IN THE HIGH COURT OF SWAZILAND

CASE NO. 129/04

In the matter between:

THE COURIER & FREIGHT GROUP (PTY) LTD

APPLICANT

AND

PATRICK MAZIYA 1st RESPONDENT

MASWAZI NSIBANDZE N.O. 2nd RESPONDENT

INDUSTRIAL COURT PRESIDENT 3rd RESPONDENT

CONCILIATION MEDIATION

AND
ARBITRATION COMMISSION 4™ RESPONDENT

CORAM K.P. NKAMBULE-J

FOR APPLICANT MR. J. MAVUSO

FOR RESPONDENT MR. SIMELANE

ORDER ON REVIEW 24/6/04

In this application the applicant seeks an order in the following respect:

1. Dispensing with the rules of court and hearing this matter as one of urgency,
2. That a rule nisi do hereby issue calling upon the respondents on a date to be fixed by the court to show cause why;

a) The sale in execution scheduled for the 30th January 2004 should not be stayed.

b) The Writ of Execution hereto marked "CFG 6" dated 9th January 2004, should not be set aside.
c) The decision of the Industrial Court dated the 9th January 2004 which endorses the Arbitration award (marked Annex CF64) as an order of court, should not be reviewed, corrected and set aside.
d) And further to review, correct and set aside the decision of the commissioner of the CMAC awarding the respondent compensation for unfair dismissal, the "award" dated the 2nd December 2003 contained in Annex "CFG4",
e) Costs of suit.
f) Further and/or alternative relief.

3) That paragraph 2(a) and (b) operate with immediate effect, pending finalisation of these proceedings.

There is filed of record a launching affidavit by Jane Dlamini, applicant's financial controller.
The first respondent has raised preliminary points of law as follows:

1) The Deponent Jane Dlamini has not been authorised to depose to the affidavit and that an application to have her affidavit struck off is moved.

2

2) The applicant has not made fully her grounds for review and/or setting aside of the Arbitration award.

Regarding point No. 1 it is trite that an applicant can call upon one of its servants to depose to an affidavit in as much as the facts deposed to are within his personal knowledge true and correct and are relevant to the issue under discussion. This is on condition that same has been properly attested to.

There are many judgements issued by this court and South African courts regarding this point. This court will not go over them because counsel should be aware of them by now. This objection fails.

Regarding the second point that the applicant has not set out fully the grounds for review and/or setting aside of the Arbitration award, is ill founded. Applicant's grounds for review are concisely and fully set out in paragraph 49 and 50 of its founding affidavit. In paragraph 49 applicant states that the Employment laws do not make a distinction between compensation for procedural unfair dismissal and substantive dismissal and that there is no justification to make two awards for unfair dismissal. This is the correct interpretation of the law on unfair dismissal in Swaziland - see Section 16 (1) of the Industrial Relations Act. This objection fails as well.

Now let us deal with the merits of the case. There are three applications contained in the book of pleadings. The applicant brought under certificate of urgency a review application. The first respondent brought a counter application. The applicant has also instituted contempt proceedings.

3

Regarding the main application and the counter application the parties have agreed that basically what they seek is one and the same thing and that is that the Arbitration award be reviewed and corrected to be in line with Section 16 (1) (a) of the Industrial Relations Act 2000.

The point of departure, however, is that the applicant is against the court correcting the arbitration award. The reason advanced is as follows:

To apply that the court should correct the award to be in line with Section 16 (1) (a) would constitute an unwarranted usurpation of the powers entrusted upon the Industrial Court and the CMAC by the legislature in terms of Section 16 and 17 of the Industrial Relations Act".

I will not dwell much in this point because the parties themselves are in agreement in so far as this point is concerned. According to Baxter Administrative Law page 682, the courts recognise at least four situations in which they will be justified in correcting the decision by substituting their own. These are:

i) Where the end result is in any event a foregone conclusion and it would reconsider the matter.
ii) Where further delay would cause unjustifiable prejudice to the applicant
iii) Where the tribunal or functionary has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again.

4

iv) Where the court is in as good a position to make the decision itself.

It is therefore clear from this authority that as a general principle, the courts will not attempt to substitute their own decision for that of the Public authority. If an administrative decision is found to be ultra ,vires the court will usually set it aside and refer the matter back to the authority for a fresh decision.

In the instant case when one looks at page 116 of the Arbitrators reasons for the award (second paragraph) he states as follows:

"Though the respondent's side did not challenge re-instatement in my considered opinion a reasonable person would objectively assume that by this time the company must have already engaged somebody else to fill the position. Moreover this is a senior position which the company could not survive without for too long."

It is clear from the construction of this passage I have just quoted that the arbitrator did not take the provisions of Section 16 (1) (a) and (2) of the Act into consideration. This was indeed a misdirection on his part. No evidence was led to find out if the aggrieved party (the employee) wished to be re-instated or re-engaged. No evidence was led to find if under circumstances the dismissal was such that a continued employment relationship would be intolerable. No evidence was led to find if it was not reasonably practicable for the employer to re-instate or re-engage the employee. All that the arbitrator did was to opine that as the employee was dismissed on the 30th of May 2003 then it would be reasonably impracticable to re-instate the employee at the time the matter came before him. He totally lost sight of the legislation regarding re-instatement.

5

Regarding the splitting of the award into two, I agree with the applicant that the arbitrator misdirected himself. The finding was correct that the employer was both procedurally and substantively unfair in the way he dismissed his employee Mr. Maziya. However, the Employment Act deals with how the award should be made in such an eventuality. These are statutory awards. One has to work within the parameters of the Employment Act.

Regarding whether the Industrial Court was aware of the matter pending in their books this court has a slightly different opinion. According to Section 85 of the Industrial Relations Act parties have a discretion whether they want their matter to be handled by the Industrial Court or the Arbitrator under CMAC. It may happen that when somebody has been dismissed from employment that he makes an urgent application to the Industrial Court for re-instatement. He can make a successful interim application to this effect and be re-instated pending finalisation of the matter by either the CMAC or the Industrial Court itself.

If the parties thereafter decide not to take the matter to the Industrial Court to be dealt with on merits, then one cannot say that the matter is pending in that court. The discretion lies with the parties.

Nothing thereafter will stop the parties to file an application that the Industrial Court adopts the decision of the Arbitration Tribunal as an order of court. However according to law the decision of the Arbitration is final. It is as good as the decision of the Industrial Court.

Regarding the issue of the contempt of court, the application was not opposed. Respondent No. 1 is found guilty as charged. He is cautioned and discharged.

6

For the foregoing it is the opinion of this court that this matter should be remitted to the CMAC to be dealt with by the Arbitrator more particularly on the following points:

1. Whether the splitting of the award is lawful having in mind the provisions of the Employment Act 1980 as amended -Read with Section 85 of the Industrial Relations Act.

2. To lead evidence regarding re-instatement having in mind the provisions of Section 16 of the Industrial Relations Act.

No order as to costs.

K.P. NKAMBULE

JUDGE