IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 80/2007**

In the matter between:

HAPPINESS GININDZA **Applicant**

and

PEAK TIMBERS LIMITED **Respondent**

CORAM:

P. R. DUNSEITH	**:**	**PRESIDENT**
JOSIAH YENDE	**:**	**MEMBER**
NICHOLAS MANANA	**:**	**MEMBER**
FOR APPLICANT	**:**	**L. ZWANE**
FOR RESPONDENT	**:**	**T. MAGAGULA**

RULING ON POINTS IN LIMINE – 22/5/2007

1. The Applicant has applied to court for determination of a dispute arising from her dismissal on or about 9 December 2004. Her application to court is supported by a certificate of unresolved dispute issued by CMAC on 13th February 2006.

2. The Respondent has raised a preliminary objection to the application, namely that the dispute was reported out of time and the Applicant's claim prescribed. The dispute is not

properly before the court, which has no jurisdiction to entertain it.

3. It is common cause that the issue giving rise to the dispute arose on 9th December 2004, when the Applicant was dismissed, but was only reported on 6th January 2006, some 13 months later.

4. Section 76 (4) of the Industrial Relations Act 2000 provided that :

" A dispute may be reported to the Commissioner of Labour if more than six months have elapsed since the issue giving rise to the dispute first arose, but the Commissioner of Labour may, subject to sub-section (5), in any case where justice requires, extend the time during which a dispute may be reported."

5. On 1st September 2005 the Industrial Relations (Amendment) Act, 2005 came into force. This Act amended the Industrial Relations Act 2000 and *inter alia* provided for disputes to be reported directly to CMAC. Under the previous legislation, disputes were first reported to the Commissioner of Labour for onward transmission to CMAC.

6. The Amendment Act deleted section 76 of the Principal Act and replaced it with a new section 76. Sub-section (2) of the new section 76 now provides as follows:

"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."

7. The Applicant failed to report her dispute within the 6 months period prescribed by the then applicable section 76 (4) of the Act. This did not operate to extinguish the Applicant's claim, since she was still entitled to apply to the Commissioner of Labour for an extension of time. The effect of the time bar was rather to render the Applicant's claim unenforceable, since the court cannot take cognizance of a dispute that has not been properly conciliated upon and certified as unresolved.

See **Transnet Ltd v Ngcezula 1995 (3) SA 538 (A) at 548.**

William Manana v Royal Swaziland Sugar Corporation Ltd (IC Case No. 160/2006).

8. Upon the elapse of the statutory period of 6 months without any report of dispute having been filed, the Respondent was vested with immunity against the enforcement of the Applicant's claim and acquired a substantive defence to the Applicant's claim, namely that the reporting of the dispute was time-barred.

9. Counsel for the Applicant argues that the Applicant can take advantage of the promulgation of the Amendment Act, which extends the time for reporting the dispute to 18 months. When the Applicant reported the dispute on 6th January 2006, the report was within the 18 month period prescribed by the new section 76 (2).

10. "*There is a well-known rule of construction that no statute is to*

be construed so as to have a retrospective operation, in the sense of taking away or impairing a vested right acquired under existing laws, unless the legislature clearly intended the statute to have that effect." - **Bartman v Dempers 1952 (2) SA 577 A at 580 B-C.**

11. This rule of construction is expressly confirmed in section 23 of the Interpretation Act 21 of 1970, which provides as follows:

"23 Where a law repeals another law in whole or part then, unless the contrary intention appears, the repeal shall not –

(a) *.....*

(b) *affect the previous operation of the law repealed or anything duly done or suffered under the law repealed;*

(c) *affect any right, privilege, obligation or liability acquired, accrued or incurred under the law repealed;*

(d) *…….*

(e) *affect any investigation, legal proceedings or remedy in respect of that right, privilege, obligation, liability, penalty, forfeiture or punishment; and that investigation, legal proceedings or remedy may be instituted, continued or enforced, and that penalty,*

forfeiture or punishment may be imposed as if the repealing law had not been promulgated.

12. In **Yew Bon Tew v Kenderaan Bas Mara (1982) 3 AER 833 (PC) at 839H** (cited with approval in **Ngcobo v Natal Provincial Administration (1994) 15 ILJ 806 (IC) at 816),** it was stated:

"… [A]n accrued right to plead a time bar, which is acquired after the lapse of the statutory period, is in every sense a right, even though it arises under an Act which is procedural. It is a right which is not to be taken away by conferring on the [amending] statute a retrospective operation, unless such a construction is unavoidable."

13. On the basis of these authorities, it is clear that the Industrial Relations (Amendment) Act, 2005 can not deprive the Respondent of its vested right to plead that the Applicant's dispute is time-barred, unless the Act expressly and clearly so provides.

14. There is nothing in the Amendment Act which suggests that section 76 (2) was intended to resuscitate disputes which were already time-barred.

15. Applicant's counsel appealed to the court to use its equitable powers to come to her client's assistance. However, the Applicant has a remedy in her own hands: she is not too late to apply to the Commissioner of Labour for an extension of the time for reporting the dispute. Just as the amendment of the Industrial Relations Act does not operate to take away the Respondent's defence of time-bar, it also does not operate to

take away the Applicant's right to apply for an extension of time under the repealed section 76 (4) of the Act. The rights of both the Applicant and the Respondent survived the repeal of section 76 (4) - see **section 23 (e) of the Interpretation Act 21 of 1970.**

See also **Transnet Ltd v Ngcezula at 552.**

16. The Applicant's counsel also contended that even if the report of dispute was time-barred, then the Respondent acquiesced in the late filing of the report and has waived its right to object at this stage. Counsel asks the court to infer acquiescence from the fact that the Respondent attended at conciliation in February 2006 and raised no objection based on time-bar.

17. Even a peremptory statutory time limit may be renounced by a person for whose benefit it operates – see **Christie: The Law of Contract in SA (4th Ed) at 519.** There is however a presumption against waiver. The onus is strictly on the Applicant to show that the Respondent, with full knowledge of its right, decided to abandon it – see **Laws v Rutherfurd 1924 AD 261 at 263.**

18. The Applicant must prove that whoever represented the Respondent at CMAC conciliation had knowledge both of the facts and the legal consequences thereof – **Ex Parte Sussens 1941 TPD 15 at 20**. Since the Respondent is a company, she must also prove that the Respondent's representative was authorized to waive his /her principal's rights.

Christie at 513 – 514.

19. There is no evidence that the Respondent's representative at CMAC was aware that the dispute was reported out of time or that the Respondent had a right to object to conciliation proceeding. There is no evidence that the representative intended, or was authorized, to waive the Respondent's right, save that he/she attended at conciliation. The Applicant has not pleaded waiver in replication, and the court is not prepared to infer solely from the issue of a certificate of unresolved dispute, that the Respondent tacitly abandoned its right to raise the issue of time-bar when the matter eventually came before court.

20. For the above reasons, the point in limine is upheld and the application is dismissed. There is no order as to costs.

The members agree.

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P. R. DUNSEITH

PRESIDENT OF THE INDUSTRIAL COURT