IN THE HIGH COURT OF ESWATINI

Held at Mbabane Case No. 982/18

IN THE MATTER BETWEEN:

UNIFOODS (PTY) LIMITED Applicant

And

MARK DLAMINI 1st Respondent

SAMUEL DLAMINI 2nd Respondent

MNCEDISI MMEMA 3rd Respondent

VINCENT NTSHANGASE 4th Respondent

MFANUZILE MATSENJWA 5th Respondent

COMMISSIONER V Z DLAMINI N.O. 6th Respondent

CONCILIATION MEDIATION & ARBITRATION COMMISSION 7th Respondent

Neutral Citation: *Unifoods (Pty) Limited v Mark Dlamini and six (6) others (982/18) [2018] SZHC 171 [26th July 2018]*

Coram : **MAPHANGA J**

Date Heard : 17/07/18

Date Delivered: 26/07/18

Summary: ***Civil Procedure- Review Motion seeking the setting aside of an Arbitration Award; In limine Respondent invoking Section 85(4) of the Industrial Relations Act objecting to the application as time barred regard being had to the prescribed***

dies for filing of application for review of arbitration award; Dies to; be determined from date of making of award; Meaning of making an award; Time of making award when award delivered by arbitrator in the presence of the parties;

Mere mistake or error of law or erroneous conclusion in the sense of not being supported by the weight of the evidence and thus unjustifiable not a ground for review; Allegation that arbitrator failed to apply his mind to the issues to be determined unsubstantiated and without foundation.

JUDGMENT

[1] This matter comes before me as an application for review of an award issued by the 6th Respondent (the arbitrator) sitting as an arbitrator in a dispute referred to the 7TH Respondent (the Conciliation Mediation and Arbitration Commission or 'CMAC') in terms of Section 84 of the Industrial Relations Act 2000 as amended (the Act). The matter arises out of a claim brought by the 1st to 4th Respondents (the respondents) seeking, *inter alia*, compensation for unfair dismissal together with certain additional ancillary claims consequent on termination of their employment against the Applicant.

[2] It goes without saying that these claims are predicated on the existence of an alleged contract of employment between the respondents and the applicant. The central issue of the dispute arose on account of the Applicant's denial of the existence of such a contract between itself and the respondents and its assertion that the latter were in fact employed by a labour broker. It emerged in the papers that a certain entity known as SIMAVSHEQ (Pty) Ltd acted as an intermediary between the applicant and the respondents and was instrumental in the recruitment of the respondents. It is common cause that upon this engagement the respondents were placed at the applicants undertaking where they were deployed and worked for an extended period of about a year.

[3] There was no formal or written contract of employement setting out the terms and conditions of employment or a form recording the key information details pertaining to their employment either with SIMAVSHEQ or the Applicant. It emerges also that due to certain unsatisfactory conditions the respondents at some point remonstrated against their unsettled and somewhat precarious engagement with the result that they started urging for written contracts with the Applicant.

[4] It was the respondent's case before the arbitrator that in June 2016 the Applicant presented them with an offer of a fixed term contract for their accession which offer they declined. They further claim that due to their refusal to agree to the offer the Respondent became indignant and on the 28th June 2016 he dismissed them summarily.

[5] On the other hand the Respondents position was that he never employed the respondents but that they were employed by SIMAVSHEQ as a labour broker on a contractual basis –

that there was no privity of contract between applicant and the respondents. The critical and main issue for determination before the arbitrator became simply whether the Applicant was the employer of the respondent on whom, conseqently liability for the applicants claim lay.

[6] The arbitrator upon entering into the reference heard the matter and considered the evidence adduced by the parties in a formal hearing. He then prepared and issued an award wherein he made the following award:

a) that there was a contractual nexus between the applicant and respondents and that the applicant was the actual employer of the respondents;
b) that the said contract of employment was of a permanent nature as opposed to a fixed-term contract;
c) that the applicant had unfairly dismissed the respondents and as a result ordered the applicant liable to pay the respondents specified sums in lieu of compensation together with further sums.

In limine

[7] The 1st to 6th respondents ('the respondents') have raised certain preliminary points and pray that these be heard and determined before venturing into the merits. These are simply that the matter having been brought under a certificate of urgency does not warrant the dispensation from the application of the normal rules as to conduct of motions in that the urgency if it exists is self-created. The second point is that the aplication for review is out of time in that it has been brought beyond the 21 days prescribed dies after the making of the award sought to be impugned in the review relief.

[8] The only instance in regard to which the Applicant urge for expeditious relief is an apprehension expressed in its papers that with the arbitration award having been made an order of court it fears that the respondents are poised to seek its execution and that unless it can obtain the stay prayed for as one of the ancillary interim orders it is seeking in this application. That appears to me to be a reasonable cause for urgent relief. The only issue is whether the urgency is 'self-created' as the Respondents contend. In this regard I can only surmise that that question is interrelated with the second issue around whether the applicant has been lax and dilatory in bringing the application for review in light of the applicants allegation that the application has only been brought now outside of the permissible time limits after the making of the award. By implication the respondent are contending that the applicant should be presumed to have become aware of the award as at the date when it was published or made.

[9] It is common cause that the award that was issued by the 6th Respondent was only made an order of Court by the Industrial Court on the 25 June 2018.

[10] Nonetheless it is the Applicants case, relying on Section 85 (4) (b) of the Industrial Relations Act of 2000 (as amended), that the award was made on the 23rd January 2018 and that the review application having only been lauched in June 2018, is hopelessly out of time in that if falls outside of the 21 days prescribed in the section as the time within which a review application may be brought after the 'making of the award.

[11] There is a dispute of both fact and law as to when the award can be said to have been made. According to the Respondent that date is the date on which the award was issued by the 6th Respondent, namely the 23rd January 2018 which is ostensibly the date on which the award was signed by the Commissioner. That is clear *ex facie* the written and signed award.

[12] There seems to very little doubt as to the clarity of the wording of section 85(4) (b) which provides as follows:

> **"85. (4) If the matter is referred to arbitration,**
>
> **a) the arbitrator shall determine the dispute within thirty (30) days of the end of the hearing; and**
>
> **b) <u>a party who is aggrieved by a determination made by an arbitrator in terms of paragraph (a) may apply, within 21 days after the making of such determination, to the High Court for a review"</u>**

(My underscore and emphasis)

[13] It is clear from the provision of the section that the critical point in time from which the dies for bringing a review application are to be reckoned is the date of 'the making of the determination'. That lends the issue to another question as to the meaning of making of an award or determination or the meaning of the phrase making of the determination. The Act does not define what making a determination is nor does it make any provision as to how or when an arbitral award is to be 'made', issued or published to the parties.

[14] When Mr Dlamini made his submissions on behalf of the Applicant he urged this court to construe the section and the words 'making' liberally to mean the delivery of the award to the parties in the sense of either the date on which the award was served on the parties and in the absence of proof of such service then, the date on which the party becomes aware of the award.

[15] I now come to an aspect in his submissions that I consider should turn on factual or evidential aspects and a matter which warrants some investigation to ascertain its veracity. That concerns the procedural practice followed by the Commission as pertains to conduct of arbitration proceedings. It seems there are no procedural rules for the conduct of arbitrations in place to give procedural certainty as to the regulation of such proceedings.

Mr Dlamini impressed upon me that as a matter of practice the Commission once it is seized with matters referred to it for arbitration will, once the hearings have been concluded, issue a written award or determination signed by the Arbitrator; which award is then despatched by indeterminate means to the parties. I would think it cause for much uncertainty and confusion. At once what emerges is that the Arbitrators at CMAC do not make and render their awards by delivering the same to the parties at the same time and in their presence before the arbitrator but that rather a written award or determination is despatched to each party separately as a purely administrative process by the secretariat of the substantial of the Commission. That means determining when it is actually delivered to the parties is subject to the vagaries of the administrative system of the institution.

[16] Mr Dube who appeared for the Respondent did not dispute Mr Dlamini's submissions pertaining to the alleged practice at CMAC, although in his submissions he urged that the mode of delivery of the award was immaterial because in his view, the award was deemed to have been issued as at the date appearing *ex facie* the award - the date on which it was signed by the arbitrator. In rebuttal Mr Dlamini urged that the Respondents' contention is untenable because it would be grossly unreasonable and be unjust as would in effect as the parties have no control over the administrative processes at CMAC. I may agree with Mr Dlamini as to the effect of that approach but I do not believe we can derive definitive guidance from that on the issue at hand. There must be an objective standard as to what constitutes the 'making' of an award as envisaged by the Act. For the sake of certainty it is presumed that the Legislature had in mind a definitive event in time against which the time lines could calculated.

[17] The referral of disputes under Section 84 (b) of the Industrial Relations Act 2000 as amended is a species of statutory as opposed to domestic or private arbitration. I shall come to the legal implications of that on the merits. For purposes of the the preliminary point as regards the question whether the application was out of time I may only note that in the absence of specific provisions or case law to guide this court as to the correct interpretation of the section on when an award can be said to have been made, it follows that the common law doctrines and principles and where appropriate the Arbitration Act of 1904 would apply. This is so because outside of specific provisions regulating the conduct of arbitrations under the Industrial Act then the Arbitration Act as the general law governing arbitrations should prevail. It was held in ***Thomas Clark & Son (Pty) Ltd v Minister of Justice and Minister of Labour*** **1944 TPD (309) at 321-322** that the same principles in law applicable to arbitrations by agreement (domestic) are applicable to statutory arbitrations, although this may be subject to exceptions[1].

[1] For example in the South African courts the esoteric doctrine enunciated by **Sheil J** in ***Lushington Village Board of Management v Loest*** **1906 EDC 260 at 264**, appears to have been adapted and applied by the labour courts in respect of review of arbitration awards under the CCMA as the justifiability and rationality test. The effect of this doctrine is that whilst an award of a domestic arbitration may only be set aside if the arbitrator either misconducted himself, or the award was improperly obtained, an award issuing from a statutory arbitration may be set aside if not 'justifiable in relation to the evidence properly before him or her or as Justice Sheil put it if goes against the weight of the evidence.

[18] We would have to look to the common law for the applicable principles as to the meaning of 'making' of an award. The jurist M. Jacobs in his ouvre ***The Law of Arbitration in South Africa*** comments on the general principles governing the publication of awards in terms of the common law and refers to the Roman Dutch authorities in that regard. He quotes Voet in support of the proposition that an arbitrator is enjoined to deliver or publish an award to the parties before him at the same time unless they have agreed otherwise[2]. The relevant quoted passage attributed to Voet reads:

> ***'The judgment moreover must in the first place indeed be given by the arbitrators in the presence of both parties, unless it has been arranged that that may be done even in the absence of both of them.***
>
> ***"Consequences of absence.- Otherwise if it has been pronounced in the absence of one or other party, however lawfully he may have been summoned, then it is indeed* ipso jure *null'***

[19] Neither does the Arbitration Act nor the Industrial Relations Act provide a definition of what constitutes publication of an award or 'determination' of an arbitrator. Put in another way there are no provisions as to when it can be said the arbitrator has made his award. The Arbitration Act merely provides that an award in an arbitration made under the Act shall be 'in writing' and no more than that[3]. In my mind there is no reason why the common law principle that in making an award an arbitrator must summon the parties and deliver the award 'in the presence of all the parties'.

[20] Through no fault of either party the learned arbitrator (or CMAC if we are to accept it to be a matter of practice that it is a standard mode of delivery of the CMAC arbitral awards to send or deliver the written award remotely to parties) the arbitration award in this case was certainly not delivered simulteneously in real time in the presence of the parties. I must accept it to be a fact that as a matter of practice CMAC does not invite or summon the parties to appear before the arbitrator to have the award given to them or at the very least a mechanism of ensuring delivery at the same time and place of the award to both parties.

[21] It is an age old maxim of our law that he who alleges must prove or in latin- *'semper necessitas probandi incumbit ei qui agit'.* The Respondents assert that the arbitration award was made on the 23rd January 2018. However they would be hard put to maintain such a stance given that the publication of arbitrators award, casting aside that the text of the award bears the date in question, it is not in question that it was not handed to both parties on that date and on the facts, it can scarcely be said to have been delivered to them on that date. The parties appeared before the arbitration tribunal during the hearing of the matter but were never summoned for

[2] In the context of statutory arbitrations I would suggest *aliter* if the statute provides specifically otherwise.

[3] See Article 4 of the schedule to the Act (made under Section 4 of the Act for the regulation of the conduct of arbitral proceedings generally)

the delivery of the award. There is no evidence as to when they were eventually put on notice as to the existence of the award or when or how exactly the award was made available to them. This is a basic right of the parties and it also makes for proper and definitive efficacy of the provisions of Section 85 (4) (b) in determining the time for a review of the award if any. It is for the Respondents who are raising the point to show that the application for review is out of time and in the absence of evidence as to the assertion that the award was delivered on the alleged date for purposes of the point they have taken, the point of law must fail.

[22] Earlier I did indicate that the point about urgency is relative to the mischief that or hardship that the bringing of an application for urgent relief such as the prayer for interim relief *in casu* may call. There is a constraint and apprehension brought about by the enforcement proceedins brought by the respondents in seeking the making of the award an order of court. I find the circumstances to justify the means and the reason given to be sufficient as an urgent instance. The Applicant indicate they were made aware of the existence of the award and thus quickened into seeking a stay of execution pending the review upon learning of the appliation to make the award an order of court. That seems reasonable and probable on the balance of the facts. It is for these reasons that the Applicant's application for review cannot be precluded on the points raised by the Respondents.

[23] For the abundance of caution I hasten to say that by this dismissal it is not to be construed as condonation of an otherwise late review but simply one based on the reasoning that it has not been proven that the application for review is out of time in relation to the making the award of the 6th Respondent as a tribunal of record; as the date of the making of the award has not been established with certainty. It is for the Respondent to persuade the court in this regard and they have not succeeded in this. I therefore now turn to the merits of the application- *vis* the grounds for the review.

On the Merits – This Review

[24] The Arbitration Act does not prescribe the parameters of review in the sense of setting out the grounds on which an arbitrators determination or award may be reviewed and set aside. In terms of the Arbitration Act of 1904 the grounds for review of an award of an arbitrator are very limited. An arbitral award may only be set aside if it can be shown either that the arbitrator has misbehaved or misconducted himself in the proceedings as in the case of bias or that the arbitration award has been improperly obtained (for instance where the arbitrator has accepted a bribe or unduly unfluence by one of the parties) as in the case of bias or fraud. I understand this to be the position as confined to private or so-called domestic or arbitrations[4]. For statutory arbitrations such as arbitrations under the IRA the

[4] Such as arbitrations by private agreement as in a reference in a contract.

common law grounds for review also apply. Thus such arbitrations are also subject to review on grounds of gross irregularities in the conduct of the proceedings as relates, for instance, to the manner in which the proceedings were conducted. An award may also be set aside on grounds of the the Commissioner exceeding his statutory powers.

[25] On examining the record it seems to me the learned Arbitrator took pains to prepare a detailed and well-considered award. The award runs into some 49 pages in length. After recital of the evidence canvassed during the hearing, the arbitrator carried out a carefu and thorough examination of the evidence and in considering the issues he makes critical analysis and assesment of the evidence to determine the crisp issue before him i.e, whether the facts bore out the standard indiciae of the existence of an employement contract between the parties.

[26] In the applicant's stated grounds on which it attacks the award is the the 6th Respondent failed to 'apply his mind to the issues and or that he misdirected hiimself on the main issue or issues to determination and or that he committed an error in applying the law to the facts and evidence presented to him.

Error of Law

[27] It is a well-entrenched principle of the law as pertains to judicial review of the conduct of tribunals that a mere error of law cannot serve as a ground for review unless it is of such a nature that it evinces such a failure on the part of the decision-maker to appreciate the nature of the discretion or power conferred on him, that one concludes that his decision amounts to a refusal or failure to exercise his discretion or power. This is premised on the notion that a fundamental misconception of the power or the issue to be determined is tantamount to an excess of the decision-making powers as to amount to a nullity- an improper decision being no decision at all (***See Hira v Booysens and Ano. 1992 (4) SA 69 (A.D)).***

[28] Equally in ***Goldfields Investments Ltd and Another v City Council of Johannesburg and Another*** **1938 TPD at 551** it was held that a mistake of law per se is not an irregularity but its consequences may amount to a gross irregularity where a judicial officer, although perfectly well-intentioned and bona fide, does not direct his mind to the issue before him and so prevents the aggrieved party from having his case fully and fairly determined.

[29] Turning to the facts of this case it is not clear to me in what respect the learned arbitrator may be said to have misdirected his mind to the vital issue of the arbitration – namely the question as to who the true employer of the respondents between the so-called labour broker and the applicant.

[30] It emerges as apparent from paragraphs 9 and 10 of the founding affidavit that the appplicant relies on the following averments as as the all-pervasive error of law or alleged misdirection:

> ***"9. In paragraph 6.1 of the arbitration award, the first thing that the 6th Respondent states in his analysis of the issues is that:***
>
> ***'Swaziland does not have legislation that governs temporary employment services also called labour brokers. The arguments advanced by the Respondent's counsel are based on South African Labour Court and Labour Appeal Courts' interpretation of Section 198 of the South African Labour Relations Act 66 of 1995'***
>
> ***All other issues for determination in the matter were then influenced by this finding by the 6th Respondent. This however is not one of the issues which the 6th Respondent listed as an issue for determination under paragraph 2 of the award. This on its own was a grave irregularity on the part of the 6th Respondent"***

[31] Having read the arbitrator's award in its entire length and the ratio on which the findings therein are founded I cannot find any justification of the applicant's assesment that the above-quoted remarks constitute a material misdirection or error in law. Even if the observation or statement of the law expressed by the arbitrator was erroneous, which I doubt, I cannot accept the argument advanced by the applicant that this was more than an incidental remark but a material 'finding that influenced the decision of the arbitrator or one that distracted the tribunal from the central question or issues. In fact it is no more than an obiter opinion and thus no 'finding' at all.

[32] The reasons for the award itself and the conclusions that gird it appear clearly from the content and text of the decision itself, esepctiall the analysis of the evidence from page 26 of the award onwards. The recurring theme in the findings is that on the balance of all the evidential material considered and the facts of the matter in the arbitrator's opinion the circumstances when taken it totality pointed to the existence of an employment nexus between the applicant and the respondents. The arbitrator goes on to enunciate the applicable tests that have been developed by the courts as tests for determining the existence or otherwise of a contract of emplyment one of which is the so-called *control* and *organisational* test.

[33] In substance I do not see how the arbitrator's remarks as to whether the labour broker contract is recognised in our law have any bearing, if at all, on the findings and the reasons articulated by the arbitrator in the award. None such have been indicated by the applicant at all.

[34] The phrase ‘failure to apply his mind’ is a hackneyed and clinched refrain in many a review application that comes before this court. It is seldom placed in its correct context in light of judicial exposition of the doctrine of judicial review. A proper perspective of its content and contextual expression is provided by the court in the South African case of ***Johannesburg Stock Exchange v Witwatersrand Nigel Ltd*** **1988 (3) SA 132** at **152 A-D** when in a passage that has incidentally also been quoted by the Appliant’s attorney in his submissions, the court said:

> ***“Broadly, in order to establish review grounds it must be shown that the Respondent failed to apply his mind to the relevant issues in the behest of the statute (conferring the power) and the tenets of justice……such failure may be shown by proof, inter alia, that the decision was arrived at arbitrarily or capriciously or mala fide or as a result of unwarranted adherence to a fixed principle or in order to furtehr an ulterial motive or improper purpose; or that the president misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the president was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the the matter aforestated”***

[35] From this statement it becomes clear that universally in the evolved jurisprudence in the common law jurisdictions both in this region and English law, the phrase ‘failure to apply ones mind is used in both a ‘process- oriented’ and ‘outcome-based’ approaches. In both instances is is used as a relative concept to quality or characterise the degree of a reviewable misdirection, or misconception or irregularity that will warrant interference by a review court. Such, I am afraid has not been demonstrated by the applicant presently.

[36] At best the applicant’s grievance is that in his opinion the arbitrator reached an incorrect or unjustifiable conclusion in law not supported by the evidence. That may be fertile ground for an appeal but is hardly proper basis for review. In ***Schoch N.O. and Others v Chetty and Others 1974 (4) SA 860 (A)*** **Botha JA**, at **866 E**, puts it thus:

> “***It is abundantly clear from the authorities that, in reviewing the proceedings of a statutory body vested with a discretion, the jurisdiction of a court of law is limited to the question whether in fact the body exercised its discretion. It has no jurisdiction to enquire into the correctness of the conclusion arrived at by it in the evidence before it”***

[37] Although the remarks of the learned judge in refering to ‘a statutory body vested with a discretion’ seems to suggest he was thinking of a pure administrative authority, it is clear from the judgment that the court had in mind and was seized with a review of an arbitral tribunal as in this case.

[38] The core principle that cuts across the leading judicial decisions on the subject emerges as this- that, subjecct to certain exceptions, 'the court can only inquire whether the official has in fact decided not whether he has decided rightly or wrongly' or whether in the instance of a quasi judicial tribunal, the decision reached is so unreasonable that it gives rise to an inference that the tribunal acted improperly[5].

[39] Closer to the matter at hand the South African Labour Court has in ***Carephone (Pty) Ltd v Marcus M.N.O and Others*** **(JA52/98) [1998] ZALAC 11,** dealt with a scenario similar to the instant case where the review was in respect to a CCMA arbitral process under the South African Labour Relations Act (similar in its functional mandate to our CMAC under our Industrial Relations Act). In that case Mlambo J makes the following insightful remarks which I find equally valid under our legislative framework;

> ***"The Act accords the Commission the jurisdiction to arbitrate certain disputes. The Act does not make provision for appeals from arbitration proceedings …….. a review is very different to an appeal and the fact that the Act provides for one and not the other is significant. The review function of a court is described by Rose –Innes in his work Judicial Review of Administrative Tribunals in South African Cape Town, JUTA, 1963 at page 14 as follows:***
>
> ***'A court of review will not enter into, and has jurisdiction to express an opinion on the merits of an administrative finding of statutory tribunal or official, for a review does not import the idea of a reconsideration of the decision of the body under review"***

[40] In my view the remarks of the learned Mlambo J are equally applicable to statutory arbitration procedures in respect of CMAC under the arbitral jurisdiction conferred in terms of the Industrial Relations Act of 2000 as amended. Of particular relevance is that the court in the ***Carephone*** case also highlighted the pertinent rationale behind the clear provisions for review and preclusion of provisions for an appeal as an expression of a policy intent by the Legislature to write into law a framework for the expeditious, accessible and simple mechanism for resolution of disputes. By providing for arbitration and specifically for review and not appeal as redress against arbitration outcomes, the choice was a deliberate intervention to provide an alternative means to dispose of certain disputes effectively quickly and with finality.

[41] To open up the matter and enquire into the correctness of the courts assessment of the evidence as it is suggested by the applicant presently, would in my judgment, be

[5] ***See Hira v Booysens case ibid***.

antithetical not only to the the principles enunciated above concerneing the scope of review but would also run contrary to the clear object, spirit and intent of the statute.

[42] In sum there can be no support for the contention that the arbitrator failed to apply his mind to the issues in the sense that he made or reached such an unreasonable conclusion in his findings as would ground an inference of irratiionality or caprice. I have found no justification either for the applicant's argument that the arbitrator misdirected himself on a fundamental matter of law as to warrant an inference of gross irregularity or excess to his powers.

[43] For the above reasons I find no merit in the application for review presently before me and accordingly dismiss the same with costs.

MAPHANGA J

Appearances:

For the Applicant-	:	Mr. B.S. Dlamini
For the Respondents	:	Mr. B. Dube