



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 1667/2012

In the matter between:

ZEPH TRANSPORT

Applicant

And

ROBERT MHLANGA N.O.

1st Respondent

**THE CONCILIATION, MEDIATION AND
ARBITRATION COMMISSION (C.M.AC)**

2nd Respondent

MPHUMELELO MAMBA

3rd Respondent

Neutral Citation: *Zeph Transport v Robert Mhlanga N. O. & 2 Others (1667/2012)*
[2013] SZHC 101 (3rd May, 2013)

Coram: Dlamini J.

Heard: 14th March 2013

Delivered: 3rd May 2013

review proceedings - whether competent for this court to set aside award by arbitrator on basis that the award was issued after thirty days contrary to Industrial Relations Act - further whether in totality of the evidence

presented arbitrator failed to apply its mind thereby reached the wrong conclusion.

Summary: The applicant instituted proceedings for review of 1st respondent's decision for an award in favour of 3rd respondent on two grounds viz. that the 1st respondent acted *ultra vires* his enabling statute and that he failed to apply his mind to the evidence prosecuted before him such that no reasonable man exercising his powers judiciously could have come to the conclusion at hand.

[1] The first ground raised by applicant rests on interpretation of the statute.

[2] Section 85 (4) of the Industrial Relations Act 2005 reads:

“If the matter is referred to arbitration –

a) the arbitrator shall determine the dispute within 30 days of the end of the hearing; and

[3] This section was subsequently amended to read as follows:

“Amendment of Section 85

5. Section 85 is amended in subsection (4) in –

(a) paragraph (a) by deleting the words “thirty days” and substituting them with “twenty one days”; and

(b) paragraph (b) by deleting the paragraph and replacing it with a new paragraph as follows:

“(b) a party who is aggrieved by a determination made by an arbitrator in terms of paragraph (a) may apply, within a period of 21 days after the making of such determination to the High Court for a review.”

[4] The canons of interpretation were well summarized by **Wessels A. J. A.** in **Stellenbosch Farmers’ Winery v Distillers Corp. S. A. Ltd and Another 1962 (1) S.A. 458 (A)** at 474 as follows:

“In my opinion it is the duty of the Court to read the section of the Act which requires the interpretation sensibly, i.e. with due regard, on the one hand, to the meaning or meanings which permitted grammatical usage assigns to the words used in the section in question and, on the other hand, to the contextual scene, which involves consideration of the language of the rest of the statute as well as the “matter of the statute, its apparent scope and purpose, and, within limits, its background.”

[5] It is not in issue that the 1st respondent delivered his decision after the 30 days or 21 days as the section requires.

[6] Should the court simply resort to the literal meaning of the words in the statute or should it read the wording in full context? Should it search for the mischief (purpose) having regard to the background of the section?

[7] It is trite that in deciding which canon the court should adopt is guided by the golden principle – the intention of the legislature must be upheld irrespective of the selected canon.

[8] It would seem this line of thinking operated in the mind of her **Ladyship Mabuza J.** when she was faced with a similar ground where the arbitrator had delivered its award one year later in **O. K. Bazaars Swaziland (Pty) Ltd t/a Shoprite v Happiness Dlodlu N. O. and Others Case No. 773/2011.** Determined to give efficacy to the legislation, the learned Judge (**Mabuza J.**) wisely cited the case of **Thembekile Dlamini and 7 Others v Principal Secretary in the Ministry of Public Service and Information, Industrial Court Case No. 347/2008** as follows:

“Having regard to these objects and purpose it is most unlikely that the legislature intended Section 17 (5) be peremptory with the result that award could not be issued after 30 days or, if so issued, would be null and void. Such a construction would mean that the default of the arbitrator, even for good reason, would necessitate that completed arbitration proceedings would have to commence de novo. Not only would this abstract and delay the final resolution of the dispute and frustrate the process of justice, but it would visit great inconvenience and added expense on the parties, not to mention C.M.M.C. under whose auspices the arbitration is conducted.”

[9] On the rationale for the section, the honourable judge had noted the *dictum* in **Standard Bank of South Africa Ltd v Fabb and Others 2003 (2) S.A. 6921 C** which was as follows:

“The time limits in this context are a guideline and not peremptory. I say so, firstly because peremptory treatment can lead to absurdity. Secondly, it is not in the interest of litigants to rehear arbitration for no reason but the fact that the award is issued outside the time limit. Thirdly, it would conflict with the object of the L.R.A. to resolve labour disputes effectively. In the nature of arbitration, awards are issued late. If they are nullity and

no effect can be given to them, then the referral for a fresh arbitration would not be an effective, expeditious solution.”

[10] *Fortiori* and even of a lesser magnitude in *casu* as the 1st respondent issued the award three or so days later, the award by 1st respondent cannot be set aside by reason that it was delivered late, in contradictory to the section. I may add that the words of the learned Judge in **Trust Bank Bpk v Dittrich 1997 (3) S.A. 740C** are apposite herein. The court held:

“The Rules are not an end in themselves to be observed for their own sake. They are provided to clear the inexpensive and expeditious completion of litigation before the courts (arbitration).” (words in brackets my own)

[11] To clarify the above *dictum* further, one may, resort to the wise words of our Master from the Holy Book, *“the people are not for the Sabbath, the Sabbath is for the people”*.

[12] For these reasons, the first ground that 1st respondent acted *ultra vires* the Act, stands to fall.

[13] I now turn to applicant’s second ground for review. Applicant avers in his founding affidavit:

“16.

I also wish to state that the 1st respondent misconstrued the law in holding that the 3rd respondent termination of service was procedurally irregular.”

17.

I also wish to state that the 1st respondent's award is so irrational and or outrageous in its defiance of logic and that no sensible person who had applied his mind to the dispute to be decided would have arrived at it.

18.

I also wish to state that in making the award, the 1st respondent took into consideration irrelevant considerations whilst ignoring relevant consideration in the processed thus misdirected himself on a point of law.”

[14] **Takhona v President of the Industrial Court and Another, Case No. 23/1997** is *locus classicus* for outlining common law grounds for review at page 11 as follows:

“Those grounds embrace inter-alia the fact that the decision in question was arrived at arbitrarily or capriciously or mala fide or as a result of unwarranted adherence to a fixed principle, or in order to further an ulterior or improper purpose or that the court misconceived its functions or took into account irrelevant considerations or ignored irrelevant ones, or that the decision was so grossly unreasonable as to warrant the inference that the court had failed to apply its mind to the matter.”

[15] The list of the grounds as highlighted in **Takhona's** *supra*, I am afraid does not include the ground under paragraph 16 by applicant. I am very much alive that the list is not exhaustive. However, inconclusive as it may, it cannot be held in our law that a “*misconstruction of the law*” is a ground for review.

[16] Explaining this position in **Ward W. Garments (Pty) Ltd v Bathobile Gule and Others Civil Case No. 2396/2005 S. B. Maphalala J.** quoting **Innes J.** in **Dolye v Schenker Co. Ltd 1915 AD 223** at 266 held:

“Now a mistake of law in adjudicating upon a suit ... cannot be called an irregularity in the proceedings. Otherwise a review would lie in every case in which the decision depends upon a legal issue and the distinction between procedure by appeal and procedure by review so carefully drawn by statute and observed in practice would largely disappear.”

[17] For the above *dictum*, applicant’s ground that 1st respondent misconstrued the law should fail.

[18] In addressing the grounds in paragraphs 17 and 18 of applicant’s founding affidavit *supra*, which I must point out, are apposite for review proceedings, I am guided by the *dictum* in **W and W Garment (Pty) Ltd** *supra*.

[19] In that case the applicant had raised as similar ground as appears at paragraph 17 of applicant’s affidavit in *casu*. The court held, citing **Rose Innes – Judicial Review of Administration Tribunals in South Africa** at page 211:

“...the unreasonableness of the decision must be so gross that something else can be inferred from it, either it is inexplicable except upon the assumption of mala fides or ulterior motives or that it amounts to proof that the person on whom the discretion i.e. conferred has not applied his mind to the matter.”

[20] The enquiry I am faced with is whether the applicant has established on a balance of probabilities that firstly the decision of 1st respondent is unreasonable. If so is “*the unreasonableness of the decision*” by the 1st

respondent “*so gross that something else can be inferred from it*” so as to amount to 1st respondent failing to have “*applied his mind to the matter.*”

[21] I must point out from the onset that the applicant has not alleged any facts showing that the award by 1st respondent was grossly unreasonable nor that he failed to apply his mind. It is trite that a litigant who has the burden of proof must stand or fall by his papers. However, that as it may and in the interest of justice it would be remiss of me not to scrutinize the evidence upon which the award was based for any gross unreasonableness or failure to apply his mind by 1st respondent. I do so much alive to the position of our law that my duty is not to ascertain whether another arbitrator would have come to a different award. Mine is to ascertain whether the 1st respondent failed to apply his mind to the matter thereby resulting to a grossly unreasonable award.

[22] In terms of the record filed herein the evidence is briefly as follows:

[23] The 3rd respondent testified in his own case. He informed the arbitrator that he was employed by the applicant on or about June 2006 as truck driver. His duty station was Arrowfeeds Matsapha having moved from Ngwane Mills, Matsapha. In March 2011, he drove a fully loaded truck, destined for Big Bend. He drove via Landmark in order to obtain a delivery note. While at Landmark, he received a call from a Security officer directing him to return to his duty station. The caller informed him that there was something amiss in the load of that day. He duly complied. At arrowfeeds the truck was weighed again and one Mr. Lombard ordered that the truck should be off loaded. When off loading it, eleven extra bags were discovered. He, together with other three employees who loaded the bags were taken to Matsapha Police station.

[24] He was questioned by the Police and released. He returned to his duty station where he was informed by Mr. Lombard that he was no longer desired at work. He was ordered to vacate the premises and the truck as well removed from Arrowfeeds premises. The reason advanced was that he was a player in the theft of the eleven bags.

[25] He informed the arbitration that when the bags were loaded into the truck, he was, in compliance with the rules and regulations of Arrowfeeds, at the guardhouse.

[26] Having been ordered to leave Arrowfeeds, he proceeded home where he called his supervisor and narrated the incident. His supervisor promised to call him later. He did and ordered him to return the keys for the truck. He undertook to resolve his matter. He called thereafter and in the last call his supervisor promised him to consult with his boss. He also assured him that he would come to his home. This however never happened.

[27] In August 2011 a meeting was arranged where the parties met at applicant's director's home. He repeated the incident at Arrowfeeds. The response was that Arrowfeeds management barred applicant from working at Arrowfeeds. Applicant informed him further that there was nothing he could do as he had to protect its contract with Arrowfeeds. Applicant advised him further to look for an alternative job as he had none. He gave him E800.00. He was promised that should the bank grant applicant a loan, applicant would buy another truck and recall him.

[28] The 1st respondent proceeded to highlight issues under cross examination. He noted that 3rd respondent was said to have committed theft of the eleven

bags. The rules of procedure at Arrowfeeds was that applicant as the driver had to be present. 3rd respondent stood his ground.

[29] The applicant called three witnesses in rebuttal.

[30] The first witness, Mr. Musa Hlophe although stating that Arrowfeeds rules dictate that the 3rd respondent ought to have been present during loading, he was not on that particular day. He is the officer that called 3rd respondent to return to Arrowfeeds. He corroborated 3rd respondent's evidence that Mr. Lombard ordered him to leave the premises with the truck. This truck was allowed back at Arrowfeeds a week later when it was driven by another driver. Under cross examination he stated that he could not enforce the rule to 3rd respondent and was not aware that 3rd respondent was briefed on the rule.

[31] The second witness was the son of applicant's director and was applicant's supervisor. He said he called 3rd respondent to enquire whether he was back from his destination, Big Bend. 3rd respondent informed him that something bad had happened. He did not elaborate. He then reported this to his father (applicant's director) who in turn called the 3rd respondent. However 3rd respondent did not answer his cellular phone. They continued calling him but applicant switched off his cell.

[32] He confirmed that at Arrowfeeds 3rd respondent was expelled following the theft of eleven bags. The truck which had also been ordered out was later allowed in. He stated also that when 3rd respondent disappeared, another driver was employed. However, 3rd respondent appeared two months later to collect his wages.

[33] Under cross examination he divulged that he knew where 3rd respondent was residing. He was asked as to why he did not go to 3rd respondent's residence to call him, he said it was not his duty to do so. He said no one would run "*after a criminal*".

[34] The 3rd respondent's boss gave evidence. He stated that 3rd respondent was dismissed by Arrowfeeds. He did call 3rd respondent who however failed to respond. He then decided to employ another driver. He said he did not have 3rd respondent postal number although his son knew 3rd respondent's residence. He said that he did not institute disciplinary proceedings against the 3rd respondent because he thought the police would handle the matter.

[35] The 1st respondent then proceeded to analyse the evidence, in line with the statutory provisions. He identified common grounds. He considered the submission by both parties. Noteworthy is the submission on behalf of applicant that it was not possible to keep the 3rd respondent at work as such would "*jeorpadise applicant's contract with Arrowfeeds*".

[36] 1st respondent concluded when weighing the evidence

"5.10 I accept the applicant's version that after this incident he remained at home wherein he waited in vain for a feedback or an update from RW2 with regard to the determination of his contract of employment.

5.11 It is common cause that within a week another driver was hired by the Respondent to replace the Applicant. It is not in dispute that when the Applicant met the Respondent (RW3) at his home at Mathangeni-Matsapha, RW3 informed the Applicant that his

services were already terminated because his client (Arrowfeeds) insisted that the Applicant was no longer needed there, and that there was no alternative post or position to which he could be placed.

5.12 *It is worth mentioning that the Applicant's alleged dismissal is classified as 'dismissal at the behest of the third party'. An employer is entitled to dismiss an employee, at the client's request even though the employee might not have committed a misconduct provided certain conditions are met. See: Andre Van Niekerk, et al Law @ work, Lexis Nexis at page 268, wherein the requirements to be met by the employer prior to a fair dismissal are summarized as follows:*

- a) The demand for the dismissal of the employee concerned must have a 'good and sufficient foundation' and must constitute a real and serious threat to the employer;*
- b) The employer must take reasonable steps to dissuade the party making the demand for dismissal from persisting with that demand;*
- c) The employer must investigate and consider alternatives to dismissal in consultation with the employee whose dismissal is being demanded; and*
- d) The dismissal must be the only option that is fair to both the employer and the employee concerned."*

[37] The 1st respondent proceeded consciously to weigh the evidence and concluded that the 3rd respondent was unfairly and unprocedurally dismissed from work.

[38] On behalf of applicant it was submitted from the bar that as applicant called three witnesses, it is unreasonable that such evidence could be held to be outweighed by evidence of one witness. By any stretch of imagination and with due respect to Counsel on behalf of applicant this argument is completely untenable in law:

[39] **James Ncongwane v Swaziland Water Services Corporation (52/2010)**
[2012] SZCS 65 at page 29 their Lordships held:

“It is thus mandatory that it be clear in the judgment that the court considered all the evidence at the trial and having placed them on an imaginary scale, the balance of admissible and credible evidence tilted towards the victor. In this venture, the court is required to first of all put the totality of the testimony adduced by both parties on any imaginary scale. It will put the evidence adduced by the plaintiff on the one side of the scale and that of the defendant on the other side and weigh them together. It will then see which is heavier not by the number of witnesses called by each party, but the quality or the probative value of the testimony of those witnesses” (my emphasis).

[40] It is the *facta probanda* and not *facta probantia* that the court considers in adjudicating upon a matter. I have read the reasons for the award and the evidence adduced and come to the conclusion that the 1st respondent cannot be faulted. 1st respondent fully applied his mind and was very much alive

to the issues at hand. There is no irregularity that can be pointed out from his award.

[41] For the aforesaid reasons the following orders are entered:

1. Applicant's review application is dismissed.
2. Costs to follow event.

M. DLAMINI
JUDGE

For Applicant : Mr. M. Mkhwanazi
For Respondents : Mr. S. Mavimbela

