



**IN THE CONCILIATION MEDIATION AND ARBITRATION
COMMISSION**

HELD AT MBABANE

CMAC REF NO. SWMB 082/12

In the matter between:

DUMA ZWANE AND 3 OTHERS

APPLICANTS

AND

CENTRAL BANK OF SWAZILAND

RESPONDENT

Coram

ARBITRATOR : VELAPHI Z. DLAMINI

**FOR APPLICANT : Mr. JOSHUA MNDZEBELE
And Mr. VUSI SIBISI**

FOR RESPONDENT : Mr. SIBUSISO ZIKALALA

RULING

DATE OF HEARING : 31ST JULY 2012

**VENUE : CMAC OFFICE, 1ST FLOOR
ASAKHE HOUSE,
MBABANE**

1. DETAILS OF HEARING AND PARTIES

- 1.1 The points of law were argued on the 31st July 2012 at the premises of the Conciliation, Mediation and Arbitration Commission at 1st Floor Asakhe House in Mbabane.
- 1.2 The Applicants are Duma Zwane, Joshua Ginindza, Siphon Mthethwa and Joyce Dlamini, Adult Swazi Males and Female respectively of P.O Box 1035 Manzini. The Applicants were represented by Mr. Joshua Mndzebele and Mr. Vusi Sibisi, Labour Consultants.
- 1.3 The Respondent is Central Bank of Swaziland, a statutory body of P.O Box 546 Mbabane. The Respondent was represented by Mr. Sibusiso Zikalala, an Attorney from Musa. M. Sibandze Attorneys in Mbabane.

2. PRELIMINARY POINTS OF LAW TO BE DECIDED

Whether or not the dispute is time-barred.

3. PARTIES SUBMISSIONS

3.1 RESPONDENT'S

- 3.1.1 The Respondent submitted that, it is apparent from the Report of Dispute that the Applicants consider that the dispute arose on the 7th March 2012. However there is correspondence that demonstrates the Applicants were aware of the issue in dispute as early as April 2009.

- 3.1.2 It is contended by the Respondent that the period from April 2009 to March 2012 is almost thirty-six (36) months. The Respondent argued that it has taken the Applicants almost thirty six (36) months to report the dispute. The Respondent's counsel argued that in terms of Section 76 (2) of the Industrial Relations Act 2000(as amended), a dispute may not be reported to the Commission after a period of eighteen (18) months has elapsed from the time the issue giving rise to the dispute arose.
- 3.1.3 Mr. Zikalala submitted that the issue giving rise to the dispute has been defined as being the same as "*cause of action.*" Respondent's counsel referred me to the case of *James Thwala v Neopac (Swaziland) Limited (IC Case No 18/98)* as authority for the foregoing principle.
- 3.1.4 The Respondent argued that since more than eighteen (18) months have elapsed from the time the issue giving rise to the dispute arose, the dispute was time-barred. Mr. Zikalala contended that even assuming the Applicant became aware of the issue giving rise to the dispute in June 2010, they were still within the eighteen (18) months period then and should have acted expeditiously to secure their right by reporting the dispute.
- 3.1.5 It was also submitted by the Respondent's counsel that, even whilst pursuing internal remedies of resolving a dispute, an employee should be mindful of statutory provisions. However it was conceded by Mr. Zikalala that where the delay in reporting a dispute has been caused by the employer, the Industrial Court has held that, the latter is estopped from raising an objection on the grounds that the dispute is time-barred. Respondent's counsel

submitted though that the Respondent did not in any way cause the Applicants to delay in reporting the dispute.

3.1.6 The Respondent prayed for the dismissal of the Applicants' claims.

3.2 APPLICANTS'

3.2.1 Mr. Mndzebele argued that I should take a liberal approach in view of the fact that this dispute affected many employees. He contended that it was one of the objects of the Industrial Relations Act 2000 (as amended), in particular Section 4(1) (a) that disputes should be amicably resolved by the parties in order to promote harmonious industrial relations. I was referred to the case of *Cyprian Mabuza v Caritas Swaziland (IC Case no. 591/06)* as authority for the foregoing principle.

3.2.2 The Applicants' representative submitted that the issue giving rise to the dispute is the unfair disparity of payment where senior accountants (Applicants) were continuously paid less remuneration than their junior colleagues from April 2009. This disparity in remuneration was discovered by the Applicants in June 2010 and that is when the Applicants began to engage the Respondent to remedy the situation.

3.2.3 It was further argued by the Applicants that, the issue giving rise to the dispute is the Respondent's failure or refusal to protect the former against the prejudice they suffered every pay period since the elevation of the junior accountants to date.

- 3.2.4 The Applicants contended in the alternative that the Respondent significantly contributed to the Applicants' delay in reporting the dispute because the practice and procedure of the Respondent encouraged them to continue to engage the latter so that the Chief Executive Officer (Governor), who was the ultimate authority, had taken a decision on the matter. Mr. Mndzebele argued that indeed the Governor took a decision on the 7th March 2012 and that is when the prescription period began to run and not earlier than that date.
- 3.2.5 The Applicants also submitted that, it would be unfair to hold the delay against them for declaring a deadlock after twenty-one (21) months, because both parties were engaged in negotiations in an endeavor to find an amicable resolution of the dispute. The case of *Swaziland Development and Savings Bank v Swaziland Union of Financial Institutions and Allied Workers (IC case no. 335/07)* was cited in support of the contention.
- 3.2.6 Finally, Mr. Mndzebele prayed for a dismissal of the Respondent's point in limine and that the Report of Dispute of the 14th March 2012 be upheld. Further the Applicants' representative prayed that in the event the Applicants' prayer succeeds, the Respondent be directed to make available to the Applicants, the (21st century Consultants) report before the commencement of arbitration.

4. ANALYSIS OF SUBMISSIONS

4.1 Section 76(2) of the Industrial Relations Act 2000 (as amended) 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.”

4.2 In the case of *Jameson Thwala v Neopac (Swaziland) Limited(supra)*, the then Judge President Nderi Nduma held that the term *“issue giving rise to the dispute”* bears the same meaning in a legal context as the term *“cause of action.”* The learned Judge President then cited with approval the English case of; *Read v Brawn* (without full citation), where the court made the following statement of law;

“cause of action” means “every fact which it would be necessary for the Plaintiff to prove if traversed in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact but every fact which is necessary to be proved”.

4.3 In the case of *Jabulani N. Mavimbela v Standard Chartered Bank (Swaziland) Limited (IC case no. 81/95)*, the Court pronounced as follows;

“while not encouraging parties to conduct negotiations in a spirit of bad faith, we would like parties to be very conscious of statutory provisions while conducting negotiations so that they ensure that they comply with legislation... we should not be understood to be discouraging employees from utilizing appeal procedures where these are available. We are saying that an employee that chooses to appeal should be fully conscious of legislation that imposes time frames for certain events to be initiated to ensure that these legal rights are protected.”

- 4.4 However in the case of *Cyprian Mabuza v Caritas Swaziland (supra)*, the Court held that where an employee has delayed in reporting a dispute to the Commission and the delay was caused by the employer, who gave the former hope that the dispute might be resolved internally, it would be unfair to dismiss the employees' application under those circumstances. The Court stated that it was the policy of the law to encourage people to resolve their differences amicably and not to rush to Court. See *Swaziland Development and Savings Bank v SUFIAW (IC case no. 335/2007)*.
- 4.5 The brief background facts of this case, which are common cause are that, in 2007 the Applicants who are accountants were paid on salary grade C4, they subsequently had their grades upgraded from C4 to C5. A second group of accountants on grade C3 raised a grievance demanding a review of their grades as well. The latter group's grades were also upgraded from C3 to C5.
- 4.6 In June 2010, the Applicants who were senior than the other group of accountants addressed a complaint in writing to the General Manager Corporate Services that the junior accountants earned more than them as senior accountants yet logically, as the employees with longer periods of service they ought to have been paid more than their juniors.
- 4.7 There was no reply from Respondent and in January 2011 the Applicants addressed their grievance to the Deputy Governor, again there was no response. The Applicants then wrote a follow up letter in April 2011. There was no acknowledgment by the Respondent and the Applicants then asked for the intervention of the Commissioner of Labour in June 2011.

- 4.8 In August 2011, the Commissioner of Labour advised the Applicants in writing to report a dispute to the Commission since it was apparent that the Respondent was unwilling to resolve the dispute.
- 4.9 The Applicants continued to engage the Respondent internally such that in January 2012 the Deputy Governor informed them that the Respondent was not prepared to review their salaries because it held the view that the job evaluation exercise was conducted properly.
- 4.10 In the same month, the Applicants persisted with engaging the Respondent by replying to the Deputy Governor's letter dated 23rd January 2012. There was no response to their letter such that the Applicants then addressed their complaint to the Governor on the 5th March 2012. The Governor reaffirmed the Respondent's position as stated by the Deputy Governor in short, the Respondent declined to review the Applicants salaries. The Applicants then reported a dispute on the 14th March 2012. The dispute remained unresolved and a Certificate of Unresolved Dispute No.210/12 was issued. The parties referred the dispute for arbitration and I was appointed to decide same.
- 4.11 What has to be determined in view of the aforementioned facts is, the date when the issue giving rise to the dispute arose. The Applicants contend that it is the 7th March 2012 when the Governor, the ultimate authority communicated the Respondent's position on the grievance. However the Respondent argued that the Applicants became aware of the issue in 2010 and that was when the issue arose.

- 4.12 In applying the case law cited above, I hold that the issue or fact that caused the Applicants to complain that they were being unfairly treated by the Respondent is that the junior accountants were paid much more than them following the salary review. Although it is said that, the junior accountants enjoyed the advantage in April 2009, it is common cause that the Applicants became aware of this issue in June 2010.
- 4.13 Consequently the Applicants lodged a grievance with the Respondent in June 2010. According to the Industrial Relations Act 2000(as amended), the term “*grievance*” has the same meaning as the term “*dispute*”.
- 4.14 I hold that prescription started running in June 2010 when the Applicants became aware of the issue and ended in December 2011 when eighteen months lapsed. From the time the Applicants raised this issue with the Respondent, the latter was disinterested in resolving it. The Respondent’s failure to acknowledge and/or reply the Applicants’ letters (minutes) should have been evident to the employees that the employer had no intention of resolving the grievance internally.
- 4.15 What is very unfortunate is that the Applicants ignored the advice of the Commissioner of Labour in August 2011, when the dispute was still within eighteen (18) months, that they should report the dispute to CMAC because it was clear that the Respondent was not willing to resolve it. From the facts of this case there is nothing to show that the Respondent encouraged the Applicants to engage internally. The case of *Cyprian Mabuza v Caritas Swaziland* is therefore distinguishable in *casu*.

4.16 The Applicants submitted that they could not have reported a dispute to the Commission before the CEO/Governor had ruled on the grievance. However the Applicants did not produce any policy of the Respondent that prohibited an employee from reporting a dispute to the Commission before the Governor had pronounced his decision on same. Although parties are encouraged to engage internally, that engagement must be mutual. If it is clear that one party expressly or by conduct has no desire to negotiate, the other party should timeously resort to external mechanisms because failure to do so may be fatal.

4.17 I find that the Applicants' claims are time-barred and I make the following order:

5. RULING

5.1 The Respondents' point *in limine* is upheld.

5.2 The Applicants' claims are time-barred and are accordingly dismissed.

5.3 I make no order for costs.

DATED AT MBABANE THIS ___ DAY OF SEPTEMBER 2012

VELAPHI Z. DLAMINI
CMAC ARBITRATOR

