutory gap, in the legislation in terms of a time frame prescribed within which a party can file an application at the Industrial Court, once a Certificate of Unresolved Dispute has been issued.

7. We consider the point in *limine* as crafted by the Respondent. The opening line is that, the applicant's claim has prescribed. It is apposite fo this court to firstly unpack the legal meaning of prescribe to ascertain if indeed this matter has prescribed in terms of the law, to give credence and substance to the point raised by the Respondent. Prescription is a time period within which a right must be exercised.

8. This definition implies that there must be an instrument that stipulates the time period within which that right must be exercised. In the matter at hand, the time frame should have been prescribed by the existing legislation. As we have already stated above, Mr. Motsa conceded that there is no prescription

period in the existing legislation. Instead he basis support of prescription on judicial precedence.

9. In our analysis, it follows that there are currently no time limits as determined by primary legislation, within which an employee is required to lodge and file an Application for determination of Unresolved Dispute in this court, other than the decided cases of course.

10. The constitution of the Kingdom of Eswatini, Act of 2005, provides separation of powers in the manner in which the country is to be governed.

11. Chapter 6 Establishes the Executive Chapter 7 Establishes the legislature, and Chapter 6 Establishes the Judicature. In terms of the Section 106 of the Constitution of the Kingdom of Eswatini *supra, provides as follows:-*

(a) Subject to the provision of this constitution of the supreme legislative, authority of Eswatini vest in the King and Parliament.

b) The King and parliament can make laws for peace, order and good Governence of eSwatini.

12. It is clear from above cited sections of the constitution, that the sole power to legislate is the preserve of Parliament. All laws are assented to by His Majesty The King.

13. Therefore, if Parliament, in its wisdom, had intended that there should be a specific period, within which a litigant could bring an application for Determination of Unresolved Dispute to this court, then Parliament should have set those time frames in the legislation. There is currently no such time frame relating to a period, within which a matter should be filed to this court, once a certificate Of unresolved dispute has been issued by the Conciliation Mediation and Arbitration Commission (CMAC).

14. **The Industrial Relation Act 2000 (as amended)**, in **Section 76 (4)** only regulates the period within which an Applicant can report a dispute at CMAC which is six (6) months.

    i) This Section irrelevant to the matter before court. The heart of the matter here is that the matter has prescribed because the applicant has failed to bring it timeously before this court. The court highlights the use of the word "prescribe" purposely, because that is how the point of law has been worded by the respondent. The respondent goes further to say, the matter has prescribed "due to inordinate delay". There is no legislation that sets a time frame within which a litigant should file an application to court once the Conciliation Mediation and Arbitration Commission (CMAC) has issued a Certificate of Unresolved Dispute.

15. What then happens in a situation where there is no time frame, specified in the legislation, yet one of the parties has taken a point of law alleging that the matter has prescribed due to inordinate delay? This specific question, was posed to the Applicant's Representative, Mr. E. Dlamini who responded to

the effect that he does not agree that the Applicant has delayed in bringing the matter to court. Which means, the issue of inordinate delay does not arise. His arguments being that, what should have informed any litigant that he is outside the law in bringing an application before court, is legislation. Either the **Employment Act of 1980 or The Industrial Relations Act of 2000 (as amended)**. Both pieces of legislation do not specify time frames within which a matter must be brought to court. Therefore, his client would not have known that he was out of time, when the law does not set time frames.

16. Mr. M. Motsa who appeared for the Respondent, argued that in a decided case of the Industrial Court of Appeal, the court has previously, pronounced itself, that was in the matter of **Usutu Pulp (Pty) Ltd vs. Jacob Seyama Appeal Case No. 01/2004**; the court set a three (3) year period as a guide for the delay.

17. There are infinite possibilities on why there is no prescription period in our laws, within which a litigant can bring an application for Determination of Unresolved dispute to the Industrial Court. We are disinclined to even delve into them. It is possible that when the legislature enacted the current laws, it thought it fit that since there is already a prescription period for reporting a dispute **(Section 76 (4) of The Industrial Relations Act 2000**, the wheels of Justice would have been set in motion as dispute would already have been reported. Hence, to further impose a prescription period would be against the spirit of the Act, which *inter alia* is to stimulate a self regulatory system of

Industrial and Labour Relations Governance (**See Section 4 (1) (i) of the Industrial Relations Act of 2000 as amended.**

18. It is also a possibility that at that time it was the right thing to do.

19. A dispute in terms of **Section 2 of Industrial Relations Act of 2000** is defined to include a grievance.

A "dispute" remains a dispute up until it is resolved. There is a certificate of unresolved dispute signifying that the dispute has not been resolved. To file an application to court is a process to resolve the dispute'.

20. We will be slow to speculate why a prescription period for filing an application to this court was not made by Parliament. In all honesty, it is not our turf. The role of the courts is to apply and interpret the laws which are already existence.

21. During the arguments, we were urged by Mr. Motsa, Counsel for the respondent, to apply the principle of *stare decisis* strictly. The argument being that, since The Industrial Court of Appeal of Eswatini in the matter **of Usuthu Pulp Company (Pty) Ltd vs Jacob Seyama and 4 Others Case no. 01/2004**, has already given guidance of 3 years, as a reasonable period. Then this court, is now bound to follow suit and take 3 years as a yardstick.

22. The purpose of the Industrial Relations Act amongst other, is to promote fairness and equity in labour relations. ***See*** **Section 4 (1) (a) of the**

Industrial Relations Act of 2000. It would be remiss of us to take a myopic approach and apply 3 years as a hard and fast rule for filing of an application to this court. To do so, would temper with the discretion of the court which depends on the circumstances of each case. We take comfort in the reasoning of Nkonyane J, in the matter of **Tokyo P.N. Ntshangase vs SNPF case no. 195/2006**, where the court held that, 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.

23. We doubt that the Industrial court of Appeal in the **Usutu Pulp Company (Pty) Ltd** judgment, sought to remove the discretionary powers of the court, when it suggested a period of 3 years. In our view, in the circumstances of that case, the court came to the decision that 3 years was appropriate. The circumstances of the Applicant before us, may be different. Unfortunately, on the papers before us, we are unable to guess what prevented the applicant from filing an application for determination of unresolved dispute between the 3rd July 2013 and the 6th November 2018. It does not appear on the Applicant's replication.

24. We note however, that the applicant has made an attempt to advance the reasons in his heads of arguments. We find this unacceptable. He had an opportunity to do so in his replication, but failed to do so. Alternatively, he should have filed a fully-fledged application for condonation, where he would have set out his reasons; that is if he accepts that he has delayed.

25. Having said so, this court will not take an adverse position to this lapse of judgment by the applicant. In terms of **Section 11 (1) of the Industrial Relations Act of 2000**, this court shall not be strictly bound by the rules of evidence or procedures. It may disregard any technical irregularities. We are of the view that it is unlikely that there will be a miscarriage of Justice, if the Applicant is given leave to traverse the issue of whether he accepts that he has delayed in bringing the application before court. Secondly, if the delay has been inordinate.

26. This court is not in a position to decide firstly, if there has been a delay in the filing of the application before court. Secondly, if the delay has been inordinate. This is due to the fact that the circumstances from which this court would have deduced that from, are lacking on the papers before court.

27. The applicant is granted leave to amend its papers to address two issues;

    a. Whether he accepts that he has delayed in bringing the application before court.

    b. If he accepts that he has delayed, the circumstances that caused him to delay.

28. It is only after then, that this court can apply its mind on whether the period was reasonable or not. The Respondent is equally given leave to reply to the amended papers to be filed by the Applicant.

29. There is no order as to costs.

30. The members are in agreement.

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B. W. MAGAGULA

ACTING JUDGE OF THE INDUSTRIAL COURT OF ESWATINI

For Applicant: Mr. E B. Dlamini (Labour Consultant)

For Respondent: Mr. M.Motsa (L.R. Mamba Attorneys)