# IN THE HIGH COURT OF ESWATINI

**HELD IN MBABANE** **CASE NO. 1896/18**

In the matter between:

**FLETCHER ELECTRICAL (PTY) LTD** **APPLICANT**

And

**ELIAS MABUZA** **1st RESPONDENT**

**NONTSIKELELO DLAMINI N.O.** **2nd RESPONDENT**

**THE CONCILIATION MEDIATION &**
**ARBITRATION COMMISSION (CMAC)** **3rd RESPONDENT**

**Neutral Citation:** *Fletcher Electrical (PTY) LTD vs Elias Mabuza & 2 Others [1896/18] [2019] SZHC 116 (27 June 2019)*

**Coram:** **M. LANGWENYA J**

**Heard:** 1 March 2019; 4 March 2019

**Delivered:** 4 July 2019

**Summary:** *Civil Procedure-Application for review in terms of Rule 53(1) of the High Court Rules-Point in limine taken by respondent objecting to review application on basis that it is time barred in terms of section 85(4) of the Industrial Relation Amendment Act 2010-Point of law upheld.*

**RULING ON A PRELIMINARY POINT OF LAW**

**Introduction**

[1] This is an application to review and set aside an arbitration award issued by the second respondent who found that first respondent's dismissal from work was substantively and procedurally unfair.

[2] Two preliminary points of law were raised by the first respondent namely that:

The review application ought to have been brought to this Court by invoking section 19(5) of the Industrial Relations Act (IRA) 2000 and not through Rule 53(1) of the High Court Rules.

[3] The applicant filed the review application out of time and contrary to the provision of section 5 of the Industrial Relations (Amendment) Act, 2010. It was the first respondent's contention that Section 5 of the Industrial

Relations Amendment Act 2010 fixes the time limit for filing review applications against arbitration awards to twenty-one days counted from the date the award was issued.

[4] In *casu*, so the argument goes, the arbitration award was issued on 25 October 2018 while the present application was filed on 5 December 2018, twenty-nine working days after the award was issued.

[5] The first respondent contends further that section 5 of the 2010 Act does not provide for condonation and as such, an applicant who fails to meet the twenty-one days period is out of time and cannot, by law, file for review application thereunder.

[6] Signing off, the first respondent states that the application for review is therefore bad in law and ought to be dismissed with costs.

[7] Even though the first respondent had raised two preliminary points of law, only the latter point of law was argued on 1 March 2019.

[8] In opposing first respondent's points of law, the applicant states that Rule 53(1) of the High Court Rules and not section 19(5) of the IRA, 2000 provides the only mechanism of bringing a review application before the High Court. Section 19(5) of the IRA provides a specific procedure for reviewing

decisions of CMAC arbitrators and directs that such review applications shall be brought before the High Court. It is only through compliance with the Rules of the High Court, particularly Rule 53(1) that a review application can be brought to the High Court-so the argument goes.

[9] The applicant argues that it was served with the arbitrator's award on 14 November 2018 and this marked the 20th day from the date the arbitration award was signed on 25 October 2018. The applicant contends that the present proceeding were launched before the expiry of twenty-one days counting from the date the applicant became aware of the arbitration award.

[10] It is applicant's contention also that it could not have been the intention of the legislature to allow the affected party twenty-one days upon which to bring a review application without actually being made aware of the decision of the matter. Applicant argues further that the legislature's intention was to afford the other party such time from the date he became aware of the award to bring the review; otherwise it would be absurd to expect the applicant to have filed the review before he became aware of the arbitration award.

[11] The applicant places reliance on *VIP Protection Services v Nkosinathi Dlamini*[1] in its contention that the twenty-one day period should be calculated from the date the arbitration award comes to the applicant's knowledge and not from the date the award was made.

[1] Industrial Court Case No. 202/2007

[12] There is a dispute of law concerning when the arbitration award can be said to have been made. According to the first respondent, that date is the date on which the award was issued and signed by the arbitrator namely 25 October 2018-a date which ostensibly appears on the arbitration award.

[13] The applicable law is section 5 of the Industrial Relations Amendment Act, 2010 which amends section 85 of the IRA, 2000 in the following manner:

**Section 85 is amended in subsection (4) in-**

**(a) Paragraph (a) by deleting the words 'thirty days' and substituting then 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'**

Clearly, from the above section the review should be brought on a date of the '**making of the determination'** and not when the aggrieved party has **knowledge of such decision**.

[14] Section 85(4)(b) of IRA, 2010 must be contrasted with section 81(9) of the IRA, 2000 which provides as follows:

**'81**

**…**

**(9) Any party against whom a decision has been made under subsection (7) may within fourteen days from the date on which he had knowledge of such decision, apply to the Executive director of the Commission in the prescribed form of manner to have the decision rescinded'**

[15] In reference to section 81(9) of IRA, His Lordship PR Dunseith as he then was, stated in *VIP Protection Services v Nkosinathi Dlamini and another*, that:

> **'…in the view of the Court, a party can only have knowledge of the decision of the arbitrator as contemplated by section 89(9) of the IRA 2000 when the written award, signed by the arbitrator has been brought to his attention'.**

[16] The wording, tenor and effect of section 81(9) of the IRA 2000 as considered in *VIP Protection Services v Nkosinathi Dlamini* is different from the wording of section 85(4)(b) of the Industrial Relations Amendment Act 2010. In the former provision, the legislation requires that the fourteen day period within which to make a review application should be computed from the date on which the aggrieved party had knowledge of the decision. On the contrary, section 85(4)(b) does not make knowledge of the decision a requirement[2]. All that is required from a party aggrieved by an arbitration award is to make the application for review within a period of twenty-one days after the making of such determination.

[17] Clearly, from the above section 85(4)(b) the review should be brought on a date of 'the making of the determination'.

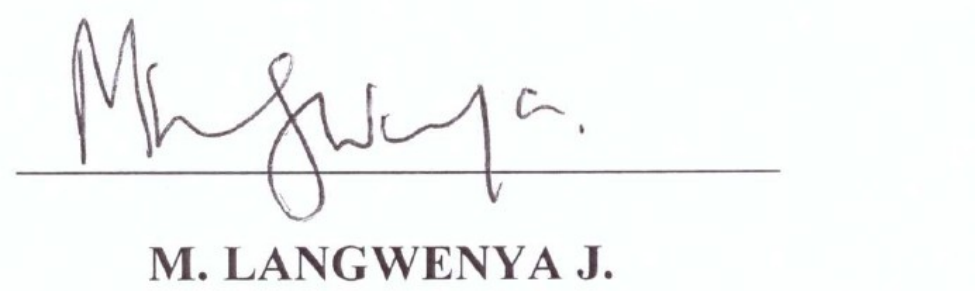
[18] The arbitration award against the applicant and in favour of the first respondent was made on 25 October 2018 and the review application was

[2] See *General Engineering Works (Pty) Ltd v Thulani Trevor Sifundza* Case No. 1158/16 (HC) page 8 para 15.

made on 5 December 2018. Twenty one working days expired on 29 November 2018. The applicant failed to exercise the right of review within the prescribed period nor did it apply for condonation for the late filing of the review application.

[19] The first respondent contends that section 5 of the IR Amendment Act 2010 does not provide for condonation and as such an applicant who fails to meet the twenty-one days period is out of time and cannot by law file a review application thereunder. I am of the view that in as much as the 2010 Act does not provide for condonation in the same vein it does not preclude it.

[20] For the above reasons, I uphold the point of law with costs that a review of the arbitration award ought to have been sought within twenty-one days after the making of such determination. However it was sought by applicant on 5 December 2018, four working days after the expected time of compliance as contemplated by section 85(4)(b) of the 2010 Act.



**M. LANGWENYA J.**

**For the Applicant:** **Mr. H. Mdluli**

**For the first Respondent:** **Mr. S.M. Simelane**